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REVIEW ESSAY

IS IT POSSIBLE TO TAKE BOTH FETAL LIFE AND WOMEN SERIOUSLY? PROFESSOR LAURENCE TRIBE AND HIS REVIEWERS*

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In *Abortion: The Clash of Absolutes* ("Abortion"), Professor Laurence Tribe sets for himself a daunting task—to help us as a nation "get beyond our . . . intractable dispute about the question of abortion."¹ According to Tribe, the abortion debate as it is currently framed "appears to pose an insoluble conflict between two fundamental values: the right of a fetus to live and the right of a woman to determine her own fate."² Consequently, one seeking ethically to resolve the abortion dilemma seemingly must "navigate like Ulysses between the Scylla of infanticide and the Charybdis of women's bondage."³

Tribe criticizes this absolutist approach to abortion as reducing one side or the other "to ghostly anonymity."⁴ The prolife side cannot see the plight of the mother and the prochoice side cannot envision the fetus.⁵ To each

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1. LAURENCE H. TRIBE, *ABORTION: THE CLASH OF ABSOLUTES* 242 (1990).

2. *Id.* at 27.

3. *Id.*

4. *Id.* at 5.

5. *Id.* We are aware of the ideological arguments that both sides of the controversy can make concerning the terms "prolife" and "prochoice." See, e.g., Joan Mahoney, *The Continuing Clash*, 59 U. CIN. L. REV. 1231, 1235 n.24 (1991) (book review). For the sake of simplicity, we will refer to each side by the name which it prefers. Tribe does this as well, which Professor Mahoney refers to as "one of the few examples of a lack of ["clearly pro-choice"] bias in his work." *Id.* at 1234. For a prolife writer who cannot bring herself to use the term "prochoice," see Pat Goodson, 30 WASHBURN L.J. 68, 68 n.1 (1990) (book review) ("prochoice label does not reflect the truth that the object of the abortion has no choice").

Concerning the term "fetus," technically it is the label given by medical science to the unborn at "[n]ine weeks from fertilization . . . because 'the main organ systems have been established' and 'the major features of the external body form are recognizable.'" David M. Smolin, *Why Abortion Rights Are Not Justified by Deference to Gender Equality: A Response to Professor Tribe*, 23 J. MARSHALL L. REV. 621, 656-57 (1990) (book review essay) (quoting

side of the debate the other side becomes an "invisible abstraction."⁶ Tribe suggests that the only way out of this "no-win battle" is to give "voice to the human reality on each side of the [dispute], keeping both the woman and the fetus in focus at the same time."⁷ While maintaining "respect for the deepest values on both sides,"⁸ Tribe seeks to accomplish this by examining "critically both the pro-choice and the pro-life arguments."⁹ He denies any intent "to 'prove' to anyone the correctness of any particular position in the abortion debate."¹⁰ Rather, Tribe's hope is that the current "logjam" may be loosened as each side recognizes "the strengths of the other's arguments and the weaknesses of its own."¹¹

Given Professor Tribe's prominence and the vitality of the abortion controversy, it is not surprising that *Abortion* has been widely reviewed.¹² A

T. SADLER, *LANGMAN'S MEDICAL EMBRYOLOGY* 58 (5th ed. 1985)). The Latin word, however, "simply means 'offspring' or 'unborn young.'" David K. DeWolf, 26 *GONZ. L. REV.* 257, 259 n.10 (1990/91) (book review) (quoting *AMERICAN HERITAGE DICTIONARY* 260 (1983)). We will use the term in this broader sense to refer to unborn humans at all points postconception. We do not imply by using this somewhat alien-sounding term that the fetus is not a person. For a discussion of this risk, see STEPHEN D. SCHWARZ, *THE MORAL QUESTION OF ABORTION* 19 (1990) (the term "fetus . . . has a cold scientific neutrality that effectively obscures the reality and preciousness of the small preborn child"). In fact, we will argue that because a fetus from conception irrefutably constitutes individual human life, he/she should be viewed as a person from that event as well.

6. TRIBE, *supra* note 1, at 5.

7. *Id.* at 6.

8. *See id.* at 3.

9. *Id.* at 7.

10. *Id.* at 8.

11. *Id.*

12. While we do not purport to have read every review of *Abortion*, we have read many. To assist the reader, we have attempted generally to categorize the reviews (alphabetically within each category) as "prolife," "prochoice," or "ambiguous" in their perspective toward abortion rights. We do so with some trepidation, for we know that everyone may not agree with our reading of a particular review. A case in point involves an assertion in a review of *Abortion* by Professor Anita Allen: "Tribe's judicious defense of the liberal pro-choice perspective has already found favor in surprising quarters. Journalist Nat Hentoff, the self-described 'atheist civil-libertarian pro-lifer,' praises Tribe's presentation of the right to privacy as unusually 'lucid.'" Anita L. Allen, *Tribe's Judicious Feminism*, 44 *STAN. L. REV.* 179, 179 (1991) (book review essay) (footnote omitted). Allen refers the reader to Hentoff's own review of *Abortion* in the *Boston Globe*. *Id.* at 179 n.1 (citing Nat Hentoff, *Abortion: Seeking a Common Ground*, *BOSTON GLOBE*, June 10, 1990, at B43).

While Hentoff does commend Tribe for the "lucid . . . concise legal education" that *Abortion* contains on several "complex elements of law," including "the right to privacy," *id.* at B45, his review says other things too. Hentoff criticizes Tribe for failing "to sufficiently distance himself from his own clear pro-choice convictions to recognize the chasm between his approach to the fetus and that of pro-lifers in their various forms." *Id.* at B43. He also faults Tribe for sliding "over angry opposition to abortion by many of the early and legendary American feminists. They thought abortion unnatural and self-debasing for a woman to do that to her own creation." *Id.*; *see infra* note 28 (giving more evidence of early feminists' opposition to abortion). Finally, Hentoff says that Tribe did not work "hard enough to break the stereotype of the pro-lifer as a Roman Catholic who never went to Harvard and who, as Barney Frank put it, is pro-life until the moment of birth and then abandons mother and

striking characteristic of the reviews is that, regardless of the particular writer's position on abortion, there is virtually unanimous agreement that *Abortion* fails to accomplish its stated objective. Rather than an evenhanded treatment of the abortion dilemma, most reviewers recognize *Abortion* to be essentially a prochoice apologetic.¹³

The evidence revealing the prochoice bias of *Abortion* is overwhelming. One need look no further than Tribe's unabashed defense of *Roe v. Wade*,¹⁴ which one prochoice reviewer calls "the most detailed and broad" that she

child." Hentoff, *supra*, at B45. Hentoff argues that many prolife agree with Tribe that society through taxpayer dollars should help women raise their children. See *id.* Taken together, these criticisms make it difficult to accept Allen's assessment that Hentoff viewed favorably "Tribe's judicious defense of the liberal pro-choice perspective."

Recognizing that some may disagree with our own characterizations of others' reviews, we nonetheless will hazard the attempt.

(A) *Prolife reviews*: Mary Ann Glendon, *Intra-Tribal Warfare*, FIRST THINGS, Aug.-Sept. 1990, at 55 (book review); Goodson, *supra* note 5; Hentoff, *supra*; Michael W. McConnell, *How Not to Promote Serious Deliberation About Abortion*, 58 U. CHI. L. REV. 1181 (1991) (book review); Smolin, *supra* note 5.

(B) *Prochoice reviews*: Allen, *supra*; Jean Braucher, *Tribal Conflict Over Abortion*, 25 GA. L. REV. 595 (1991) (book review); Daniel Callahan, *Life, Liberty and the Pursuit of Compromise*, L.A. TIMES, July 22, 1990 (Book Review Section), at 1; Celeste M. Condit, *Within the Confines of the Law: Abortion and a Substantive Rhetoric of Liberty*, 38 BUFF. L. REV. 903 (1990) (book review); Robert F. Drinan, *Abortion and the Law: A Problem Without a Solution?*, 89 MICH. L. REV. 1390 (1991) (book review); Mary C. Dunlap, *Mediating the Abortion Controversy: A Call for Moderation, or for One-Sided Etiquette While the Bombs Keep Flying?*, 30 WASHBURN L.J. 41 (1990) (book review); Eugene Gressman, Book Review, 21 SETON HALL L. REV. 221 (1990); Erwin N. Griswold, *Thorough, Careful and Fair*, HARV. L. BULL. 29 (Summer 1990) (book review); Amy Gutmann, *No Common Ground*, THE NEW REPUBLIC, Oct. 22, 1990, at 43 (book review); Mahoney, *supra* note 5; Isabel Marcus, *Many Realities, Many Words: Abortion and the Struggle Over Meaning*, 69 TEX. L. REV. 1259 (1991) (book review).

(C) *Ambiguous reviews*: Vada Berger, Book Note, 25 HARV. C.R.-C.L. L. REV. 625 (1990); Stephen L. Carter, *Abortion, Absolutism, and Compromise*, 100 YALE L.J. 2747 (1991) (book review); DeWolf, *supra* note 5; Maximilian B. Torres, Book Note, 28 HARV. J. ON LEGIS. 282 (1991).

13. For prolife recognition of Tribe's bias, see, e.g., Glendon, *supra* note 12(A), at 55; McConnell, *supra* note 12(A), at 1182-83. For prochoice recognition, see, e.g., Callahan, *supra* note 12(B), at 1; Condit, *supra* note 12(B), at 903; Dunlap, *supra* note 12(B), at 48 n.30; Gutmann, *supra* note 12(B), at 44; Mahoney, *supra* note 5, at 1232, 1234. But see Griswold, *supra* note 12(B), at 29, 30 (Tribe "is not a polemicist"; his assessment of various issues concerning the fetus "is thorough, careful, and fair."); Marcus, *supra* note 12(B), at 1262-63 (stating that Tribe writes "in a voice which removes him from the fray"). All of the reviews which we have labeled "ambiguous" recognize Tribe's prochoice slant. See Carter, *supra* note 12(C), at 2750; DeWolf, *supra* note 5, at 258; Berger, *supra* note 12(C), at 626; Torres, *supra* note 12(C), at 289-90.

The fact that *Abortion* has a prochoice bias does not mean that Tribe escapes criticism from prochoice reviewers. Professor Jean Braucher, for example, while acknowledging that Tribe defends the prochoice position, notes that "he does so with great heaves of moral doubt, in a manner that gives ammunition to the other side." Braucher, *supra* note 12(B), at 596. Other instances of prochoice criticism will be noted in the course of this article.

14. 410 U.S. 113 (1973). Although the defense of *Roe* in itself substantiates our point, other examples of Tribe's prochoice bias will be noted as we proceed.

has read.¹⁵ Professor Tribe praises *Roe* because it "reflects the widely shared sense that we should erase neither the fetus *nor* the woman from the picture our law presents."¹⁶ *Roe*, as a compromise between absolute views,¹⁷ turns neither "being into a ghost":¹⁸ women are recognized through the right to abort up until fetal viability, while the possibility of postviability protection keeps the fetus in view.¹⁹

Contrary to Tribe's characterization, it is difficult to consider *Roe's* impact as anything other than rendering the fetus a "ghost." First, as will be shown, by Tribe's own standards fetal personhood can be shown to exist prior to viability.²⁰ Those preivable humans killed under the *Roe* scheme are undeniably "reduced to ghostly anonymity."²¹ Second, the protection which viability actually affords the fetus is illusory. Under *Roe*, states cannot prohibit postviability abortions needed by women for "health" reasons.²² In *Roe's* companion case, *Doe v. Bolton*,²³ the Court defined "health" as encompassing "all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient."²⁴ Therefore, *Roe* and *Doe*

15. Condit, *supra* note 12(B), at 903.

16. TRIBE, *supra* note 1, at 138.

17. *Id.* at 12, 78-79, 138.

18. *Id.* at 138.

19. *Id.* Much of *Abortion* is devoted to defending the "constitutional legitimacy," *id.* at 129, of *Roe*. Our article will not address this issue, although it does predominate in several of the reviews of *Abortion*. See, e.g., DeWolf, *supra* note 5 (arguing that *Roe* was constitutionally illegitimate); Gressman, *supra* note 12(B) (arguing that *Roe* was constitutionally legitimate). A chief reason that we will not focus upon *Roe* is given by Professors Mensch and Freeman in their recent tour de force on the abortion controversy: "The effect of *Roe's* 'rights' formulation of the issue was to render [the] process of moral dialogue abruptly irrelevant for lawmaking purposes." Elizabeth Mensch & Alan Freeman, *The Politics of Virtue: Animals, Theology and Abortion*, 24 GA. L. REV. 923, 932 (1991) (special supplement issue). Our goal for this article is to contribute to what we hope will be an ongoing "moral dialogue" about abortion.

As for our own opinion of *Roe* itself, suffice it to say that we share the view of Mensch and Freeman that *Roe* "may be fairly characterized as a mistake for three combined reasons; it was legally problematic at best, sociologically inaccurate and politically disastrous." *Id.* at 1120 n.739. On *Roe* as a political failure, see Carter, *supra* note 12(C), at 2748. With *Roe's* reversal believed by "many on both sides of the debate . . . [to be] only a matter of time . . . the entire matter of abortion [will be thrown] back to the states." Karen Tumulty, *The Abortions of Last Resort*, L.A. TIMES, Jan. 7, 1990 (Magazine), at 12. It is in the various state legislatures, then, that one can expect increasingly to see the "moral dialogue" concerning abortion which we hope our article will further. One caveat should be noted. State legislative struggles could of course be precluded by abortion legislation at the federal level. Prochoice advocates are attempting such a "preemptive strike" right now with their push for passage of a Federal Freedom of Choice Act. H.R. 25, 102d Cong., 1st Sess. (1991); S. 25, 102d Cong., 1st Sess. (1991).

20. See *infra* notes 120-23 and accompanying text.

21. *Roe's* discussion of viability in terms of the *state's interest* in protecting potential life, 410 U.S. at 164, rather than in terms of the fetus's own right to life, in itself shows how the unborn are marginalized under *Roe*.

22. 410 U.S. at 165.

23. 410 U.S. 179 (1973).

24. *Id.* at 192.

together effectively legalize abortion throughout all nine months of pregnancy.²⁵ Rather than a compromise which values both fetal life and a woman's liberty,²⁶ *Roe* totally subordinates the fetus to the mother.²⁷

If Tribe fails to keep his commitment to be impartial,²⁸ one wonders why. One answer is straightforward: one cannot have reasonably expected

25. See Glendon, *supra* note 12(A), at 55 (stating that "*Roe* leaves virtually no room for protection even of viable fetuses from abortion"); McConnell, *supra* note 12(A), at 1198 n.40 (stating that since, under the *Doe* gloss, "the only genuine restraint on post-viability abortions is medical, not legal," it is "somewhat misleading" to interpret *Roe* as having actually treated viability as "an important concept").

26. Even the question of whether *Roe* properly should be referred to as a compromise is controversial. Prochoice writers, as Tribe did, commonly do so. See, e.g., Gressman, *supra* note 12(B), at 228; Frances Olsen, *Unraveling Compromise*, 103 HARV. L. REV. 105, 107 (1989). Pro-life writers, such as ourselves, believe that such a characterization is not accurate in any meaningful sense. As expressed by John T. Noonan, Jr., under *Roe*, during the first two trimesters of pregnancy the "liberty to abort remain[s] in its essentials absolute." JOHN T. NOONAN, JR., A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 11 (1979). In the third trimester, due to the broad health of the mother exception to the state's ability to protect viable fetuses, any apparent limitation on abortion is "illusory." *Id.* at 12. Mensch and Freeman, who not only profess neutrality on the issue of abortion rights, Mensch & Freeman, *supra* note 19, at 931, but also succeed in being impartial, appear to find the pro-life characterization of *Roe* more accurate: "the assertion of *Roe v. Wade* as 'compromise' is substantially belied by both the substantive positions of its critics and the politics which followed the decision." *Id.* at 928 n.9.

27. Rather than helping women, however, we will show in Part II that *Roe's* complete devaluation of the fetus results in the devaluation of women as well.

28. Additional support for this conclusion is found in Professor McConnell's evaluation of the sources relied upon by Tribe in writing *Abortion*. They are overwhelmingly prochoice in orientation. See McConnell, *supra* note 12(A), at 1183-85. McConnell concludes "that Tribe made almost no attempt to acquaint himself with the pro-life position as it has been articulated by anti-abortion ethicists, scientists, historians, and constitutional lawyers." *Id.* at 1184.

Tribe's scholarship is also criticized by Professor Smolin, who says that Tribe acted irresponsibly in Chapter 3 of *Abortion*, "Two Centuries of American Abortion Law." Smolin, *supra* note 5, at 629. Smolin describes the "lively scholarly debate regarding the history of American abortion," which has produced both an "abortion rights history" and a "pro-life history." *Id.* at 627-28. Tribe, though, "simply recounts one version of the abortion rights history, announcing as accepted fact its most contentious conclusions . . . without even acknowledging differing scholarly views. . . . *Id.* at 629 (footnote omitted); see also McConnell, *supra* note 12(A), at 1183 n.4.

We believe that Professor Smolin's criticism is warranted. Skepticism concerning Tribe's impartiality is immediately aroused by his initial footnote to his American history discussion, which states that a prochoice amicus curiae brief is "the point of departure for much of this chapter." TRIBE, *supra* note 1, at 244 n.1. Professor McConnell argues that the use of such partisan briefs "is a questionable scholarly practice. Briefs are a form of advocacy, not of objective analysis." McConnell, *supra* note 12(A), at 1183 n.4.

A specific example of the inadequacy of Tribe's historical account concerns his treatment of the early feminists. Tribe says merely that it is intriguing that abortion rights were not on their agenda. TRIBE, *supra* note 1, at 33. As convincingly demonstrated by Professor McConnell, however:

the nineteenth century anti-abortion movement was strongly supported by the woman's movement. For example, in their journal, *The Revolution*, Elizabeth Cady Stanton and Susan B. Anthony frequently denounced the practice of abortion as

that Tribe, a long-standing "partisan of the pro-choice position,"²⁹ could have acted in any other way. One prochoice reviewer, after noting "the bias that pervades the book," states that she would not even have purported "to provide an objective description of the abortion controversy, knowing that objectivity on that issue [was] not within [her] capabilities."³⁰ A more disturbing explanation of Tribe's failure is provided by Professor Michael McConnell, who suggests that Tribe's assertions in *Abortion* that he sought "common ground" may have been disingenuous from the start.³¹ According to McConnell, to one who wants to defend *Roe*, it might "be good strategy to be openly unfair to advocates of the pro-life position, because this could serve to radicalize them, cause them to take a more extreme position, and thus stave off the day when a moderate and humane reform of abortion law is possible."³²

We do not know if Professor McConnell's unflattering evaluation of Tribe's motives is accurate. We hope not. An alternative explanation is suggested by Professor Mary Ann Glendon's characterization of Tribe as someone who is experiencing an inner struggle concerning abortion, between "the Larry Tribe who is compassionate towards the weak, vulnerable, and disenfranchised [and thus is uncomfortable with his defense of a "right to abort what he recognizes as a human person"], against the pioneering feminist Larry Tribe."³³ Such a struggle, in which the feminist Tribe for the moment retains the ascendancy, could explain Tribe's expressed desire to honor prolife values, but his inability to do so in fact.

Regardless of the explanation, *Abortion* does fail to achieve Tribe's truly worthwhile stated objective:³⁴ to articulate a position on abortion which avoids

"child murder," "infanticide," and a "horrible crime," and editorialized that "[w]e want *prevention*, not merely punishment. We must reach the root of the evil, and destroy it."

McConnell, *supra* note 12(A), at 1188 (footnotes omitted) (quoting *Maternity and Marriage*, 1 THE REVOLUTION 4, 4 (July 8, 1869)). See *id.* at 1188 n.11; *supra* note 12 (Hentoff's comments).

29. Marcus, *supra* note 12(B), at 1262.

30. Mahoney, *supra* note 5, at 1234. Several reviewers mention Tribe's prochoice partisanship as an explanation for *Abortion's* prochoice bias. See, e.g., McConnell, *supra* note 12(A), at 1182-83; Torres, *supra* note 12(C), at 289-90.

31. McConnell, *supra* note 12(A), at 1200-02.

32. *Id.* at 1202. Support for McConnell's thesis is provided by Mensch and Freeman, who believe that Tribe in *Abortion* "proclaim[s] and perpetuat[es] [the abortion issue's] intractability . . . in order to advance his implicit agenda in favor of the pro-choice status quo exemplified by *Roe v. Wade*." Mensch & Freeman, *supra* note 19, at 927-28.

33. Glendon, *supra* note 12(A), at 58.

34. Professor McConnell laments Tribe's failure. Tribe, "[w]ith his long-term commitment to abortion rights . . . [was] in a unique position . . . to introduce his audience to the pro-life position, to show that . . . [it] is not (as he says many pro-choice advocates assume) 'prejudiced, superstitious, [and] backward.'" McConnell, *supra* note 12(A), at 1181-82 (quoting TRIBE, *supra* note 1, at 239). Similarly, "if pro-life advocates [had] heard Professor Laurence Tribe, of all people, taking their ethical, scientific, and legal claims seriously, they might also be inclined to listen with a more sympathetic ear to Tribe's description of the other side of the tragedy of abortion." *Id.* at 1182.

treating either the woman or the fetus as a "ghost." Tribe's goal of taking both fetal life and women seriously is, however, achievable. Our contention is that the only way to do so, rather than by abortion on demand as sanctioned by *Roe* and defended by Tribe, is through a comprehensive prolife approach. While there are other integral elements, the core of such an approach is, regardless of the circumstances which lead a woman to seek an abortion, to provide from conception the same protection for the lives of preborn humans that is provided to humans postbirth. This article's principal purpose is to explain and defend our position. Doing so will allow us not only further to demonstrate the flaws in Tribe's view, but also to critique various aspects of other reviews of *Abortion*.

I. TAKING FETAL LIFE SERIOUSLY

A. Motives

One would think that it would hardly be necessary to defend the proposition that a prolife perspective involves taking fetal life seriously. A "unifying theme" of *Abortion*, however, is Professor Tribe's effort to impugn the motives of the prolife movement.³⁵ On the book's first page, Tribe wonders if there are ways of considering the abortion issue "that face the realities of sex and power that underlie the struggle."³⁶ *Abortion* reflects Tribe's attempt to expose these "realities." His conclusion? "Whether in the name of traditional sex roles or in the name of traditional sexual morality . . . opposition to women's having the right to choose to end a pregnancy is more about the control of women than about the sanctity of life. . . ."³⁷ From this premise, Tribe argues that prolife advocates should:

conclude that the objection to abortion rights ought to yield, as a matter of morality, to the claim of the woman to her liberty and equality. To conscript a woman to save a *life* might be one thing. To conscript her to save a *way* of life, one in which she is relegated to a second-class role, is another thing entirely.³⁸

Professor Tribe's emphasis on attacking prolife motives³⁹ is inconsistent with his stated goal of not treating the fetus as a "ghost." Imple-

35. Gutmann, *supra* note 12(B), at 44. Ms. Gutmann, a prochoice reviewer, finds this characteristic to be the "most troubling aspect" of Tribe's book. *Id.* McConnell, a prolife reviewer, says that it is "the most unattractive part of [Tribe's] argument." McConnell, *supra* note 12(A), at 1188-89.

36. TRIBE, *supra* note 1, at 3.

37. *Id.* at 238, 241.

38. *Id.* at 241.

39. In the last paragraph of *Abortion*, Tribe suggests that the prochoice movement also may not have been totally honest about its motives. *Id.* at 242. The only explanation Tribe offers is the description a few pages before of the movement as consisting disproportionately of the "educated elite[]," who are often contemptuous of prolife and who, in addition to abortion rights, "tend to favor a cluster of positions including . . . more vigorous enforcement

menting that goal would instead have required concentration upon the question of whether the fetuses killed by abortions are in fact persons. If they are, the relevance of Tribe's charge is questionable. As Professor David Smolin argues

Surely purity of motivation is not required for social action, so long as the end sought is proper. Nobody has completely pure motivations, even for laudable conduct. . . . If we discovered that enforcement of infanticide laws was primarily motivated by a desire to maintain traditional gender or parenting roles, rather than "true" concern for neonatal life, would we urge abolition of such laws?⁴⁰

We believe that Professor Smolin's point regarding motives is valid. Consequently, since we will establish that abortion should be equated with infanticide, it might seem superfluous for us to address the merits of Professor Tribe's attack upon prolife motivations. Tribe, however, directly contradicts our contention that a comprehensive prolife approach is the only way to take both fetal life and women seriously. While we argue that such an approach values fetal life, Tribe says that the purported solicitude for fetal life is a smoke screen for a hidden objective. While we argue that a prolife approach values women, Tribe says that the prolife movement's true goal is their subjugation. It is, therefore, imperative to demonstrate that Tribe's thesis cannot be substantiated.

A simple place to begin is to say that Tribe has not accurately described *our* motives. Such a flat assertion, however, might be rejected as merely self-serving. We therefore will examine Tribe's attack in some detail to show that, as a general critique⁴¹ of the motives underlying the

of laws protecting racial minorities, unrestricted speech and artistic expression, tighter control of police brutality, opposition to the death penalty, stronger environmental protection, stricter gun control, gay rights, and so forth." *Id.* at 239-240. This characterization of prochoicers, which can be viewed only as an aside when weighed against the book's persistent impugning of prolife motives, nonetheless earns criticism for Tribe from his prochoice reviewers. Professor Braucher says that "Tribe seems to think people support abortion rights to be among the liberal chic." Braucher, *supra* note 12(B), at 606. Professor Mary Dunlap characterizes Tribe's description as "condescending, undocumented and insulting." Dunlap, *supra* note 12(B), at 62. Her conclusion? "[B]eware of undocumented and expedient claims of education-based elitism made by Harvard law professors, and, especially, beware such claims when made by candidates for the United States Supreme Court who may be seeking to balance their 'resumes' on the acid issue of abortion choice." *Id.* at 62-63 (at another point, *id.* at 52, 53, Dunlap accuses Tribe of attempting, through compliments to various Justices, "to ingratiate himself with . . . members of a bench . . . on which he is often mentioned as the likeliest first nominee of a liberal President. . . .").

40. Smolin, *supra* note 5, at 627.

41. Tribe himself acknowledges that there are some prolifeers whose "opposition to letting women choose [abortion] . . . reflect[s] not a sexist view of a woman's 'place' but a humane concern for the fetus as an unborn baby, as a helpless member of the human family but a family member nonetheless." TRIBE, *supra* note 1, at 211. To Tribe, though, even a genuine

prolife movement, it is unpersuasive.⁴²

If the true objective of the prolife movement is to perpetuate the subjugation of women, one initially wonders at Tribe's failure to explain the fact that "women are significantly more prolife than men."⁴³ It would

concern for the fetus would not warrant opposition to abortion.

Not even someone who regards every abortion as wrong is likely to think it just doesn't matter whether children whose mothers do not want them are born. . . .

The compassionate impulse that leads everyone to agree that the plight of such unwanted children *does* matter no doubt plays an important part in the decisions of many women not to have children, to use contraception, and, if they have become pregnant, reluctantly to choose abortion.

Id.

The view that compassion for unwanted children requires a woman's license to abort is a long-standing staple of the prochoice movement. *See, e.g.,* Allen, *supra* note 12(B), at 202; Mensch & Freeman, *supra* note 19, at 1106; *infra* notes 170-73 and accompanying text. The argument is deeply flawed. First, it inaccurately presupposes that every unwanted preborn baby will be unwanted once born. Tribe himself acknowledges that many women decide not to give up babies who, prebirth, were unwanted. TRIBE, *supra* note 1, at 104, 211. Second, even assuming that a preborn baby's unwantedness will continue after birth, it is at best incongruous to say that one demonstrates compassion for an unwanted child by allowing his/her very "unwantedness" to serve as the justification for his/her death through abortion. Recall that Tribe at this point of his argument is conceding that the fetus is "an unborn baby . . . a helpless member of the human family but a family member nonetheless." *Id.* at 211. There can be no more subjective standard by which to judge the value of a human being than whether that person is wanted by those around him/her. Tribe's embrace of this standard for preborn humans reveals the extent to which they are "ghosts" under his approach.

42. We do not contend that there are *no* proliferators who are motivated by a desire to subjugate women. We agree with Professor McConnell "that some opposition to abortion may stem from an antipathy to the participation of women in economic and public life outside their traditional roles." McConnell, *supra* note 12(A), at 1192. He notes as well, however, that "some support for abortion rights stems from male sexual adventurism and some from a racist desire to control the population of minorities and welfare recipients." *Id.* Mary Ann Glendon adds to the list of silent prochoice motives the pecuniary interests of "the profit-making abortion industry." Glendon, *supra* note 12(A), at 57. Her conclusion, however:

is that searches for hidden reasons are not very useful. Any coalitions as diverse as the prolife and prochoice movements will have some members who are animated by base and unworthy motives. After many years of watching the fray, I see no reason not to accept the accounts given by both sides as substantially accurate descriptions of what is most important to most of their supporters.

Id. at 58.

43. Glendon, *supra* note 12(A), at 57; *see also* McConnell, *supra* note 12(A), at 1190. Based on the strength of female prolife support, Daniel Callahan, a prominent prochoice advocate, rejects as an "old stereotype" Tribe's argument "that resistance to legal abortion is little more than an exercise of male power over women." Callahan, *supra* note 12(B), at 13. The recent formation of the National Women's Coalition for Life corroborates Callahan's view. Founding members include "Feminists for Life, the Professional Women's Network, Concerned Women for America, Women Affirming Life, the International Black Women's Network, the National Council of Catholic Women, and Women for Women." Press Release, National Women's Coalition for Life (April 3, 1992). The coalition's various groups together have 1.5 million members. *Id.* The coalition rejects rhetoric which equates "women's rights with abortion 'rights.'" *Id.* Rather, it maintains that "[r]eal rights for women come from 'a societal commitment to the unique roles women are living out, including motherhood.' Women's rights are not promoted when women 'stand idly by while our government and society urge] us to treat unborn children as [disposable] property.'" *Id.*

seem odd on its face for women to be fighting to keep themselves in "a second-class role."⁴⁴ One explanation, which Tribe attributes to some pro-choicers, is "a doctrine of 'false consciousness' that permits them to dismiss pro-life women in particular as benighted victims of social conditioning that prevents their views from authentically reflecting their own genuine needs and deepest beliefs."⁴⁵ Tribe says that he condemns such a contemptuous attitude.⁴⁶ If so, it is difficult to explain Tribe's own apparent dismissal of prolife women.

How then does Tribe attempt to show the hidden sexist motives of the prolife movement? He does so through an involved extrapolation from the fact that "people who generally oppose abortion would nonetheless permit it in cases of rape and incest."⁴⁷ This exception, which "suggests that antiabortion sentiment is not *entirely* rooted in a belief that abortion constitutes the killing of an innocent human being,"⁴⁸ is most likely explained by the "*nonconsensual nature of the sex* that led to [the] pregnancy. . . ."⁴⁹ Why then, Tribe wonders, do prolife women not recognize a similar exception when pregnancy results "from the failure of a conscientiously used, ordinarily effective means of birth control?"⁵⁰ Does not the absence of such an exception:

suggest that such opponents of abortion come to their views about the immorality of abortion not in response to the voluntary nature of the woman's *pregnancy* but in response to the voluntary nature of the *sexual activity* in which she has engaged? And does this not

44. TRIBE, *supra* note 1, at 241.

45. *Id.* at 239. Professor Celeste Condit evinces a different form of contempt for prolife women. She describes the abortion controversy as actually pitting "the liberty of wage-laboring women . . . against the economic interests of all those groups who would bind these women as the producers of 'potential human life.'" Condit, *supra* note 12(B), at 905. Such "groups include 'traditional women' for whom laws premised upon 'women as mothers' will favor their interests, whereas laws premised on 'women as persons with choices' will not as directly favor their interests." *Id.* at 905 n.6. It is obvious that Professor Condit's views are premised in the stereotype that only prochoice women are "wage-laboring," whereas prolife women are "traditional," conjuring up the image of the happy homemaker. Condit's presuppositions are inaccurate. Consider, for example, the statement of Jean French, who, when a nurse, in 1984 co-founded (together with "an architect, an attorney, and a graduate student in business") the Professional Women's Network, Human Life Advocates: "People automatically assume that if you're an educated, thinking woman with tolerant values, that you're pro-choice and this is simply not the case." . . . "There are thousands of professional women out there who are pro-life." Diane Krstulovich, *Disposing of Pro-Life Stereotypes*, JOURNAL MONTAGE, Dec. 11, 1991, at 47, 56.

46. See TRIBE, *supra* note 1, at 239-40. Professors Mensch and Freeman note that such an evaluation of prolife women "seems increasingly facile and outmoded." Mensch & Freeman, *supra* note 19, at 936 n.22. They cite a number of sources which recognize that even feminist women "might in good faith . . . support a pro-life position. . . ." *Id.* at 934 n.19.

47. TRIBE, *supra* note 1, at 232.

48. *Id.*

49. *Id.* at 233.

50. *Id.* at 132.

in turn suggest that such antiabortion views are driven less by the innocence of the fetus (which does not turn on how or why the sex occurred *or* the pregnancy began) than by the supposed “guilt” of the woman?⁵¹

Tribe believes so: such proliferers’ “aversion to abortion rights would seem to reflect a deeply held *sexual* morality, in which pregnancy and childbirth are seen as a punishment that women in particular must endure for engaging in consensual sex.”⁵²

51. *Id.*

52. *Id.* at 234. Tribe bolsters his conclusion by the frequent assertion that some proliferers oppose “sex education and the availability of birth control,” *id.*, because of their belief that such practices condone “premarital or nonprocreative or irresponsible sexuality, which they regard as immoral.” *Id.* at 213. According to Tribe, “[i]f one truly believes that abortion is *murder*, preventing it through sex education is surely a lesser of two evils.” *Id.* To Tribe, such proliferers expose their position as one “in which sexual morality is primary, with any claim of a fetus’s right to life taking a very distant backseat.” *Id.* at 234.

Before responding specifically to Tribe’s argument, it is important to note that not all of those proliferers who do oppose contraception do so for reasons grounded in beliefs concerning sexual morality. Pat Goodson, for example, notes that “contraceptives are unacceptable to many proliferers who see an undesirable connection between abortion and contraception. The acceptance of contraception creates a climate, a ‘contraceptive mentality,’ in which the rejection of an unwanted pregnancy becomes a convenient solution. . . . On a practical level abortion is a ‘fail-safe’ contraceptive.” Goodson, *supra* note 5, at 78 n.69. It is also significant that the quoted passages from *Abortion* show that Tribe himself recognizes that not all proliferers oppose sex education and birth control. The National Right-to-Life Committee, for example, takes no position on contraception and does not involve itself in family planning issues unless abortion is included as a family planning method. To many proliferers, contraception differs fundamentally from abortion. True contraceptive methods (that is, those that are not abortifacients) prevent a human being from coming into existence, whereas abortion destroys a human being already in existence. See *infra* notes 99-101 and accompanying text. In view of many proliferers’ approval of contraception, one cannot help wondering why Tribe so emphasizes the disapproval of some. After all, there is very little, if any, indication that proliferers who do not believe in contraception are interested in outlawing contraceptive use by others. See, e.g., DR. & MRS. J.C. WILKE, *ABORTION: QUESTIONS AND ANSWERS* 234 (1990). Tribe, though, raises the specter of prolife opposition to contraception, perhaps to deter people from reevaluating their support of abortion—Tribe’s (unconvincing) message being that opposition to abortion necessarily entails opposition to contraception.

Regardless of Tribe’s motives, his argument that those proliferers who on moral grounds oppose a “progressive sex education policy” are subordinating the value of fetal life to their views concerning sexual immorality, *TRIBE, supra* note 1, at 213, is not persuasive. Tribe’s position presupposes that sex education and birth control invariably lead to a reduction in unwanted pregnancies and, hence, fewer abortions. While Tribe cites Swedish experience to support this assumption, *id.* at 212, the correlation that he posits has not been proven. In June 1991, for example, the Washington Post reported a “dramatic” increase in teenage pregnancy rates in Alexandria, Virginia, from 1985 to 1989. Pierre Thomas, *Teenage Pregnancy Rate Increasing Steadily in Area; AIDS Threat Having Little Effect on Figures*, WASH. POST, June 27, 1991, at C1. If Tribe’s thesis is accurate, one would suppose that the way to combat the problem would be sex education and an increased availability of birth control. Not so. As revealed by an editorial in the Richmond Times-Dispatch, the Alexandria public schools “provided the working model for development of . . . [Virginia’s] compulsory FLE [Family Life Education] program. Alexandria has had comprehensive sex education in its schools for

It is curious that Professor Tribe uses the rape exception to level a general charge of sexism against the prolife movement. First, as he recognizes in a brief allusion,⁵³ some proliferers do not acknowledge a rape exception.⁵⁴ Second, one would have thought that Tribe, instead of attacking their integrity,⁵⁵ would have commended those proliferers who do accept the rape exception for not reducing raped women "to ghostly anonymity."⁵⁶

In any event, Tribe's thesis that the rape exception shows that proliferers are really motivated by a desire to punish guilty women for consensual sex is implausible on its face. Consider the fact that consensual sex within marriage is morally blameless. Consequently, if as Tribe asserts, a woman's

10 years now. And that's not all. It even has school-based birth control clinics." *Teen Pregnancy Promotion?*, RICH. TIMES-DISPATCH, Aug. 13, 1991, at A14. The writer concludes that the fact that Alexandria's teen pregnancy rate subsequently went "through the roof" provides strong "circumstantial evidence" establishing "a cause-and-effect relationship between free-and-easy sex-ed in schools and [an] escalating teen pregnancy rate." *Id.*

53. TRIBE, *supra* note 1, at 114.

54. We include ourselves in this group. See *infra* notes 178-88 and accompanying text. Interestingly, Tribe, who premises so much of his attack on prolife motives upon the rape exception, nowhere mentions the well-known fact that rape pregnancy abortions are very uncommon. Dr. and Mrs. Willke estimate that for the entire country the figure is "somewhere between 30 and 500 . . . per year, with a more likely figure between 50 and 100." WILLKE, *supra* note 52, at 153. Since well over one million abortions occur in the United States each year for reasons other than rape, it is somewhat puzzling that Tribe accords the rape exception so much significance, especially when it can be explained by reasons more plausible than those offered by Tribe. See *infra* notes 55-60 and accompanying text.

55. Amy Gutmann says that "[t]his is a counterproductive argument, if the goal is common ground." Gutmann, *supra* note 12(B), at 44. Tribe's approach to the rape exception, however, is consistent with his general tack throughout the book: "to persuade the pro-life reader that it is unprincipled to take anything but the most absolute position." McConnell, *supra* note 12(A), at 1193. According to Mensch and Freeman, "the strategy of [*Abortion*] is to keep the two sides as far apart as possible, especially emphasizing the pro-life position as necessarily incapable of compromise, so as to leave the reader who is unwilling to criminalize all or nearly all abortions with no choice but to reaffirm *Roe v. Wade*." Mensch & Freeman, *supra* note 19, at 927 n.8. See also *supra* note 32 and accompanying text.

There is other evidence of how *Abortion* does not advance the search for "common ground." Prochoicer Daniel Callahan criticizes Tribe's "scornful [attitude toward] proposed American laws that would mandate waiting periods for women who want abortions, require parental notification for minors, and place restrictions on government financing of abortion for indigent women." Callahan, *supra* note 12(B), at 1; see TRIBE, *supra* note 1, at 199-204, 206-07. To Callahan, Tribe's rejection of these proposed compromises "is unfortunate, particularly since he offers nothing to take their place." Callahan, *supra* note 12(B), at 13.

56. Tribe, in the first few paragraphs of *Abortion*, states that "[r]ape is among the most profound denials of liberty, and compelling a woman to bear a rapist's child is an assault on her humanity." TRIBE, *supra* note 1, at 3. He thus plainly implies that, if women are to be valued, abortion must be allowed in cases of rape. Yet, Tribe impugns the motives of proliferers who recognize a rape exception. Tribe's approach obviously is a "no win" proposition for the proliferer. It also fits Professor Smolin's description "of a common tactic of pro-abortion rights polemicists. Where pro-lifers are lenient, or grant exceptions, the suggestion is made that their proposals are irrational, inconsistent, or reflect ulterior motives. Where pro-lifers are strict, however, the accusation is made that they are inhumane, too harsh toward women, or impractical." Smolin, *supra* note 5, at 648. In any event, we will argue later in this article that the rape exception is not in fact in the best interest of rape victims. See *infra* note 188.

moral guilt or innocence in having sex were the chief prolife criterion for determining if an abortion should be allowed, one would expect prolife supporters also to support abortions for married women whose unwanted pregnancies resulted from sex with their husbands. Tribe's argument, though, apparently presupposes unmarried sexual partners. His contention is that the way to explain the fact that some prolife supporters recognize a rape exception, while failing to recognize an exception for failed birth control, is that forced continuation of the pregnancy in the latter case is a punitive "sentence" for engaging in an immoral act. There is a much more plausible explanation. Because it is known that no birth control is 100 percent effective,⁵⁷ when a couple has consensual sex, the partners know that there is some risk of pregnancy. In an exercise of autonomy, both partners knowingly subject themselves to this risk and thus are responsible for the potential consequences of freely chosen action. This imposition of responsibility is morally justifiable regardless of one's views of the morality of consensual sex itself.⁵⁸ Tribe's description of the refusal to allow abortion as "punishment" is therefore not persuasive.⁵⁹

What then of the rape exception? Rape victims have not exercised their autonomy at the risk of becoming pregnant. It is this absence of volitional risk-taking that partially explains some prolife supporters' willingness to relieve the victim from any responsibility to the unborn child.⁶⁰ As we will explain later,⁶¹ we do not recognize the rape exception. Still, as an explanation for why some prolife supporters do, we find a distinction between rape and failed birth control premised in comparative moral responsibility for the consequences of one's acts more compelling than Tribe's distinction premised in comparative moral blameworthiness of the underlying conduct.

One's moral accountability for the reasonably foreseeable consequences of one's conduct reveals the inaptness of Judith Thomson's well-known

57. See TRIBE, *supra* note 1, at 214.

58. A major flaw in Tribe's theory is its presupposition that the prolife movement is a monolithic entity with one view of sexual morality. This assumption ignores reality. As an indication of the fact that people with quite different worldviews have united to seek legal protection for the unborn, consider that the prolife movement includes such groups as (1) Atheists for Life; (2) Feminists for Life; (3) Libertarians for Life; (4) the Pro-Life Alliance of Gays and Lesbians; and (5) Wiccans Against Abortion.

59. See Smolin, *supra* note 5, at 660 n.163 ("[e]ven those who believe that sexual intercourse outside of marriage is immoral, do not necessarily view pregnancy as 'punishment,' but rather as 'responsibility:' pregnancy after all can follow either the moral act of marital intercourse or the immoral act of fornication.").

60. Tribe mentions another factor—the compassion these prolife supporters feel "for the woman; they don't think she should have to live through having her rapist's child develop within her." TRIBE, *supra* note 1, at 233. In this quote, Tribe ignores the fact that the child is not solely the "rapist's"; he/she is also the woman's child. There is substantial evidence that the additional trauma associated with killing her own child is not helpful to a woman attempting to deal with the trauma of rape. See *infra* note 188. Still, it is undeniable that "[m]any people who otherwise oppose abortion feel that the case of rape is different. . . ." SCHWARZ, *supra* note 5, at 147; see *id.* at 147-49 for a statement of reasons.

61. See *infra* notes 178-88 and accompanying text.

unconscious violinist hypothetical, which Tribe relies upon as part of his defense of the freedom to abort all unwanted pregnancies, not just pregnancies resulting from nonconsensual sex. In this hypothetical, each of us is asked "to imagine waking up in the morning attached to a famous and accomplished violinist. The violinist has a kidney disorder and, unbeknownst to you, he has been attached to your circulatory system while you were asleep. If he were detached, he could not survive."⁶² Tribe states that "just about everybody" would agree that no law could justly compel you to remain attached, even though the "inevitable result" of detachment would be the violinist's death.⁶³

While Thomson's scenario is an argument for abortion in the case of rape, Thomson herself recognizes difficulties with its persuasiveness when "pregnancy result[s] from a voluntary act," including cases where birth control was used but failed.⁶⁴ Although Tribe at one point appears ready to acknowledge this distinction between rape and failed birth control,⁶⁵ ultimately he rejects it and persists in his critique of the prolife movement as sexist. Why? Because "however voluntary the sex may have been, the woman was, of course, not the sole participant. Yet a ban on abortion imposes truly burdensome duties *only* on women. Such a ban thus places women, by accident of their biology, in a permanently and irrevocably subordinate position to men."⁶⁶

Because women alone bear the physiological consequences of pregnancy, it cannot be denied that they have more at stake in the decision to have sexual intercourse. A woman, however, knows this at the time she chooses to have sex. She thus knowingly assumes a greater risk of the burdens of any resulting pregnancy. Moreover, freely allowing abortions does not equalize matters between women and men because only women can have abortions.⁶⁷ A major weakness in *Abortion* is Tribe's failure to address the

62. TRIBE, *supra* note 1, at 129 (citing Judith J. Thomson, *A Defense of Abortion*, 1 J. PHIL. & PUB. AFF. 47 (1971)).

63. *Id.* at 130.

64. Thomson, *supra* note 62, at 58-59. Prochoicer Amy Gutmann speaks more strongly: "The violinist example supports only the prohibition against imposing the virtue of saving a life on a person who is not at all responsible for bringing that life into being." Gutmann, *supra* note 12(B), at 44. While we agree with Gutmann that the violinist hypothetical does not support abortion where pregnancy results from consensual sex, we will demonstrate in Part II that neither does it support abortion where the sex was nonconsensual. The reason is that prohibiting abortion is not to force a woman to "save" a life, but rather is to prevent her from killing. See *infra* notes 178-88 and accompanying text.

65. TRIBE, *supra* note 1, at 131-32. After struggling with whether the distinction should matter, Tribe states that "if one assumes a pregnancy that did not result from any sort of coercion, . . . perhaps the imposition of continued pregnancy on the woman may not be unjust." *Id.* at 132.

66. *Id.*

67. According to Professor Smolin:

women will never be equally autonomous, because women will always pay a higher price for their autonomy. Only women have to kill in order to attain a male-like degree of autonomy. Only women have to experience the pain and physical intrusion

mounting evidence of the physical and psychological harm inflicted upon women by abortion.⁶⁸ The fact is that women and men are biologically different beings and therefore it is impossible to equalize sexual intercourse between them. Tribe assumes that the male experience of presumed irresponsibility is the model to which women should aspire.⁶⁹ We urge instead that both parties be held morally accountable.

For the woman, moral accountability means accepting the fact that once she is pregnant she *already is* a mother;⁷⁰ a preborn baby exists and there is a duty not to kill him/her. Upon birth, the mother owes her child fulfillment of all parental duties until her parental responsibilities are legally terminated, as by giving the child up for adoption. Similarly, a man, upon his sexual partner's pregnancy, must accept the fact that he *already is* a father. He therefore has a duty not to seek his child's death by encouraging or insisting upon an abortion. Rather, he must provide medical care to the mother during pregnancy and delivery. After birth, the father, like the mother, owes his child fulfillment of all parental duties until legal termination of his parental responsibilities.⁷¹ A comprehensive prolife approach should include efforts to establish more effective ways for holding men to these duties.⁷²

of abortion to achieve autonomy. Only women have to experience the act of the fetus being torn from her body, or dying within her body, to achieve autonomy.

Smolin, *supra* note 5, at 639. See *infra* notes 206-09 and accompanying text.

68. See *infra* notes 204-09 and accompanying text.

69. See *infra* notes 197-99 and accompanying text for a discussion of the sexism inherent in this assumption.

70. See *infra* note 147.

71. The concept of parental duties is a neglected element of the abortion debate, which has focused instead on the relative rights of the woman and of the fetus. It helps to ask not when does the fetus have rights, but when do parental duties attach. Prolifers argue that parental duties depend upon the status of the being to whom the duties are owed. Since a fetus from conception is a human being and an offspring of the parents, he/she is a "child" to whom the parents owe a duty to care and provide. This perspective resolves Tribe's "clash of absolutes":

There is no conflict of rights between mother (or father) and child because parents have an obligation to care for their children and, therefore, children have a right to that care. . . . Even the state acknowledges this is true, for the state compels parents to support their children. If children are children before as well as after birth, the parents have the obligation to care for them, also.

125 CONG. REC. 33,995 (1979) (statement of Doris Gordon, founder of Libertarians for Life).

72. Fully to discuss the specifics of how to hold men more accountable is beyond the scope of this article. Ensuring male accountability will not be easy. Professor Glendon, for example, writes of the "national scandal" in the United States concerning "child support (for children born inside or outside of legal marriage). . . . The problems of ascertaining paternity of children born outside wedlock, of the low amounts of support awarded, of the difficulty in collecting and enforcing child support awards are well known and of long standing." MARY ANN GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 57 (1987). Glendon, however, also offers hope by contrasting the situation in several European countries:

countries like Denmark, Norway, and Sweden have long had mandatory paternity actions that do in fact result in determining paternity for nearly all children born

Professor Tribe, rather than recognizing the desirability of increasing male responsibility in the context of a sexual partner's pregnancy, instead focuses upon society's failure in another context to impose upon men "the kind of sacrifice some would have us impose on the pregnant woman in the name of the fetus."⁷³ Tribe posits a daughter in need of a liver transplant and only her father's liver tissue is compatible with hers. Tribe points out that the law has never required a father to make such a sacrifice⁷⁴ and implies that this proves the sexist motivation of the prolife movement.⁷⁵

The liver transplant hypothetical provides no support for Tribe's charge of sexism. First, Tribe fails to note that the law does not force mothers to be organ donors to their children either. Second, the liver transplant scenario is distinguishable from an unwanted pregnancy. The father in that hypothetical had nothing to do with causing his daughter's ailment. With pregnancy, however, the woman by having sex was a participant in causing both the fetus's existence and the dependent condition for which the fetus needs his/her mother. Moreover, it is inaccurate to view the two situations as each raising the issue of whether one should be forced to rescue another from death.⁷⁶ The daughter who needs a liver transplant is in the natural process of dying. Not coming to her aid would be to allow her to die. The father's intervention could thus accurately be characterized as a rescue which saves his daughter's life. In pregnancy, the fetus, in its natural prebirth environment, continues to develop and grow in a process naturally leading to birth. A decision to abort is thus a decision to kill rather than a decision to allow another to die.⁷⁷ Consequently, being required not to abort is not like being required to rescue,⁷⁸ since the event from which the mother would

to unmarried mothers. Several countries now use standard formulas and tables for calculating realistic amounts of child support and have extremely efficient collection mechanisms, including direct deduction of child support from the noncustodial parent's wages. Many countries, in addition, have assumed the risk of noncollection of child support by paying a guaranteed public maintenance allowance to the support creditors while the state attempts to collect what is owing from the support debtor.

Id. For a discussion of innovative methods being used in the United States in an attempt "to beef up [child support] collections," see Steven Waldman, *Deadbeat Dads*, NEWSWEEK, May 4, 1992, at 46, 49.

73. TRIBE, *supra* note 1, at 133.

74. Tribe is referring to the Good Samaritan doctrine, under which "there is no general duty to give of yourself to rescue another." *Id.* at 130.

75. *Id.* at 133, 210.

76. As Professor Jean Braucher, a prochoice reviewer, notes, the Good Samaritan doctrine distinguishes "between acts and omissions. To use the no-duty-to-help doctrine, having an abortion has to be characterized as an omission, a refusal to help, rather than as an act causing harm." Braucher, *supra* note 12(B), at 614. This and other difficulties in applying the doctrine lead Braucher to characterize it as "a slender reed on which to hang abortion rights." *Id.* at 613. She also criticizes "the radical individualism involved in applying [the] doctrine in the abortion context [as] not consistent with the way in which many women make the moral decision to have an abortion." *Id.*; see *infra* notes 169-70 and accompanying text.

77. See Smolin, *supra* note 5, at 643.

78. Tribe appears to acknowledge this distinction by noting that "many . . . feel that

be saving the fetus is her own act of aggression against the fetus.

B. Fetal Personhood

As Professor McConnell has noted, one of the most disturbing aspects of *Roe* was its suggestion, through the statement that the Court “‘need not resolve the difficult question of when life begins,’ . . . that the question of human life was irrelevant to the decision.”⁷⁹ To many people a finding of fetal personhood⁸⁰ presumably would significantly affect their evaluation of the circumstances under which abortion should be allowed. To Professor Tribe’s credit, he at least discusses the possibility that protecting fetal personhood might be a sufficiently strong governmental interest to overcome the woman’s right to abort.⁸¹ Tribe’s conclusion, however, contrasts starkly with his stated intention not to treat fetuses as “ghosts”: even if fetuses are persons, a woman’s right to abortion supersedes the fetus’s right to life.⁸² His reasoning is the identical argument which he makes to support the charge of sexism against the prolife movement: the law does not force a man to rescue his dying child and thus a woman should not be forced to rescue the fetus by being denied an abortion.⁸³ We have already shown the inaptness of this analogy.⁸⁴

There is even more compelling evidence of the “ghostliness” of fetal life under Tribe’s analysis. Tribe asserts that even if it were possible to remove a fetus (regardless of whether the fetus at that particular moment was a person) from the mother without destroying him/her, the mother still might have the right to kill the child.⁸⁵ Tribe’s view is astonishing because he at several points carefully distinguishes between “*the right not to remain*

the very act of abortion, given current technology, represents a decision to kill and not simply a refusal to help or an unwillingness to sacrifice.” TRIBE, *supra* note 1, at 210. This contrasts with what Tribe describes as Judith Thomson’s position: “A woman denied the right to decide whether or not to end a pregnancy is not merely being asked to refrain from killing another person but being asked to make an affirmative sacrifice, and a profound one at that, in order to save that person.” *Id.* at 130.

79. McConnell, *supra* note 12(A), at 1198. McConnell also points out that the *Roe* Court’s withdrawal of “protection from fetal life appears to [have] resolve[d] the question” after all. *Id.* at 1185. By deciding “without admitting it,” the Court did not have “to support its decision with reasons.” *Id.* at 1198.

80. We use the term “personhood” not in reference to a technical constitutional status, but to the moral concept of an individual human being.

81. TRIBE, *supra* note 1, at 113-38. It should be noted, though, that Tribe, by framing the issue in this way, already has significantly devalued the fetus. He begins with a woman’s right to abort and only then asks whether that right can be curtailed to protect the fetus. A more solicitous approach to the fetus would have been to consider his/her right to life in the evaluation of whether a woman should have a right to abort in the first place. For Tribe’s defense of his approach, in terms of constitutional principles (rather than principles of morality), see *id.* at 96-98.

82. *Id.* at 129-35.

83. *Id.*

84. See *supra* notes 73-78 and accompanying text.

85. TRIBE, *supra* note 1, at 223-25.

pregnant" and the "right to destroy one's fetus."⁸⁶ Tribe plainly states that it is the former right, not the latter, which is protected by *Roe*.⁸⁷ Thus, when technology makes it "possible for a woman to decide to terminate her pregnancy but . . . save the life of the fetus,"⁸⁸ one would think that Tribe, who wants to give "voice to the human reality" of the fetus,⁸⁹ would firmly support the fetus's right to live. Not so. For Tribe, killing the fetus might be justified by a woman's right to control her genetic material⁹⁰ and by an aversion to reliance upon a technology which offers a woman "equality only by rendering her womanhood inconsequential and marginalizing her distinctiveness as a woman."⁹¹

In view of Tribe's refusal to defend fetal life even if the fetus is a person, one wonders why he even discusses the issue of whether the fetus is in fact a person. Tribe does, however, devote considerable attention to this issue. He begins⁹² by pointing out how both prolife and prochoice look to science to support their respective arguments for and against separate fetal personhood.⁹³ While Tribe initially seems persuaded by Charles Gardner's argument that the fertilized ovum is not a separate person—based on Gardner's contention that there is not "one and only one 'path' for the fertilized egg to travel on its way to full gestation"⁹⁴—Tribe concludes that Gardner's

86. *E.g., id.* at 98. Professor Mary Dunlap, a prochoice reviewer, labels Tribe's attempt to distinguish these two rights "one of the strangest developments in his book." Dunlap, *supra* note 12(B), at 57. It is a "line that cannot yet be medically and technologically drawn . . . [and thus] resolves nothing in the current abortion dilemma." *Id.* To Dunlap, Tribe's "fanciful discussion . . . seems . . . like legalism taken to its most absurd height, and escapism taken to a new length." *Id.* at 57 n.75.

87. TRIBE, *supra* note 1, at 99, 114-15.

88. *Id.* at 98.

89. *Id.* at 6.

90. *Id.* at 223-25; *see id.* at 230. Tribe's reference to the preborn as "genetic material" is stark evidence of the extent to which he marginalizes their value.

91. *Id.* at 224-25; *see id.* at 230. It is interesting to note that Judith Thomson does not support a woman's "right to secure the death of the unborn child." Thomson, *supra* note 62, at 66. Referring to her violinist hypothetical, she says that: "I have argued that you are not morally required to spend nine months in bed, sustaining the life of that violinist; but to say this is by no means to say that if, when you unplug yourself, there is a miracle and he survives, you then have a right to turn around and slit his throat." *Id.*

92. In a prologue to his discussion, Tribe rejects the argument that the question of when "someone's life begins is inherently a religious one" and thus inappropriate for governmental consideration: "[A]s a matter of constitutional law, a question such as this, having an irreducibly moral dimension, cannot properly be kept out of the political realm merely because many religions and organized religious groups inevitably take strong positions on it." TRIBE, *supra* note 1, at 116; *see Carter, supra* note 12(C), at 2757 n.27. For an argument that there are faith-based constraints on a Christian's freedom to seek laws which implement faith-based precepts, see Samuel W. Calhoun, *Conviction Without Imposition: A Response to Professor Greenawalt*, 9 J.L. & RELIGION (forthcoming 1992).

93. TRIBE, *supra* note 1, at 116-17.

94. *Id.* at 117-19 (citing Charles A. Gardner, *Is an Embryo a Person?*, NATION, Nov. 13, 1989).

“disproof” of separate embryonic personhood . . . cannot succeed completely. It does not *prove* that the fetus is less a human being than any of us. The particular and distinctive person *you* might become, even today, is ‘not yet there’ either. . . . [I]t hardly follows that you are not now a human being—a separate person.⁹⁵

Tribe’s ultimate position is that “[c]ell biologists and experts in the anatomy and physiology of the developing embryo are unable to provide a satisfactory answer to the question of when a separate human life begins.”⁹⁶ As Professor David Smolin points out, however, Tribe, in his constitutional law treatise, concedes that the fetus is human life.⁹⁷ What, though, about “separateness”? On this point, the 1989 testimony of Dr. Jerome Lejeune in the “frozen embryo” case⁹⁸ is instructive. Dr. Lejeune, one of the world’s leading geneticists,⁹⁹ stated that from the time of conception:

when this information carried by the sperm and by the ovum has encountered each other, then a new human being is defined because its own personal and human constitution is entirely spelled out . . . a personal constitution which is entirely typical of this very one human being which has never occurred before and will never occur again . . . it’s not a definition to build a theoretical man, but to build that particular human person we will call later Margaret or Paul or Peter, it’s already there.¹⁰⁰

While this conclusion concerning uniqueness from fertilization once was based upon “statistical certainty,” now, due to recent advances, it is “an experimentally demonstrated fact.”¹⁰¹

The conclusion that separate human life exists from conception does not necessarily mean that “personhood” exists from that event. Professor Smolin states that the term “person”:

can be used in many senses: legal, philosophical, or theological. Arguably, it is not a scientific term at all. Science can tell us

95. *Id.* at 119.

96. *Id.*

97. See Smolin, *supra* note 5, at 657 (quoting LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 1348-49 (2d ed. 1988) (footnote omitted)).

98. *Davis v. Davis*, 1989 WL 140495 (Tenn. Cir., Sept. 21, 1989), *rev’d*, 1990 WL 130807 (Tenn. App., Sept. 13, 1990), *aff’d*, 1992 WL 115574 (Tenn. June 1, 1992).

99. In his own words, Dr. Lejeune “discovered the first disease due to a chromosomal mistake in man which is Down’s Syndrome.” *The Custody Dispute Over Seven Human Embryos: The Testimony of Professor Jerome Lejeune* 46 (pamphlet published by the Center for Law & Religious Freedom of the Christian Legal Society) [hereinafter *Testimony*]. For this discovery Dr. Lejeune received the Kennedy Prize and the William Allen Memorial Award, which he describes as “the highest award that you can get in genetics in the world.” *Id.*

100. *Id.* at 50, 53.

101. *Id.* at 55-57. The advances referred to include the ability to process DNA so as to produce a “DNA bar code” for each individual. *Id.* at 56. For a discussion of the use of this so-called “DNA fingerprinting” by forensic science, see Sally E. Renskers, Comment, *Trial by Certainty: Implications of Genetic ‘DNA Fingerprints’*, 39 EMORY L.J. 309 (1990).

whether an organism is an individual; whether it is alive; whether it is of the species *homo sapiens*. In one sense, the "personhood" debate is between those who would accord legal or moral personhood to all those who are individual, live organisms of our species, and those who use a restrictive definition.¹⁰²

In this "'personhood' debate," Smolin praises the prolife movement for its refusal "to accept a definition of personhood that excludes some forms of individual human life."¹⁰³ Smolin argues that "[r]estrictive definitions of personhood" are undesirable because they "are always open to reinterpretation, and thus are subject to the political, philosophical or theological proclivities—and the raw self-interest—of those in power."¹⁰⁴

As strikingly illustrated by three of Tribe's prochoice reviewers, restrictive concepts of personhood are indeed dangerous.¹⁰⁵ Tribe initially seems

102. Smolin, *supra* note 5, at 657-58.

103. *Id.* at 659.

104. *Id.*

105. Professor Braucher, in outlining a prochoice "moral scheme," compares the "claim to personhood" of a preborn baby of eight weeks gestational age to that of the pregnant woman. Braucher, *supra* note 12(B), at 600. The preborn child falls far short due to the woman's "fully realized personhood . . . with her social history, commitments and responsibilities." *Id.* This concept of personhood would be difficult to meet for children of up to several years in age.

Infants (and perhaps toddlers and beyond) would have similar difficulties qualifying as persons under Professor Allen's standard of "self-conscious, rational, moral agency." Allen, *supra* note 12(B), at 193. Nor would these groups fare any better under another view of personhood discussed by Allen. In asserting that restrictive abortion laws interfere with the privacy "interest of physical seclusion," Allen criticizes Justice Blackmun's statement in *Roe* "that as pregnancy progresses a woman 'cannot be isolated.'" *Id.* at 187 (quoting 410 U.S. at 159). To Allen:

Justice Blackmun's characterization of pregnant women as *ipso facto* not "isolated" problematically assumes that the unborn are the metaphysical and moral equivalents of persons for purposes of describing conditions of privacy. To treat the unborn as relevant for purposes of the discourse of physical seclusion, even though they do not watch and listen in ways that give rise to modesty and shame, requires an argument.

Id. We find deeply troubling a test that accords personhood status depending upon whether one evokes in another feelings of "modesty and shame." Infants and small children are not the only ones at risk under such a test. If the evaluator were particularly immodest and shameless, would not all of us (women too) be in danger of losing our personhood?

While the content of Professor Allen's standards of personhood is alarming, the danger of a restrictive definition is equally well-illustrated by the fact that Allen discusses two standards in the same article. She apparently cannot settle upon which should govern. Also of concern is Allen's statement that in weighing the "inchoate potential of the unborn" against "the more tangible potential of the pregnant woman," the latter should prevail "[e]xcept perhaps in a grossly underpopulated community." *Id.* at 193-94. Factoring demographic considerations into an evaluation of personhood creates additional risks. While in Allen's example underpopulation allows the fetus's personhood to trump that of the woman (and thus deny the woman a right to abort), what if there were overpopulation in certain age categories? Could excessive individuals be deemed "nonpersons" and terminated?

Other evidence of the dangers of restrictive views of personhood is seen in Professor

to agree, for he rejects Professor Frances Olsen's argument that "[f]etal life has value when people with power value it."¹⁰⁶ As Tribe expresses it:

[t]he same thing once was said of slaves: the value of black Americans was less than the value of white Americans in the view of people with power. It once was said of women, who were deemed property in the early law of much of Europe, Britain, and some of the colonies. And it once was said of some infants and may be said even today, by some, about the severely deformed.¹⁰⁷

Mary Dunlap's criticism of Tribe for stating that, with respect to fetuses that look human and feel pain, "few . . . [could] avoid the sense of tragic choice that each abortion entails." Dunlap, *supra* note 12(B), at 61 (quoting TRIBE, *supra* note 1, at 230). Dunlap says that not everyone would agree. "Is the choice to abort inevitably tragic? Is the choice to give birth inevitably joyous?" *Id.* Dunlap resents Tribe's implication that those who do not share his view "that abortion is a tragic choice are extremists." *Id.* Implicit in Dunlap's critique is the notion that the personhood of the fetus, despite its physical attributes, depends upon the woman's feelings. Even for a "baby pushing through the birth canal," Dunlap apparently would accord personhood or not according to the mother's emotional reaction to the birth. *Id.* at 60 n.96. We do not hesitate to describe Dunlap's view of personhood, grounded as it is totally in others' feelings, as an "extreme" position. Would anyone be safe under such a principle?

106. TRIBE, *supra* note 1, at 119 (quoting Olsen, *supra* note 26, at 128).

107. *Id.* With respect to black Americans, Professor Carter writes that to "many people with power, the slaves were a sub-species, not fully human, which justified their masters in holding them in thrall and making all decisions for them." Carter, *supra* note 12(C), at 2761. How then, Carter asks, does one explain the fact that our laws prohibit slavery but allow abortion? If the state cannot override the woman's decision as to the moral status of the preborn, why should it "be able to override the slaveholder's claim that what he is enslaving is not human [?]" *Id.* Carter's proffered explanation is to focus upon

what the two protestors, the slaveholder and the pregnant woman, are trying to accomplish. Here the conscription argument for reproductive freedom might be brought into play. The slaveholder wants to control what the state seeks to liberate, whereas the woman seeks to rid herself of what the state seeks to force her to keep; without regard to the humanity of the object, then, one seeks control of what the state wishes to make free, while the other seeks freedom from that which the state wishes to make her control. The distinction, then, turns not at all on the question of who has the right to determine personhood, and much more on the liberal bias toward freedom rather than control; so that even if the fetus and the slave are both human, the result that slavery is prohibited and abortion is allowed is both coherent and consistent.

Id. at 2761-62.

We find Carter's distinction unconvincing. It is premised in the validity of describing state abortion restrictions as "conscription" of a woman's body. While this is a common rhetorical device (Tribe uses it at several points; see TRIBE, *supra* note 1, at 114-15, 226, 241), this view ignores the fact that the state does not cause a woman's pregnancy. Other than in cases of rape, a woman becomes pregnant as a result of her decision to engage in sexual intercourse. The state initially does not "conscript" her body; the woman offers it through the assumed risk of having sex. (For why we would prohibit abortion even in cases of rape, see *infra* notes 178-88 and accompanying text.)

Nor does forced continuation of the pregnancy constitute an illegitimate "conscription." Tribe himself defines the woman's liberty interest as the freedom to decide "whether her body is to carry a baby until she becomes a parent." *Id.* at 104. Tribe acknowledges that this right

For Tribe, might does not make right.¹⁰⁸ The fact that members of minority groups are “degraded sometimes by the law” does not mean that they are not human beings.¹⁰⁹ There must be a way “to import into the law some moral view from a perspective external to that of those with power, or we will be trapped in a moral world of, by, and for the powerful.”¹¹⁰

Professor Jean Braucher criticizes Tribe for equating “Olsen’s position with a moral code of ‘might makes right.’”¹¹¹ Olsen’s true view, according to Braucher, is “that the pregnant woman should be the one to decide the value of the fetus . . . not on a ‘might makes right’ basis, but on an evaluation of the relative harms that would result from the pro-choice as opposed to the pro-life legal approach.”¹¹² The chief harm of opposing abortion, Braucher states (quoting Olsen), is that “‘one [thereby] cooperates with the devaluation of women’s lives and paves the way for further devaluation of life.’”¹¹³ In fact, even “[t]he possibility of valuing fetal life from an early stage exists because of the systematic undervaluation of women’s lives. If women were taken seriously, early fetal life would not be valued by society at large unless and until the woman carrying the fetus valued it.”¹¹⁴

ends once a child is in existence: “there is certainly no right to commit infanticide,” *id.* at 99, and “one obviously has no right . . . to kill one’s offspring.” *Id.* at 224. Logically, the next critical step would be to determine when does an infant or offspring exist, thereby terminating the woman’s right. We have seen, however, that Tribe, by defending the right to abort even if the fetus is a person, *see supra* notes 82-84 and accompanying text, fails to complete this logical progression. Carter apparently would not be concerned. Under his language, the “conscripting” theory would justify abortion even if the fetus were in fact fully human because the woman would be seeking “freedom from that which the state wishes to make her control.” This formulation would compel Carter also to attack laws prohibiting infanticide, because, by “conscripting” the physical and other resources needed to raise a child, the laws interfere with parents who seek freedom from the responsibility for their children that the state would impose.

In the final analysis, it is impossible to accept Professor Carter’s conclusion that it is “coherent and consistent” to prohibit slavery but to allow abortion. The weakness of his assertion does not consist only of the fact that his defense of abortion would support infanticide as well. In addition, he does not persuasively show that laws prohibiting slavery are any different from laws prohibiting abortion. He would justify the former as restraining “[t]he slaveholder [who] wants to control what the state seeks to liberate.” Carter, *supra* note 12(C), at 2761. What, though, is a more ultimate form of control over another than the unfettered right to kill? Laws prohibiting abortion can be defended as state attempts to liberate preborn persons (recall that Carter assumes fetal personhood) from others whose desire is to control them by killing them. From this perspective, state involvement is an all-or-nothing proposition. The state should either protect all persons or leave the issue of whether particular persons should be enslaved or killed to individual discretion.

108. *TRIBE, supra* note 1, at 120.

109. *Id.*

110. *Id.*

111. Braucher, *supra* note 12(B), at 615 (footnote omitted).

112. *Id.* (footnotes omitted).

113. *Id.* at 616 (footnote omitted) (quoting Olsen, *supra* note 26, at 132).

114. *Id.* (footnote omitted) (quoting Olsen, *supra* note 26, at 128).

Professor Olsen's view that taking women seriously requires vesting them with absolute discretion to assess the value of "early fetal life" is a proposition that we will refute in Part II. It suffices now to point out the unsubstantiated presupposition in Professor Olsen's approach: it is illegitimate *even to consider* whether "early fetal life" might have value in his/her own right because *by definition* doing so undervalues women. A skeptic could easily conclude that this formulation is an attempt to discourage thoughtful inquiry in areas which an abortion advocate would rather leave unexplored.

Professor Braucher would vest even more discretion in women than would Olsen: individual pregnant women should decide the "moral status" of the fetus,¹¹⁵ apparently regardless of his/her developmental age.¹¹⁶ Professor Tribe, drawing on the external moral standard of intuition, recoils: "[n]early everyone, surely, would think it profoundly wrong if 'people with power' [in this case, the child's mother] chose to treat an admittedly 'unborn' infant, struggling to push itself through the birth canal during the final minutes of its mother's labor, as not yet a person morally entitled to our protection and love."¹¹⁷ Tribe wonders, however, whether it would be morally wrong to take this position "with respect to a just fertilized, twenty-three-hour-old one-cell embryo or with respect to a more fully developed fetus that has begun to display higher-level neurological activity?"¹¹⁸ Regrettably, Tribe does not proceed to evaluate the issue he poses. Instead, after stating that the moral question is "difficult (and perhaps intractable)," Tribe begins to examine whether the Constitution as it exists today protects embryos as persons.¹¹⁹

Why was Tribe so evasive? Perhaps it is because if he had grappled with the moral, as contrasted with the constitutional issue, he would have become quite uncomfortable with his defense of *Roe's* holding that viability is the earliest point at which a state can intervene to protect fetal life. Elsewhere in *Abortion*, for example, Tribe states that to most Americans:

the more the fetus is like a baby, the more we must admit that the moral picture reveals two beings. Even someone who is strongly pro-choice but who has seen an ultrasound picture of a fetus may

115. *Id.* at 618.

116. At one point in her article, Professor Braucher states that "viability is a possibility for a logical point at which legal restrictions to protect [the fetus] should begin." *Id.* at 600. She then immediately states, however, that the "fetus should never be viewed as having an equal claim to personhood with the pregnant woman. . . ." *Id.* Moreover, Braucher explicitly states that by "fetus" she refers "to every stage of pre-birth human development after fertilization." *Id.* at n.31. Thus, her unqualified statement that individual pregnant women should determine a fetus's "moral status" gives women this discretion up until birth.

117. TRIBE, *supra* note 1, at 120. Professor Dunlap disagrees and even chastises Tribe for this statement. See *supra* note 105.

118. TRIBE, *supra* note 1, at 120.

119. *Id.*

be offended by any suggestion that only one human life is at stake.¹²⁰

In another passage, Tribe states that "as soon as abortion involves a fetus that is recognizably human in form, or when it involves a fetus that one might imagine feeling pain, few of us can avoid the sense of tragic choice that each abortion entails."¹²¹ Under these standards, the line of moral personhood would be pushed much earlier than the viability line of twenty-four weeks¹²² from conception. Both are satisfied at least by the middle of the thirteenth week of pregnancy, and perhaps as early as the end of the ninth week.¹²³ The fact is that viability has nothing to do with personhood. Rather, it refers to the point at which the fetus can live outside the womb with any necessary artificial help.¹²⁴ The concept is thus merely a measurement of the level of sophistication of life support systems available at a given time, or, for that matter, in a given city or in a given hospital on any particular day.¹²⁵ Tribe's defense of this standard, which by his own statements has no moral relevance to the personhood of the fetus, is yet another indication of fetal "ghostliness" under Tribe's approach.¹²⁶

There comes a point, of course, as one moves earlier in the pregnancy, when Tribe's intuitive standards of personhood may not be met. Tribe, for example, suggests that for most people abortion presents no significant moral difficulties when "performed in the very beginning stages of pregnancy, when the embryo is a tiny, visually undifferentiated, multicelled growth without discernibly human features."¹²⁷ This emphasis upon how

120. *Id.* at 138. For a discussion of the impact of ultrasound technology on the abortion debate, see *infra* note 133.

121. *Id.* at 230. This statement angers prochoice reviewer Professor Mary Dunlap. See *supra* note 105.

122. *Roe v. Wade*, 410 U.S. 113, 160 (1973).

123. For the point at which the fetus is recognizably human, see *supra* note 5. As to fetal pain during abortions, it is a "reasonable medical certainty that the fetus can sense pain at least by 13-1/2 weeks [gestational age]." VINCENT J. COLLINS ET AL., *FETAL PAIN AND ABORTION: THE MEDICAL EVIDENCE* 8 (Pamphlet No. 18, Law and Medicine Series, Legal Defense Fund of Americans United for Life (1984)). It is "probable" that pain is experienced "between 8 and 13-1/2 weeks." *Id.*

124. *Roe v. Wade*, 410 U.S. at 160.

125. Professor McConnell argues that "the moral-legal status of a being should not depend on such contingent factors." McConnell, *supra* note 12(A), at 1199. He also notes that "[t]he emerging consensus, even among pro-choice scholars, other than Tribe, is that "viability" is becoming increasingly irrelevant to the abortion debate." *Id.* (footnote omitted) (quoting KATHLEEN McDONNELL, *Not an Easy Choice* 45 (1984)).

126. We have previously discussed Tribe's argument that even if a fetus could be removed from the mother without destroying him/her, killing the fetus might be justified. See *supra* notes 85-91 and accompanying text. To say that the fetus can be removed and saved is to say that the fetus is viable. Tribe nonetheless believes that the mother might have the right to kill the child. Tribe's purported recognition of a viability limitation on the mother's discretion is thus shown to be meaningless.

127. TRIBE, *supra* note 1, at 230. It is important to note that the bulk of abortions performed in America today involve fetuses who are more developed than Tribe's description. See Smolin, *supra* note 5, at 656-57.

people feel as the way to determine the value to be accorded young fetuses is not defensible. Human intuition has not proven to be the most reliable moral standard. As we have noted, Tribe himself recognizes that in the case of black Americans and others, "people with power" have often treated those without it as less than fully human.¹²⁸ This oppression, based in large part upon the powerful's "intuition" concerning the status of the powerless,¹²⁹ has gradually been remedied as the law has accorded full protection to previously disfavored classes.¹³⁰

Prolife advocates believe that fetuses, as undeniable individual and genetically unique members of the human species, deserve the same protection of their lives as do other human beings.¹³¹ A fetus's personhood should

128. See *supra* notes 107-10 and accompanying text.

129. Professor H.L.A. Hart writes that "[i]n slave-owning societies the sense that the slaves are human beings, not mere objects to be used, may be lost by the dominant group, who may yet remain morally most sensitive to each other's claims and interests." H.L.A. HART, *THE CONCEPT OF LAW* 196 (1961). He illustrates this with an episode from Mark Twain: "Huckleberry Finn, when asked if the explosion of a steamboat boiler had hurt anyone, replied, 'No'm: killed a nigger.' Aunt Sally's comment 'Well it's lucky because sometimes people do get hurt' sums up a whole morality which has often prevailed among men." *Id.* (Twain relates this incident approximately midway through chapter thirty-two of *Huckleberry Finn*.)

Professor David Granfield references the Hart passage to support his contention that "[s]ocieties and individuals within them often possess blind spots in matters of right and justice that shock the dispassionate observer." DAVID GRANFIELD, *THE ABORTION DECISION* 166 (1969). Granfield, who wrote in the pre-*Roe* era about the need to resist developing pressure to liberalize abortion prohibitions, stated that "[t]he frequent reference to abortion as a 'crime without victims' shows that this moral blindness is still possible." *Id.* While we do not hear so much today the particular phrase which Professor Granfield criticizes, we believe that his phrase "moral blindness" aptly describes the prochoice perspective in which the personhood of the preborn is so thoroughly denigrated.

130. Full legal protection does not mean that there can be no justifiable killing of a human being. Our society recognizes several legally blameless killings. Among these are killings (1) in self-defense; (2) in war; and (3) to carry out legal executions. There also can be justifiable killing of the preborn. See *infra* note 131 and accompanying text.

131. This means that the law should not allow the killing of a preborn person in any situation in which the killing of a postbirth person would be prohibited. Tribe suggests that such a standard would rule out abortion even where the life of the mother is endangered by continuation of the pregnancy: "Especially if the woman initially *chose* to become pregnant, how could we justify securing her survival by destroying her voluntarily conceived child? No claim of self-defense could go this far." TRIBE, *supra* note 1, at 122. We agree, however, with Professor Smolin, who defends a life of the mother exception based on a self-defense analogy. Smolin, *supra* note 5, at 650. For criticism of the life of the mother exception, see SCHWARZ, *supra* note 5, at 167-74.

We do not accept two other commonly-acknowledged exceptions to abortion prohibitions: (1) where pregnancy results from rape; and (2) where the fetus is severely handicapped. Our rejection of the rape exception is explained later in this article. See *infra* notes 178-88 and accompanying text. Concerning the handicapped fetus, the crux of our position can be understood by applying the basic principle with which we began this footnote. If some tragedy befell an infant which caused a severe handicap, the law does not free the mother to respond by killing the baby. Neither should the law allow the mother to kill her handicapped baby within the womb.

not depend upon his/her stage of development. Professor Olsen would disagree:

refusal to distinguish between embryos, fetuses, and newborn babies is simplistic and untrue to the experience and common sense of most women and men. An early miscarriage is very different from a stillbirth. Birth control that prevents implantation of a blastocyst is different from a first trimester abortion. Most people experience the loss suffered from a miscarriage as less severe than the death of a newborn baby.¹³²

Focusing upon Olsen's last statement concerning miscarriage allows us to consider her point. Even if we assume that her assessment of most people's relative loss experience is accurate, what does it mean? It could reflect the fact that the fetus prior to birth has not had the same opportunities as the newborn to become known.¹³³ Similarly, the death of a newborn might not evoke the same pain as the death of a one-year old or a twelve-year old. This emotional differentiation does not mean that the newborn is less human.

One wonders also how Professor Olsen, and Tribe himself, would deal with those whom she places in the minority—people who experience miscarriage as equivalent to losing a child. Consider the poignant account of Dr. Dan Doriani.¹³⁴ Upon his wife's miscarriage of their unborn child (age eleven weeks), the attending physician said "in techno-babble and euphemism. 'Incomplete spontaneous abortion . . . I need to remove the product of conception . . . there is some tissue here . . . I need to remove this tissue'."¹³⁵ Dr. Doriani's response?:

Tissue! Horror and anger, stilled by numbness welled within. "That's not tissue, that's my baby," I thought, I shouted, within "Why can't he say it!?"—"I'm sorry Mr. and Mrs. Doriani, your baby is dead." He won't even call it a fetus! Doesn't he know what's happening here? Our baby has died and he doesn't even know it!"¹³⁶

132. Olsen, *supra* note 26, at 127.

133. Technological advances have made it increasingly possible better to know the preborn. One of us (Andrea) recently had her fourth child. During the pregnancy, ultrasounds at eleven, seventeen, and nineteen weeks gestational age gave Andrea and her husband their first visual experiences of their baby daughter. During all three sonograms, their child moved and turned frequently as the ultrasonographer took various measurements of her bones and organs. On the last occasion, the first image on the screen showed the baby's hand holding her feet; fingers and toes were clearly visible. The baby also yawned three times.

In addition to helping open a "window into the womb" for parents, improved ultrasound techniques are impacting those who provide abortion services. Dr. Joseph Randall, after having performed an estimated 32,000 abortions, quit doing so in 1983 because ultrasound had convinced him that "there were full-fledged human beings in there." . . . Mimi Hall, *Legal Abortions Tougher to Get*, USA TODAY, May 1, 1991, at 7A.

134. Dan Doriani, *Reflection on Miscarriage*, THE PCA MESSENGER, April 1991, at 17.

135. *Id.* at 18.

136. *Id.*

Others in Dr. Doriani's position might not have experienced this miscarriage so powerfully. The fetus, however, would have been exactly the same entity in either case. He/she would also have been the same entity had Dr. Doriani's wife sought an abortion a few days before because she had decided that she did not want to have a baby. Under this hypothetical, would the fact that the fetus was unwanted mean that he/she was any less of a person than the real fetus whose death a few days later Dr. Doriani experienced as a child's death? The point is that "emotional attachment" and "wantedness" are far too subjective to serve as standards of personhood. The most defensible way to avoid them is to confer personhood status—and with it legal protection—at the point when science tells us that individual human life begins: conception.¹³⁷

II. TAKING WOMEN SERIOUSLY

A. Liberty

The thesis of this essay is that a comprehensive prolife perspective, under which a fetus's right to life is protected from the time of conception, is the only approach to abortion which accomplishes Professor Tribe's goal of treating neither fetuses nor women as "ghosts." When one recalls Professor Olsen's statement that even "[t]he possibility of valuing fetal life

137. It is instructive to consider an exchange which occurred at the trial in the "frozen embryo" case, *see supra* note 98, between Dr. Jerome Lejeune and Charles Clifford, the cross-examining attorney:

Q. I will ask you directly, Dr. Lejeune: You have referred to the zygote [the fertilized ovum] and the embryo as quote 'early human beings.'

A. Yeah.

Q. Do you regard an early human being as having the same moral rights as a later human being such as myself?

A. . . . As far as your nature is concerned, I cannot see any difference between the early human being you were and the late human being you are, because in both case[s], you were and you are a member of our species. What defines a human being is: He belongs to our species. . . . I would say very precisely that I have the same respect, no matter the amount of kilograms and no matter the amount of differentiation of tissues.

Q. Dr. Lejeune, let me make sure I understand what you are telling us, that the zygote should be treated with the same respect as an adult human being?

A. I'm not telling you that because I'm not in a position of knowing that. I'm telling you, he is a human being, and then it is a Justice who will tell you whether this human being has the same rights as the others. If you make difference between human beings, that is, on your own to prove the reasons why you make that difference. But as a geneticist you ask me whether this human being is a human, and I would tell you that because he is a being and being human, he is a human being.

Testimony, supra note 99, at 70.

We submit that Dr. Lejeune has plainly stated the chief challenge to those who assert a restrictive view of personhood: they must offer a morally compelling rationale for their position. Attempts by prochoice advocates to do so have been woefully inadequate. *See, e.g., supra* note 105; *infra* note 146 (discussion of quickening).

from an early stage” involves undervaluing women,¹³⁸ substantiating our thesis would appear to be somewhat difficult. Tribe increases the challenge by referring to many proliferers as those “who can readily envision the concrete humanity of a fetus, who hold its picture high and weep, [but who] barely see the woman who carries it and her human plight.”¹³⁹ To them, Tribe says, “Where is the person who develops, nurtures, and sustains the fetus we are looking at? Where is the woman? In this vision, she is insignificant, devalued. When a woman does somehow momentarily enter our view, she is rendered translucent, a ghost of a real person.”¹⁴⁰

Concerning the “human plight” which could lead to a decision to abort, Tribe emphasizes the burdens of pregnancy: the “significant restrictions of a woman’s physical liberty,” the “substantial medical risk,” and the profound intrusion of bodily integrity.¹⁴¹ He also chastises proliferers who blithely dismiss as “convenience” abortions those abortions actually motivated by

tragic circumstances . . . [I]s an abortion a matter of mere convenience for impoverished single mothers who can barely support their current children? For teenage girls who believe a pregnancy would ruin their future and cause them shame in their communities? For women who find themselves pregnant after their husbands have left them or died?¹⁴²

These serious consequences of unwanted pregnancy lead Tribe to conclude that “laws telling a woman she must remain pregnant deprive her of the very core of liberty and privacy.”¹⁴³ Such laws “reduce women to ‘mere instrumentalities of the state’ . . . [by taking] ‘diverse women with every variety of career, life-plan, and so on, and [making] mothers of them all.’”¹⁴⁴ To avoid this—to give any meaning whatever to a woman’s “individual rights and human dignity,”—women must have “the freedom to decide whether or not to endure pregnancy.”¹⁴⁵

Professor Celeste Condit agrees with Tribe as to the centrality of abortion rights in achieving liberty for women. Being pregnant affects women’s lifestyle choices because “[a] mother, by definition, is a person-in-a-relationship. Almost anything a mother does (smokes cigarettes, eats chocolate, uses a jack-hammer, goes jogging) affects another living entity, one that is becoming a person.”¹⁴⁶ This mothering relationship, moreover,

138. See *supra* note 114 and accompanying text.

139. TRIBE, *supra* note 1, at 5.

140. *Id.* at 136.

141. *Id.* at 103.

142. *Id.* at 136.

143. *Id.* at 104.

144. *Id.* (footnotes omitted) (quoting Jed Rubenfeld, *The Right of Privacy*, 102 HARV. L. REV. 737, 790 & 788 (1989)).

145. *Id.*

146. Condit, *supra* note 12(B), at 909. Condit chooses “quickening” as the point at which the pregnant woman becomes a mother. *Id.* The *Roe* Court defined quickening as “the first

does not end with a child's birth. Condit quotes Tribe to the effect that "[p]regnancy does not merely "inconvenience" the woman for a time; it gradually turns her into a mother and makes her one for all time."¹⁴⁷ Women must therefore be free "to secure the status of 'not-mother.'"¹⁴⁸

recognizable movement of the fetus *in utero*, appearing usually from the 16th to the 18th week of pregnancy." 410 U.S. at 132 (footnote omitted). This event is crucial to Condit because, "[w]hether or not we see the fetus as a full individual in its own right, the historical significance of . . . quickening indicates quite clearly, as does the testimony of individual women, that the fetus is experienced relationally from that point." Condit, *supra* note 12(B), at 909 n.20.

While Condit concedes that at quickening the fetus is in a relationship with his/her mother, she falls short of acknowledging the personhood of the quick fetus. This suggests that to her a fetus even after quickening might not be a person. Conversely, we contend that there is nothing about quickening to support the argument that fetuses prior to that point are not persons. Professor Condit stresses quickening because it is after this event that the fetus is "experienced relationally." We reject this factor as the standard of personhood. A human being is a human being even if he/she lives in complete isolation from others. Even if being "experienced relationally" were accepted as the key criterion, quickening is not the first time that this occurs for the preborn. We have previously shown, for example, how ultrasound technology makes this possible long before. *See supra* note 133.

Quickening merely is the point at which the mother physically feels her baby. This is primarily a function of the baby's size. Dr. and Mrs. Willke write that:

[t]he baby has to be almost a foot long (30 cm.) and weigh about one pound (454 gm.) before he or she is large enough to brace a shoulder against one wall [of the uterus] and kick hard enough against the opposite wall to dent it outward. Then the mother feels it because the outside of the uterus is covered by a sensitive peritoneal surface.

WILLKE, *supra* note 52, at 46. We submit that size is a morally irrelevant criterion of personhood.

Only the baby's movement is left as possibly making quickening a morally significant event. Movement, though, is irrelevant to personhood. Are paralyzed people nonpersons? Even if movement were accorded moral significance, it is undeniable that the preborn move weeks before the mother is aware of it. A recent video, *ULTRASOUND: EYEWITNESS TO THE EARLIEST DAYS OF LIFE* (Sound Wave Images 1990), using ultrasound technology, shows preborn babies moving inside their mothers by the seventh week following conception. By the tenth week, vigorous movement is visible, including very energetic jumping.

147. Condit, *supra* note 12(B), at 909 (quoting TRIBE, *supra* note 1, at 104). In contrast to Condit's focus upon quickening, Tribe believes that the final transformation of the pregnant woman into a mother does not occur until birth. *See* TRIBE, *supra* note 1, at 114, 135. Our argument in Part I was that the personhood of the preborn should be acknowledged from conception. We would therefore agree with Pat Goodson that "if a woman is pregnant, she is already a mother." Goodson, *supra* note 5, at 72. Goodson, by the way, agrees with Tribe that once motherhood is attained, it is a lifelong condition. She writes that the pregnant woman "cannot 'unbecome' a mother. Her only options are to be the mother of a dead child or the mother of a live child." *Id.* The truth of this statement is being tragically revealed to the many women who later realize that in choosing to abort, they were in fact choosing to kill their own child. *See infra* notes 206-09 and accompanying text.

148. Condit, *supra* note 12(B), at 909. Under Condit's view of when motherhood begins, if abortion is allowed after quickening it would not prevent motherhood because motherhood would have already begun. Such an abortion thus would be to allow the mother to kill her own child (can there be a mother if there is no child?). If we assume hypothetically that Condit, who defends *Roe, id.* at 903-04, also accepts fetal viability as the point at which the

Permissive abortion laws "are fundamental to . . . Liberty because they are the ultimate guarantor that no woman will have to be a mother against her will."¹⁴⁹ Such laws also "will establish a legal status for women as persons, rather than as essentially proto-mothers."¹⁵⁰

Professor Tribe, backed by Professor Condit, appears to make a compelling case that abortion license is a prerequisite to taking women seriously. The problem, of course, is the effect that this approach has upon fetuses—millions have been killed, revealing a serious (if not total) devaluation of fetal life. Our premise in Part II is that a preborn person exists from conception. Killing by abortion, therefore, should not be permitted except under circumstances in which society would permit the killing of any other person.¹⁵¹ Applying this standard, though, presumably would mean that abortions would not be allowed in any of the "tragic circumstances"¹⁵² described by Tribe.¹⁵³ Women's liberty would appear to be inescapably impaired. Perhaps Tribe was correct after all in his initial description of the abortion controversy. Is it possible to value either fetal life or women's liberty without completely devaluing the other side of the equation?

We believe that considering anew what it means to "take a person seriously" shows a path out of the dilemma. An important component of the phrase's meaning is to hold a person morally responsible for the reasonably foreseeable consequences of his/her conduct. One of us recently saw this concept movingly expressed upon attending the bar mitzvah of the son of a colleague. The ceremony signifies the passing of boyhood into manhood, with an accompanying acceptance of certain important responsibilities. Everyone there, including the young man so solemnly charged, knew that his new duties reflected the fact that he was now being viewed more seriously than before.

While a bar mitzvah has special religious significance, the underlying concept expressed is a common phenomenon. Both of us are parents. As our children mature, we take them more seriously by holding them more

preborn can be protected, this means that she is perfectly willing to have a mother become a "not-mother" by killing her child between quickening and viability (if not beyond). See *infra* note 149.

149. Condit, *supra* note 12(B), at 910. One wonders how Condit would feel about infanticide, which is also a method of keeping a woman from being "a mother [of a live child] against her will." She approves abortion of quick fetuses, even after acknowledging that they are then "experienced relationally" by their mothers. *Id.* at 909 n.20. Moreover, it apparently is of no special concern to Condit "[w]hether or not [at quickening] we see the fetus as a full individual in its own right." *Id.* If Condit would allow abortions for a fetus who undeniably is in a relationship with his/her mother and might in addition be a "full individual," would the step to infanticide for her be unthinkable?

150. *Id.* at 910-11.

151. See *supra* notes 130-31 and accompanying text.

152. See *supra* text accompanying note 142.

153. However hard the circumstances, our laws would not permit an impoverished single mother, a teenage mother, or a divorcée or widow to meet the crisis by killing a six-month old baby. Preborn persons should receive the same protection.

accountable for their actions. What is missing in Tribe's account of unwanted pregnancies is any real recognition of the moral desirability of holding both parties responsible for the consequences of their actions.¹⁵⁴ A woman does not, though some prochoicers express it this way, suddenly "[find herself] pregnant."¹⁵⁵ Other than in the case of rape,¹⁵⁶ a woman becomes pregnant as a result of the decision of both partners to engage in sexual intercourse.¹⁵⁷ Often, no contraceptive is used.¹⁵⁸ Even when preg-

154. Erwin Griswold joins Tribe in this omission. This is surprising, for Griswold emphasizes what he calls "the moral approach" to the abortion question. Griswold, *supra* note 12(B), at 30. In fact, although Griswold generally praises *Abortion*, he criticizes Tribe for not devoting more effort "to the fundamental moral question, and help[ing] us to find how that can be made more widely a guiding way, and more conducive to self-restraint for young Americans." *Id.* Curiously, however, Griswold's focus on morality pertains solely to a couple's initial decision to have sexual relations. To Griswold:

[t]he best solution to the abortion problem . . . and certainly the surest, is for young American women to refrain from becoming pregnant, and for young American men not to participate in making them so. It can be done, as many in earlier generations did, just because it seemed to be the decent thing to do—aided no doubt by religious and practical concerns.

Id.

While we agree with Griswold as to the desirability of "self-restraint for young Americans" pertaining to having sex, we do not understand why his concern for morality ignores how the couple should respond if an unwanted pregnancy actually occurs. Griswold's silence on this point is especially perplexing because elsewhere in his review he criticizes those who view "[s]ex . . . primarily as a source of pleasure, and rarely in terms of the mystery of life, and its sacred character." *Id.* If life is "sacred," it would seem that a "moral approach" would require grappling with the responsibilities of those whose acts bring new human life into existence. Griswold, though, is content to approve the result in *Roe*, thereby endorsing a regime in which mothers and fathers through abortion are permitted blatantly to violate their parental duties. See *supra* notes 70-71 and accompanying text.

155. See, e.g., Marge Piercy, *Foreword* to ELLEN MESSER & KATHRYN E. MAY, *BACK ROOMS: VOICES FROM THE ILLEGAL ABORTION ERA* at ix (1988).

156. We will follow Tribe's example and treat incest as "a particular kind of rape." *TRIBE, supra* note 1, at 231.

157. Prochoice reviewer Professor Dunlap agrees. Dunlap, *supra* note 12(B), at 48. She criticizes Tribe for "not squarely address[ing] . . . the position that women who become pregnant by acts of voluntary heterosexual intercourse are *responsible* for those pregnancies." *Id.* In fact, Tribe does discuss the argument that "when the woman is 'responsible' for the pregnancy, she loses at least her moral right to claim that its continuation interferes with her autonomy." *TRIBE, supra* note 1, at 132. Tribe concludes, however, in part for a reason very similar to that given by Dunlap herself, that the woman's responsibility should not deprive her of the right to an abortion. See *infra* notes 162-63 and accompanying text.

158. Tribe suggests that half of all abortion patients did not use contraceptives "during the month in which they became pregnant." See *id.* at 205 (footnote omitted). Concerning women who do not use contraceptives, Professor Braucher argues that "contraceptive risk-taking" cannot be explained simply as a matter of female irresponsibility (although she fears this interpretation by "an unsympathetic audience"). Braucher, *supra* note 12(B), at 622-23. Rather, women take risks due to "the subtle, pervasive effects of gender roles and gender hierarchy in this area of life." *Id.* at 622 (footnote omitted). For example, contraceptive use implies "sexual availability and consequent loss of status and bargaining position with men." *Id.* (footnote omitted); see *TRIBE, supra* note 1, at 213. Such factors might indeed be a disincentive to contraceptive use. The woman, however, still can choose either to use or not

nancy results from contraceptive failure, the couple knew of that risk.¹⁵⁹ We believe that taking both the woman and the man seriously requires that they be held responsible for the new preborn person whom they have brought into existence.¹⁶⁰

With respect to a woman's accountability, Tribe fleetingly appears to recognize the justice of prohibiting abortions for pregnancies not resulting "from any sort of coercion."¹⁶¹ As previously noted, however, Tribe ultimately rejects this approach based on the inapt liver transplant hypothetical which he offers to show society's failure to require comparable sacrifices of men.¹⁶² At one point, Tribe's premise seems to be that if a man cannot be held accountable in the same way as a pregnant woman, then neither party should be held accountable at all.¹⁶³ At another point, however, he

to use contraceptives. If she selects nonuse, she has apparently decided that the gains of nonuse outweigh the risk of pregnancy. Thus, if pregnancy ensues, it was the result of a risk voluntarily taken.

We would make the same point with respect to men who do not use contraceptives. While Tribe does not address this issue in terms of percentages, he does point out that men do not like condoms because "they reduce sensitivity." *Id.* at 213. A man who, for a moment's enhanced pleasure, risks impregnating his sexual partner, might well be thought to have acted irrationally. If, however, pregnancy actually ensues, it is a risk which he willingly, if foolishly, took.

159. *See supra* note 57 and accompanying text.

160. *See supra* notes 69-71 and accompanying text. What, though, if the sexual partners are not a man and a woman, but a young girl and a young boy? Consider consensual sexual relations between two fourteen-year olds. Do sexual partners this young really know the potential consequences? In this age of early exposure, probably. Still, our moral accountability principle does appear to have serious flaws in this context. Concerning the father, what does it mean to hold a fourteen-year old boy to "all parental duties"? Concerning the mother, is it not incongruous to hold this young teenager to "all parental duties," if, as we do, we support (in the current regime of legalized abortion) parental notification legislation, which is premised upon the lack of maturity of teenage girls?

These are good questions. Appropriate practical implementation of parental moral accountability in this difficult setting will take considerable thought. At this stage, we will make these few observations. The key principle is that there still is no basis for allowing an abortion. *See supra* notes 151-53 and accompanying text. Concerning the father, to the extent that he is unable to fulfill his duties, society may need to intervene to fill the gap. *See infra* note 188 (discussing a similar problem involving pregnancies due to rape). Concerning the mother, any critique of our position based upon our support for parental notification laws is not persuasive. We would ask, for example, a converse question of prochoice opponents of such laws. In view of the many serious risks which abortion entails, *see infra* notes 200-15 and accompanying text, is it not incongruous to argue that teenage girls are mature enough independently to obtain an abortion, but not mature enough to be mothers? Pregnant girls need parental support and guidance concerning the abortion decision. We believe the same to be true with respect to the burdens of pregnancy, childbirth and raising the child. If the parents cannot or will not provide this support, once again society may need to intervene.

161. *See supra* note 65 and accompanying text.

162. *See supra* notes 73-78 and accompanying text.

163. *See* TRIBE, *supra* note 1, at 132-33. Tribe focuses on the fact that men who engage in sex "cannot be saddled [physiologically] . . . with the responsibility of pregnancy. . . . It is suspiciously easy to say that women should and must make an enormous sacrifice whenever their sexual activity results in pregnancy, even though men need not." *Id.* at 133. This appears

appears to reject the whole notion of holding someone accountable. Speaking of society's unwillingness to "impose selfless and virtuous behavior on a man," Tribe says that to do so "would demean his capacity for individual choice and independence."¹⁶⁴ Professor Condit supports this view, arguing that acting "irresponsibly" . . . is precisely what true Liberty allows us to do—to make individual choices that are less than optimal."¹⁶⁵ To Condit, this "true Liberty" requires allowing women to "use abortion for sex selection or for other 'frivolous reasons.'"¹⁶⁶

We reject the notion that liberty means the freedom to act without accountability. We also reject the idea that it demeans or undervalues the individual to require accountability.¹⁶⁷ Surprisingly, our position receives theoretical support from Professor Jean Braucher, whose view that each pregnant woman should decide the "moral status" of the fetus we described earlier.¹⁶⁸ Braucher criticizes Tribe for supporting abortion:

in terms of a woman's right to control her own body in order to protect her liberty and autonomy. . . . Women have abortions be-

to be the view of Professor Dunlap as well. To her, "consideration of women's role in becoming pregnant [should not] punish women for pregnancy by depriving [them] of abortion choice, if we commit ourselves to the proposition that women and men must be treated equally under the law, whatever fundamental differences have been programmed by nature or circumstances." Dunlap, *supra* note 12(B), at 49.

It is undeniable that the burdens of pregnancy to the woman are markedly greater than those of her sexual partner. As we have argued, however, this is no reason to allow the woman to avoid by abortion the consequences of the greater risk she took by having sex. See *supra* notes 65-67 and accompanying text. The answer instead is to hold both parties morally accountable by requiring them to accept full parental responsibilities. See *supra* notes 69-72 and accompanying text.

164. TRIBE, *supra* note 1, at 135. We wonder what Tribe's opinion of laws prohibiting drunk driving would be? Do such laws "impose selfless and virtuous behavior" and thereby "demean [one's] capacity for individual choice and independence"? Presumably, Tribe would say that drunk driving laws are appropriate because they prohibit active wrongdoing—misfeasance. See *infra* note 180 and accompanying text. Tribe, however, views ending a pregnancy through abortion as mere nonfeasance, a failure to rescue. See TRIBE, *supra* note 1, at 129-33. Such a characterization ignores the harsh reality of abortion. See *supra* notes 76-78 and accompanying text; *infra* notes 178-86 and accompanying text.

165. Condit, *supra* note 12(B), at 907-08. This quote actually is part of Condit's rebuke of Tribe for emphasizing "the 'rational conduct' of women." *Id.* at 907. She refers to the fact that Tribe criticizes "conservative legal restrictions on abortion [for presupposing] that women will not make reasonable choices about abortion—either they will act hastily, they will choose for frivolous reasons, or they will misrepresent their situations." *Id.* (footnotes omitted). Condit's view of "true Liberty" is such that any inquiry into whether or not women act responsibly "with regards to procreation and abortion" is anathema. See *id.* at 907-08. While Condit scolds Tribe, Tribe's statement that imposing virtue upon a man "would demean his capacity for individual choice and independence," *supra* text accompanying note 164, shows that their views are not dissimilar.

166. Coudit, *supra* note 12(B), at 908.

167. Professor Mary Ann Glendon, referring to women, says that not holding them "morally responsible" implies that they are too "weak" to be held accountable. Glendon, *supra* note 12(A), at 58.

168. See *supra* notes 115-16 and accompanying text.

cause of the conditions and responsibilities of their lives, not primarily as a vindication of an atomistic individualism. Women give multiple reasons for having abortions, usually some combination of the following: they are too young, too poor, too sick, too isolated; they do not feel ready; they have not finished their formal education; they have too many children to provide for and nurture already; they are unmarried or having difficulty in a marriage; they lack a social network. These women are concerned with relationships and responsibilities.¹⁶⁹

Professor Braucher's argument, "that women usually have abortions for *moral* reasons that are grounded in their values and sense of obligation to others, including the fetus, and to themselves,"¹⁷⁰ is certainly more appealing than the Tribe/Condit defense of irresponsibility.¹⁷¹ In the final analysis, however, Braucher is not persuasive because a woman who conscientiously aborts is still killing another person.¹⁷² Braucher stresses that prochoicers on moral grounds have "very high aspirations for what parents and society should provide for children in the way of emotional, social and financial resources. . . . In this view, it is not illogical to think . . . of a woman's having an abortion in a spirit of love for the fetus. . . ."¹⁷³ We do not doubt that many women who have abortions fit the model that Braucher describes. Nonetheless, our society does not freely permit mothers to kill their one-year old babies if only they do so "in a spirit of love" to save their children from lives involving some deprivation in terms "of emotional, social and financial resources." Similarly, killing preborn babies cannot be accepted as a morally responsible act.

Our argument in this subpart has been that holding women morally accountable for their conduct does not reflect a failure to take them

169. Braucher, *supra* note 12(B), at 599 (footnotes omitted).

170. *Id.* at 611.

171. We must point out, though, that a woman's "sense of obligation" to herself might, depending upon the circumstances, be just another way of referring to one's irresponsible actions toward others. Braucher cites, for example, a 1987 survey which showed that seventy-six percent of the women questioned answered "yes" to the following inquiry "concerning their reasons for having abortions . . .:" "because having a baby would dramatically change your life in ways you are not ready for?" *Id.* at 599 n.24 (quoting Torres & Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169, 170-71 (1988)). There is plenty of room in such a response for that "vindication of an atomistic individualism" which Professor Braucher eschews. See *supra* text accompanying note 169.

172. To the preborn child who is killed, it does not matter whether the mother aborts because she wants to be able freely to smoke or eat chocolate (reasons which Condit would recognize as sufficient, see *supra* notes 145-48 and accompanying text), or because she is concerned about her ability "to provide for and nurture" her other children (one of the moral reasons approved by Braucher, see *supra* text accompanying note 169).

173. Braucher, *supra* note 12(B), at 601 (footnotes omitted). See *id.* at 599 n.24; Dunlap, *supra* note 12(B), at 58-59. This "kill with love" argument is but a variation of the standard prochoice assertion, which we have previously refuted, that compassion for unwanted children requires that women be allowed to abort. See *supra* note 41.

seriously. To the contrary, moral accountability is an important touchstone of the significance with which a person is viewed. We can anticipate, however, a major criticism of our position. The principle of accountability which we have thus far applied is premised in the voluntary assumption of reasonably foreseeable risks. However, what if the circumstances which make a particular pregnancy unwanted were not meaningfully foreseeable? Take, for example, the story that Tribe relates concerning Kate Michelman, now executive director of the National Abortion Rights Action League. She "was pregnant with her fourth child when her husband left her for another woman."¹⁷⁴ And what of pregnancies that result from nonconsensual sex? Those due to rape would be an obvious, tragic example. Moreover, there is the argument which Tribe attributes to some feminist writers "that within our society even most nominally 'consensual' sex, particularly in cases where the woman does not feel free to use or to suggest the use of birth control, involves coercion."¹⁷⁵ To the extent that risks are not reasonably foreseeable or that pregnancy results from coercion, a critic might say that our "moral accountability" edifice collapses.

We do not agree. The moral accountability principle is broad enough to encompass even unforeseeable, nonconsensual circumstances. As an example, consider a forty-year-old father of three whose sixty-five-year-old father lives alone in the old family home. Although previously robust, the older man contracts Alzheimer's disease. The young man could not have meaningfully foreseen that such a tragedy could occur. He certainly did not agree to accept the risk. Providing for the parent might very well disrupt the young man's life, sap the emotional and financial resources needed for his children, and all in all be very burdensome. Nonetheless, we contend that the young man would have the moral responsibility to care for his father.

Well and good, one might say, but how does this relate to laws prohibiting abortion? Even if one concedes the young man's moral responsibility to his father, the law does not compel the assumption of that duty.¹⁷⁶ This, of course, is the same point that Tribe made concerning his liver transplant hypothetical: "[a]lthough the relationship between a parent and a child carries with it more legal obligation than the relationship between two strangers, nowhere do we require a voluntary parent to make, for an

174. TRIBE, *supra* note 1, at 134. It is significant that the feeling of desperation which led Michelman to obtain an abortion resulted in large part from her lack of "resources to support another child." *See id.* at 134-35. What about the husband who left? He certainly had the moral and legal responsibility to support the child he had helped conceive. As we have indicated, a comprehensive prolife approach must involve working to improve the procedures available for holding men to their parental obligations. *See supra* notes 71-72 and accompanying text.

175. *Id.* at 132; *see also supra* note 158.

176. *See, e.g.,* ROLLIN M. PERKINS & RONALD N. BOYCE, *CRIMINAL LAW* 665 (3d ed. 1982).

already born child, the kind of sacrifice some would have us impose on the pregnant woman in the name of the fetus."¹⁷⁷

Prohibiting abortion, yet not requiring the young man to help his father, is justifiable for the same reasons we previously gave for not compelling a father to provide liver tissue to his daughter. The son's not assisting his father, like a father's not helping his daughter, is unlike a woman's procuring an abortion. Abortion is malfeasance "because it constitutes the affirmative act of removing the fetus from the uterus, usually by dismemberment."¹⁷⁸ Not acting to help the father or the daughter,¹⁷⁹ on the other hand, constitutes nonfeasance because it is the failure to render affirmative assistance. As Professor Smolin points out, Tribe himself "declares the malfeasance/nonfeasance distinction to be fundamental to upholding autonomy: 'to make a man serve another is to make him a slave, while to forbid him to commit affirmative wrongs is to leave him a free man.'"¹⁸⁰

The "malfeasance/nonfeasance distinction" is also the answer to Judith Thomson's unconscious violinist hypothetical, which she herself implicitly recognizes as being most pertinent where pregnancy results from involuntary sex.¹⁸¹ Again, the assumption is that one awakens to find oneself attached to an unconscious violinist. If he is detached, he will die. Tribe posits that virtually everyone would say that the law should not compel continued attachment.¹⁸² Thomson's scenario has, in Professor Smolin's phrase, "surface appeal."¹⁸³ Unplugging the violinist appears to be "mere nonfeasance . . . [because] Thomson's hypothetical attachment . . . an arbitrary creation of medical science," has no normal duration.¹⁸⁴ Smolin points out, however, that "pregnancy . . . is a complex, self-regulating physiological process that generally will continue for a certain period . . . unless someone does something: 'terminates' the pregnancy."¹⁸⁵ Consequently, to Smolin, interrupting a pregnancy is unlike disconnecting the violinist:

Pregnancy "termination" upon examination is a nice euphemism for acts that, from the viewpoint of both mother and fetus, are quite active and quite forceful: usually an intrusion through the cervix and into the uterus followed by physical dismemberment and removal of the fetus; sometimes an intrusion followed by salt poisoning of the fetus and then labor; occasionally surgical removal of the fetus or artificial inducement of premature labor Abortion interrupts the complex physiological, hormonal and psy-

177. TRIBE, *supra* note 1, at 133.

178. Smolin, *supra* note 5, at 643.

179. See *supra* notes 76-78 and accompanying text.

180. Smolin, *supra* note 5, at 643 (quoting TRIBE, *supra* note 1, at 131).

181. See *supra* note 64 and accompanying text.

182. See *supra* text accompanying note 63.

183. Smolin, *supra* note 5, at 643.

184. *Id.* at 644.

185. *Id.*

chological relationship of mother and fetus in a manner that may only be described as an active intrusion. Abortion is therefore nothing like . . . disattaching a mechanical tube. Abortion is unambiguously an affirmative action—malfeasance—in the traditional criminal law sense.¹⁸⁶

We believe that Professor Smolin's response to Thomson's hypothetical is compelling. The law should not permit a mother's malfeasance¹⁸⁷ in affirmatively killing her unborn child, even where the pregnancy resulted from nonconsensual sex.¹⁸⁸ Since Tribe himself recognizes the importance

186. Viewing abortion as nonfeasance requires one to characterize it as a "mere failure[] to continue the virtuous act of fetal rescue commonly called pregnancy." *Id.* at 645. The "harsh reality of abortion, either as experienced by the woman or her unborn child," renders any such characterization erroneous. *Id.*

187. Forbidding affirmative wrongs is one of the law's most common, yet most important, functions. The fact that a particular prohibition may disproportionately affect one sex is not necessarily objectionable. Tribe points out, for example, that "[o]nly men . . . are physiologically capable of certain sorts of rape, but this does not make laws against such rape instances of impermissible sex discrimination." TRIBE, *supra* note 1, at 133.

188. We believe that allowing rape victims to abort is wrong because abortion would produce a "second innocent victim." See TRIBE, *supra* note 1, at 114 (recognizing that some proliferers make this argument). The preborn person is no less so due to the nonconsensual sex which conceived him/her. See *id.* at 232 (arguing that the prolife assertion that abortion should be limited because it "constitutes the killing of an innocent human being . . . [cannot] plausibly be put forward by anyone who thinks that abortion should be permitted in cases of rape"); Goodson, *supra* note 5, at 68 n.4 (a prolife reviewer stating her complete agreement with Tribe's point). Denying an abortion to rape victims, though, may seem ipso facto to devalue women. Indeed, it is compassion for such victims which in part leads some proliferers to recognize a rape exception to abortion prohibitions. See *supra* note 60 and accompanying text. There is a significant argument, however, that aborting the child conceived in a rape is not truly in the best interest of the woman. DAVID C. REARDON, *ABORTED WOMEN: SILENT NO MORE* 188-218 (1987), examines this issue at length in a chapter which includes first person testimonies of rape victims who became pregnant, aborted their child and later suffered great harm from doing so. Reardon's conclusion is that rape (and incest):

involve psychiatric stresses that are ill-treated with abortion. The evidence shows that pressures to abort . . . arise primarily from outside sources, from the superstition and prejudice that friends, family, and society hold against these "tainted" women. When the desires of the victims are examined, it is found that the vast majority of women pregnant from rape or incest actually desire to carry their children to term. Psychologists confirm that this is a healthy response and is the most productive path these women can take in reestablishing their self-images and renewing control over their lives.

Id. at 205.

Reardon's conclusions are corroborated by Professor Stephen Schwarz. According to Schwarz, "rape pregnancy" results in a "stigma"—"that the woman is somehow "tainted" or "dirtied" . . ." There is also an assumption that the woman was somehow responsible . . . The result is a strong desire to get rid of the whole thing . . . There is an obvious way to do this: get rid of the visible sign of rape; abort the child." SCHWARZ, *supra* note 5, at 163 (footnote omitted) (quoting Sandra K. Mahkorn, *Pregnancy and Sexual Assault*, in *THE PSYCHOLOGICAL ASPECTS OF ABORTION* 53, 67 (David Mall and Walter F. Watts eds., 1979). Schwarz condemns "[t]he absurdity and injustice" of an attitude which views the woman as

to liberty of the malfeasance/nonfeasance distinction,¹⁸⁹ we hope that he eventually will be convinced to support laws generally prohibiting abortion.¹⁹⁰ Doing so would not be to devalue women, who instead would be accorded great significance through application of the moral accountability principle.

B. Equality

The previous subpart has shown that a prolife perspective does not fail to take women's liberty seriously. Tribe, however, also argues that abortion restrictions devalue women by failing to accord them equality with men:

[Such laws] so dramatically shape the lives of women, and only of women, that their denial of equality hardly needs detailed elaboration. While men retain the right to sexual and reproductive autonomy, restrictions on abortion deny that autonomy to women. Laws restricting access to abortion thereby place a real and sub-

anything other than an "innocent victim." *Id.* at 164. He also argues that:

abortion for rape is especially bad for women. The woman, already weakened and devastated by the assault of the rapist, now becomes subject to another assault on her body and spirit, the assault by the abortionist. . . . She may feel that abortion is wrong, but that she must have one to please others or do what they insist is the right thing. . . . Already made to feel vulnerable by the rapist, she is now made to feel vulnerable by the pressure to abort: "Abortion promises only to compound the trauma of rape with yet another experience of violence. . . . In an attempt to overcome the violation of her own person, she does violence to another . . . This brings no peace of mind and no healing, only more pain and more regret."

Id. at 164-65 (footnote omitted) (quoting CURT YOUNG, *THE LEAST OF THESE: WHAT EVERYONE SHOULD KNOW ABOUT ABORTION* 208 (1983)).

Schwarz believes that, rather than abortion, the best way to help the rape victim who becomes pregnant is to support her in her pregnancy and in her efforts to deal with rape's "emotional trauma. . . . There is no shortcut to coming to grips with pain. From a counseling perspective, abortion is a simplistic and presumptuous suggestion. . . . In the course of choosing life and sacrificing for the child within them, women . . . have discovered a peace they never imagined was possible." *Id.* at 165 (footnote omitted) (quoting YOUNG, *supra*, at 207-08).

Protecting the preborn and rape victims themselves is in our view sufficient reason for not recognizing a rape exception. There remains, however, another important issue. Our goal of holding fathers to their parental responsibilities will be significantly more difficult in cases of rape. It cannot reasonably be expected that the typical rapist will be very solicitous of the welfare of any children conceived by the rape. Legal coercion will be an option in some cases, such as date rape, where the rapist is known. Even here, however, the mother for obvious reasons may find it intolerable to have any contact whatever with the rapist. Moreover, in some instances the perpetrator will not even be known, much less caught. These matters merit further thought and study. One possible response is to establish social programs to meet the needs during the pregnancy of any rape victim who finds herself in exigent circumstances.

189. See *supra* text accompanying note 180.

190. Tribe's colleague Mary Ann Glendon believes that Tribe, primarily because of his compassion "towards the weak, vulnerable, and disenfranchised . . . will come . . . to accord more weight to the value of protecting human life than is . . . expressed [in *Abortion*]." Glendon, *supra* note 12(A), at 58.

stantial burden on women's ability to participate in society as equals.¹⁹¹

In this quote,¹⁹² one again sees reflected Tribe's perspective that a condition of male-female mutual irresponsibility is a necessary characteristic of society's response to unwanted pregnancies. Men have "reproductive autonomy" (presumed translation: they are not held responsible when their sexual activities result in pregnancy); equality therefore demands that the same be true for women. As has been shown, we reject the morally vacuous position that sexual partners be permitted to be equally irresponsible when their activities produce a new human life. The preferred paradigm of equality, which Tribe fails to consider, is joint responsibility.¹⁹³

Even if one assumes male "reproductive autonomy [irresponsibility]," to be an irremediable fact, Tribe's defense of abortion as the path to equality for women cannot withstand scrutiny. Ironically, Tribe's position is inherently sexist.¹⁹⁴ One of its presuppositions is a disparaging attitude towards pregnancy and motherhood. It is the burdens associated with these conditions which impair a woman's ability to compete in the "real world," or perhaps, more accurately, in a "man's world." Feminists have made great strides in eradicating the assumption that pregnant women should be removed from public view or, at least, prohibited from keeping jobs. Similarly, there have been increasing workplace opportunities for women with born children. Tribe, though, views women as captives of their unique capacity to bear children. His perspective that surgical alteration is a prerequisite to women's social equality is fundamentally anti-women.¹⁹⁵ It insists that women change their bodies to accommodate

191. TRIBE, *supra* note 1, at 105. This passage is part of Tribe's argument that abortion restrictions deny women "the 'equal protection of the laws' . . . guaranteed by the Fourteenth Amendment." *Id.* In this article, we are interested in moral dialogue, not constitutional interpretation. See *supra* note 19. In our response to Tribe's "denial of equality" argument, we will therefore consider equality in its moral, not constitutional, aspects.

192. Tribe's premise that abortion restrictions "dramatically shape" only "the lives of women" is inaccurate. The other group most obviously impacted is the preborn, many more of whom with legal protection will survive to birth. See *infra* note 217 and accompanying text. Abortion restrictions, by protecting the preborn, also dramatically affect the lives of those fathers who, because they accept the moral responsibilities of fatherhood, oppose abortion. Such laws help ensure fulfillment of these fathers' desire to love and raise their offspring.

193. Prochoicer Amy Gutmann provides support for our thesis. Since the sexual partners share responsibility for any resulting pregnancy (she is speaking specifically of failed birth control), she offers as "common ground" a vision of equality under which men and women share the burdens of childbearing rather than placing them "solely upon women." Gutmann, *supra* note 12(B), at 44.

194. The irony, of course, results from the fact that so much of *Abortion* is devoted to impugning the motives of the prolife movement as sexist. See *supra* Part I (A).

195. Nancyjo Mann, founder of Women Exploited by Abortion (WEBA), argues that the abortion mentality attacks the unique value of female sexuality. . . . This attempt

society rather than seeking ways to change society to accommodate women.¹⁹⁶

A second sexist premise of Tribe's equality argument, as noted by Professor Smolin, is his assumption "that the goal of equality is to be equally *autonomous*."¹⁹⁷ This in itself can "be deemed a sexist ideal" because it accepts "male sexuality . . . as the norm," while stigmatizing "[w]oman's inherently more relational sexuality . . . [as] 'abnormal.'"¹⁹⁸ Smolin argues that "to many women the ideal of women being self-defining and autonomous in the realm of sexuality and reproduction is repugnant. From this perspective, an argument that abortion regulation leaves women less autonomous than men becomes irrelevant."¹⁹⁹

Another grave deficiency of Professor Tribe's equality argument is his failure to examine whether the type of equality which he seeks for women—to be as autonomous as men—actually would benefit women in an overall sense. Such an inquiry would seem to be a minimal responsibility for

to de-sex women, to separate them from their reproductive potential, has eroded the natural pride which women enjoy in being able to conceive and bear children—a creative wonder which no man can duplicate. Instead of praising this unique potential of women, the abortion mentality belittles it, or at best, dismisses it as commonplace.

Nancyjo Mann, *Foreword* to REARDON, *supra* note 188, at xi.

It is somewhat ironic that Tribe in his equality argument treats pregnancy and motherhood in such a negative way. We referred earlier to his view that even if technology developed so as to enable the removal of the fetus without killing him/her, the mother still might have the right to kill the child. See *supra* notes 85-91 and accompanying text. One of Tribe's reasons was a reluctance to depend upon methods which give a woman "equality only by rendering her womanhood inconsequential and marginalizing her distinctiveness as a woman." See *supra* text accompanying note 91. Tribe cannot have it both ways. Either a woman's biology is a burden to her ability to achieve political and social equality and, therefore, abortion is essential, or a woman's unique biological capacity for childbearing is what most makes her a valuable human being. In contrast to both of these extreme positions, prolife feminists argue that women need not bear children in order to be valuable or personally fulfilled, but that female sexuality, including the unique capacity to bear children, must be respected and accommodated by society. See Sidney Callahan, *Abortion and the Sexual Agenda*, in *THE ETHICS OF ABORTION* (Robert M. Baird & Stuart E. Rosenbaum eds., 1989), at 138-42 (promoting communitarian and maternal elements of prolife feminism).

196. In fairness to Tribe, it should be noted that in *Abortion* he does argue for societal change to make it easier for women "to care for infants once they are born." TRIBE, *supra* note 1, at 211. Still, Tribe's resolute defense of abortion as a prerequisite to women's equality is subject to the sexism charge we have described. Moreover, Sidney Callahan points out the irony in the view which, like Tribe's, supports full abortion rights for women while simultaneously calling for greater societal assistance for mothers:

Permissive abortion, granted in the name of women's privacy and reproductive freedom, ratifies the view that pregnancies and children are a woman's private individual responsibility. . . . A child becomes a product of the individual woman's freely chosen investment, a form of private property resulting from her own cost-benefit calculation. The larger community is relieved of moral responsibility.

Callahan, *supra* note 195, at 137.

197. Smolin, *supra* note 5, at 638.

198. *Id.* at 639 (footnote omitted). See *id.* at 660; McConnell, *supra* note 12(A), at 1191-92.

199. Smolin, *supra* note 5, at 638-39.

someone desiring to take women seriously. Tribe, however, together with his prochoice reviewers, appear to be engaged in a "conspiracy of silence" regarding the burgeoning evidence of the harm which abortion inflicts upon women.²⁰⁰ Professor David Smolin's review is especially helpful in discussing this evidence, which is largely found in "the extensive literature [totally ignored by Tribe]²⁰¹ recounting women's experience of legal abortion, gathered by both pro-abortion rights and pro-life advocates."²⁰² To Smolin, this literature suggests that there is no true clash between the interests of the woman and of the fetus, because abortion harms both mother

200. Smolin writes that "Tribe appears oblivious to this [issue], possibly because he is so blinded by the slogan 'safe, legal abortion' that he is unaware of the evidence that 'safe, legal abortion' has physical and emotional hazards of its own." *Id.* at 625. See DeWolf, *supra* note 5, at 259 (noting that "stories of women traumatized by abortion are missing" from *Abortion*). The only recognition of this issue which we found in any of the prochoice reviews was a phrase in Professor Braucher's article that some women feel regret about abortions. Braucher, *supra* note 12(B), at 621. She, however, immediately trivializes the point with a footnote stating that "[m]ost women . . . primarily feel relief after abortions and regret tends to be short-lived." *Id.* at 621 n.151.

201. We have already commented upon how *Abortion* reflects Tribe's inadequate scholarship. See *supra* note 28. It may be, of course, that Tribe's silence, rather than reflecting adversely upon his research, is but one more indication of the prochoice bias which pervades *Abortion*. Smolin points out a specific example of "Tribe's selective storytelling" which supports this explanation. See Smolin, *supra* note 5, at 624. While Tribe recounts the story of Becky . . . whose death was linked to Indiana's parental consent law . . . [w]e are not told . . . the contrasting story of Gaylene, who at fourteen felt pressured by her school counselor and Planned Parenthood clinic to procure an abortion without her parent's knowledge or consent. According to Gaylene, this abortion was the cause of an attempted suicide over twelve years later.

Id. (footnotes omitted). There are many other examples of young women harmed by the lack of parental involvement in their abortion decision. See, e.g., Appendix A of Brief of Focus on the Family et al. as Amici Curiae Supporting Respondents and Cross-Petitioners in *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990).

202. Smolin, *supra* note 5, at 624. If Tribe ignores the evidence of the harm to women from legal abortion, he certainly does not ignore the argument that a return to restrictive abortion laws will have a devastating effect upon women by forcing them to resort once again to illegal abortion. The horror of back-alley abortions is a steady refrain of *Abortion*. See TRIBE, *supra* note 1, at 35, 40-41, 113, 140, 174-75. Professor Dunlap stresses this point as well. Dunlap, *supra* note 12(B), at 45. She congratulates Tribe for helping "ground the abortion discussion in reality" by correcting its distorted "visual imagery," which "has left out the pictures of women dying of abortion, while literally oversizing the fetus by contrast." *Id.* Dunlap (who, like Tribe, totally ignores the reality of women harmed by legal abortion) also highlights the illegal abortion issue in a poem she wrote to celebrate a politician who sacrificed his career to support abortion rights:

Moving men.
 What a job!
 But when
 Assemblyman George Michaels . . .
 stood up in the New York Legislature . . .
 and changed his vote from "No" to "Yes"
 to repeal the criminal abortion laws
 that had killed and maimed as many women
 as a small undeclared war . . .

and child. Tribe is searching for a way out of the "no-win battle that mercilessly pits women against their unborn children. . . ." He

'thousands of women
 . . . butchered
 in underworld abortion . . .'
 When this happens
 When someone not possibly directly
 in the line of fire, on the hook
 of the coat hanger
 of the abortion-by-drunk-auto-mechanic
 of the abortion-by-jumping-off-the-garage-roof and
 dying, age 18
 When someone gets it
 who isn't s'posed to
 Then, say:
 Hallelujah. . . .

Id. at 44 n.12.

Our contention that protecting the preborn does not preclude one from valuing women would appear hard to maintain in face of the harsh reality that when abortion is prohibited, some women will obtain illegal abortions and some of these will die as a result. Marge Piercy, for example, warns her readers that the "traumatic circumstances" of the "bizarre" pre-*Roe* illegal abortion era "are those in which you will soon be conducting your life, if the forces of reaction—who call themselves pro-life but value the lives of women not at all—are victorious in their attempt to deny women the right to choose." Piercy, *supra* note 155, at viii. We reject Piercy's characterization of proliferators. It is far too simplistic to point to one consequence of abortion restrictions—some illegal abortions in which some women die—and say that this proves that those who seek abortion restrictions do not value women. Prohibiting abortion has other, beneficial consequences for women. *See infra* notes 204-16 and accompanying text. Until one has weighed the harm against the benefit, one cannot say whether women as a whole will be hurt or helped by abortion illegality. *See Smolin, supra* note 5, at 624-25 (calling for evaluation of women hurt and women helped by abortion). We contend that the great likelihood is that women generally will benefit.

In conducting this balancing process, it is first necessary to evaluate the accuracy of prochoice statements concerning how widespread illegal abortion was in the pre-*Roe* era. Tribe himself is a good place to start. He states that "[b]y the late 1960s as many as 1,200,000 women were undergoing illegal abortions each year: more than one criminal abortion a minute." *TRIBE, supra* note 1, at 41. Mensch and Freeman point out, however, that "Tribe cited J. Mohr, *Abortion in America: The Origins and Evolution of National Policy* 254 (1978), where this sentence appears: 'By the late 1960's estimates of the number of illegal abortions performed in the United States each year ranged from 200,000 to 1,200,000.'" Mensch & Freeman, *supra* note 19, at 927 n.8. They state that "the difference between Mohr's very qualified statement . . . and Tribe's coverage of the same issue . . . is the difference between a scholarly agenda and an advocacy agenda." *Id.* While Mohr may have been more the scholar than Tribe (at another place in *Abortion*, *TRIBE, supra* note 1, at 137, Tribe refers flatly to "the one million women who had illegal abortions each year prior to *Roe*"), it must be pointed out that Professor Smolin identifies Mohr as the historian of choice for "pro-abortion rights advocates." Smolin, *supra* note 5, at 628-29. Mohr's figures, as nonspecific as they are, are certainly not free from doubt. One statistical study concludes that "[a] reasonable estimate for the actual number of criminal abortions per year in the prelegalization era would be from a low of 39,000 (1950) to a high of 210,000 (1961) and a mean of 98,000 per year." Barbara J. Syska et al., *An Objective Model for Estimating Criminal Abortions and Its Implications for Public Policy*, in *NEW PERSPECTIVES ON HUMAN ABORTION* 178 (Thomas W. Hilgers et al. eds., 1981). *See REARDON, supra* note 188, at 291 ("before legalization there were only 100,000 to 200,000

never seems to realize that it is abortion itself that creates this "merciless" conflict, and that the legalization of abortion may aggravate, rather than alleviate, the human suffering this conflict creates for women.²⁰³

There is compelling substantiation for Professor Smolin's thesis. Initially, there is persuasive evidence that abortion entails significant short-term and long-term medical risks to women.²⁰⁴ The nature of these risks

illegal abortions per year—a range substantiated by both statistical evidence and the testimony of aborted women.”).

After the incidence of illegal abortion, the next key issue is how many women actually were physically harmed as a result of obtaining an abortion illegally. Mary Dunlap's poem states that "criminal abortion laws . . . killed and maimed as many women as a small undeclared war . . . 'thousands of women . . . butchered . . .'" This image of the illegal abortion era is inaccurate. Evidence suggests, for example, that rather than the "five to ten thousand" deaths per year claimed by abortion proponents, the actual figure was at most several hundred. See, e.g., REARDON, *supra* note 188, at 282-84. Dr. and Mrs. Willke cite the U.S. Bureau of Vital Statistics for the fact that in 1972, the year prior to *Roe*, the total number of reported maternal deaths from both illegal and legal abortions was 39. WILLKE, *supra* note 52, at 105.

Even one woman's death, of course, is a tragedy. What some prochoicers, however, have tried zealously to conceal is that legal abortion also puts women at risk of severe health complications and death. See *infra* note 204. We must also not let the preborn fade into "ghostliness" as we consider what impact maternal death from illegal abortion should have upon the abortion debate. This is precisely what prochoicers commonly do. Marge Piercy, for example, in arguing against any change which would "prevent women from terminating undesired pregnancies by making abortion illegal," says that "[s]ex leads to pregnancy less certainly than sugar leads to tooth decay, but we do not think of punishing teenagers for eating fast food by withholding dental work." Piercy, *supra* note 155, at x. She thus equates obtaining an abortion with dental work. We have shown instead that abortions kill preborn persons. If mothers of one-week old babies could kill them only by some procedure which risked the mother's own life, our society would not legalize killing babies so that some method safer for the mother could be found. Likewise, we should not make it easier for mothers to kill their preborn babies. Piercy also equates having sex with eating fast food. This is to trivialize sex, which, because of its role as an expression of love between a man and a woman, as well as its potential for creating a new human life, should be accorded great significance. Finally, Piercy equates prohibiting abortion with punishment. We have shown that instead it is to hold the sexual partners morally responsible for the consequences of their actions. Doing so devalues neither, but rather demonstrates that respect for another's importance as a human being which can only be shown by holding him/her morally accountable.

203. Smolin, *supra* note 5, at 624 (footnote omitted) (quoting TRIBE, *supra* note 1, at 6).

204. See REARDON, *supra* note 188, at 89-114; Smolin, *supra* note 5, at 625 n.17. In a very revealing article, Nat Hentoff recounts an April 1991 segment of *60 Minutes*, which reported on a Maryland abortion clinic. Nat Hentoff, *Covering Up Destructive Abortions*, VILLAGE VOICE, June 18, 1991, at 20. The episode described three aftermaths of "safe, legal abortion" at the clinic: one woman dead; one woman almost completely paralyzed, with no ability to speak; and one woman who, after almost bleeding to death, required an emergency hysterectomy. *Id.* As tragic as these incidents are, Hentoff found equally disturbing the *60 Minute* revelation that "many pro-choice leaders knew about problems [at the clinic] but didn't want them publicized." *Id.* To Hentoff, "a responsible, caring pro-choice leadership would try as hard as it could to get the news about this clinic spread as widely as possible. As well as the news about other such clinics in other states. For instance, appalling abortion

sometimes is not communicated to women contemplating abortions.²⁰⁵ Women are also misled, through lack of information about the nature of the fetus, into thinking "that they can 'get rid of their problem' without killing their baby."²⁰⁶ Eventually, many women discover "the facts of fetal development. It was a baby, not a blob, not a 'product of conception.' It *looked like a baby.*"²⁰⁷ This realization understandably often produces tremendous grief, guilt and psychological distress. Such a reaction is poignantly described by Nancyjo Mann, who in 1982 founded Women Exploited By Abortion (WEBA).²⁰⁸ Mann, who in 1974 had a saline abortion when five and one-half months pregnant, recounts

Before that needle had entered my abdomen, I had liked myself. Though I may have had my share of problems, I had seen myself as basically a good person. . . . I was a good housewife and a loving mother. I was happy to be me. But when that needle entered

clinic practices and conditions in Florida, Missouri, and Illinois, among other states." *Id.* at 21. Instead, there has been silence. Why? Because, Hentoff says, "[s]uch a campaign would get in the way of [the pro-choice leaders'] continual contrast between pre-1973 back-alley and coat-hanger abortions and how assuredly safe women are when they now go for abortions." *Id.* at 20.

205. Nancyjo Mann, who had a saline abortion, recalls that her doctor told her nothing about the risks: "Only later did I find out that if he had hit a vein, the saline solution could have made me violently ill or caused any number of other complications, including death. He told me none of this. Instead he made it sound like a simple and relatively painless procedure." Mann, *supra* note 195, at xv. Incredibly, the Supreme Court in *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 772 (1986), invalidated a Pennsylvania statute which required physicians fully to inform women of the medical risks associated with the contemplated abortion procedure. Such a requirement, however, was recently approved by the Supreme Court in *Planned Parenthood v. Casey*, 1992 U.S. LEXIS 4751 (1992).

206. Smolin, *supra* note 5, at 637; *id.* at 637 n.74; see McConnell, *supra* note 12(A), at 1195 ("Even the better counselors apparently do not provide accurate information about the gestational age and characteristics of the fetus the patient is carrying.")

207. Smolin, *supra* note 5, at 637.

208. A WEBA fact sheet concerning WEBA's history states that:

Women Exploited By Abortion . . . became the name of a group of women from across the USA who had induced abortions and later suffered manifold symptoms relating to unresolved guilt and grief. The word "*exploit*" means "*to make use of selfishly or unethically.*" It aptly describes the experience of most women who were taken advantage of by abortion industry profiteers and a society that favors abortion over the loving support of women facing crisis pregnancies.

WEBA Fact Sheet (on file with *The Washington and Lee Law Review*).

Today, WEBA has chapters in thirty-three states and eight foreign countries. Nor is it the only organization that ministers to women suffering from the aftermath of an abortion. Others include Project Rachel, Open Arms, The Conquerors and Healing Hearts on Abortion—Last Harvest Ministries. Also indicative of the scope of the problem is the significant number of books on the topic. See, e.g., PAULA ERVIN, *WOMEN EXPLOITED: THE OTHER VICTIMS OF ABORTION* (1985); PAM KOERBEL, *ABORTION'S SECOND VICTIM* (1986); MICHAEL T. MANNION, *ABORTIONS AND HEALING: A CRY TO BE WHOLE* (1986); NANCY MICHELS, *HELPING WOMEN RECOVER FROM ABORTION* (1988); REARDON, *supra* note 188; KATHLEEN WINKLER, *WHEN THE CRYING STOPS: ABORTION, THE PAIN AND THE HEALING* (1992).

my womb, when it pulled out the nurturing fluid of motherhood and replaced it with that venom of death, when the child I had abandoned suddenly began its struggle within me, I hated myself. It was that fast. Every bit of self-esteem, every value I had held dear, every hope of which I had ever dreamed—all were stripped away by the poison of that one vain act. Every memory of joy was now tainted by the stench of death.²⁰⁹

Other evidence of harm to women from permissive abortion laws flows from their destructive effect upon male attitudes. According to Professor Steven Carter, one aspect of this may be an increased likelihood of sexual exploitation, since “the widespread availability of abortion makes it harder rather than easier for women to withstand the predatory conduct of men.”²¹⁰ Professor Michael McConnell provides corroboration by noting that “the availability of abortion makes it easier for men to engage in sex without risking any consequences—reason enough for abortion rights to be enshrined among the tenets of Playboy Philosophy.”²¹¹ Abortion encourages male

209. Mann, *supra* note 195, at xvi. We do not contend that all women suffer psychologically following their abortions. Smolin suggests that some, influenced by a “peculiar form” of “radical feminis[t] . . . machoism,” “bury their guilt” to avoid being “considered weak and maladjusted.” Smolin, *supra* note 5, at 639. Other women, though, simply may not experience any guilt. There is the case of Caroline, for example. She aborted twins at eighteen weeks because having additional children would have derailed her plans to finish college and advance from her administrative job to an executive position with a Wall Street financial firm. Tumulty, *supra* note 19, at 35. “‘I don’t feel guilty,’ she said]. . . ‘I feel that life begins when a baby is born.’” *Id.* at 37. Caroline viewed her abortion as necessary to escape a “trap” like the one she had experienced earlier in her life, when she was a struggling single mother “in a drug-infested New York housing project.” *Id.* at 35, 37. Caroline’s positive attitude toward her abortion is akin to the post-abortion emotions of a group of women who had illegal abortions in the pre-*Roe* era. These women “felt they had to find a way to have an abortion because it seemed the only option that would allow them ‘to go on with life, even at the risk of losing it.’ They saw the choice as life-affirming. Afterward they felt relief—some even exhilaration—at the idea that they had been given a second chance.” KATHRYN E. MAY & ELLEN MESSER, *BACK ROOMS: VOICES FROM THE ILLEGAL ABORTION ERA* at xii (1988).

What are the implications of the fact that some women suffer greatly following their abortions, while some do not? It might be viewed as suggesting that since one cannot know in advance which women will suffer and which will not, the better course is to leave that risk up to each woman, perhaps after informing her of the nature of the risk. We disagree. As our discussion of the risks of illegal abortion to women has shown, *see supra* note 202, the moral imperative of prohibiting abortion is premised in the fact that abortion kills a preborn person. If a mother of a one-week old daughter could kill her without guilt, experiencing in fact a sense of release from a “trap,” we still would not freely allow her to do so. Nor would we permit it if the mother informed us that she would be exhilarated by killing her daughter because of the “second chance” it would create. Preborn persons are entitled to the same protection. If in a particular case, the restrained woman ends up more burdened than she would have been had she been able to obtain an abortion, it must be accepted as a not uncommon characteristic of moral accountability, which more often than not involves some measure of self-sacrifice.

210. Carter, *supra* note 12(C), at 2755.

211. McConnell, *supra* note 12(A), at 1191 (footnote omitted). *See* Glendon, *supra* note

irresponsibility in other ways. As McConnell notes, “[w]hat claim can [a woman] make on her male partner . . . if the bonds of obligation and responsibility are purely a matter of ‘choice’ and the ‘choice’ is hers alone?”²¹² The perspective is growing “that pregnancies and children are a woman’s private individual responsibility. More and more frequently, [one] hear[s] some version of this old rationalization: if she refuses to get rid of it, it’s her problem.”²¹³

Professor Smolin, in summarizing the reality of abortion for many women, hopefully delivers a sobering message to Professor Tribe and others who tout abortion rights as the way to assure equality²¹⁴ for women:

12(A), at 57 (“It does not take Sherlock Holmes . . . to discern why the strongest supporters of elective abortion are young men.”). Playboy’s strong support for abortion rights makes it particularly ironic that the feminist Tribe recently granted Playboy an interview. *The Playboy Forum Interview*, PLAYBOY, Dec. 1991, at 57. Some of Playboy’s readers undoubtedly will be stirred to an even greater proabortion mentality by Tribe’s warning that to prohibit abortion is to open the door for prohibiting contraception. *Id.* at 58. We have already shown that this common prochoice argument is insupportable. See *supra* note 52.

212. McConnell, *supra* note 12(A), at 1192.

213. *Id.* (quoting Sidney Callahan, *Abortion and the Sexual Agenda*, COMMONWEAL, Apr. 25, 1986, at 236). Nancyjo Mann writes that

with abortions easily and legally available . . . it is easier than ever for men to sexually exploit women. When their promises of love end in pregnancy, these uncommitted and selfish men are free to manipulate women into abortions so as to free themselves of unwanted commitments. They whine and pout about “doing the sensible thing,” or resort to threats, “If you don’t have an abortion, I’ll leave you.” In either case the end result is the same: the woman faces the risks and guilts of abortion alone. And if a woman resists such coercion, her exploiter can simply deny all personal and financial responsibility for *his* “unwanted” child, saying, “You’re stuck with it now, baby. After all, you could have had an abortion.”

Mann, *supra* note 195, at xi.

214. There is one area involving abortion in which women are receiving more than equal treatment, treatment which belies Tribe’s argument that equal sexual autonomy for women through the right to abort is in women’s best interest: the disproportionate killing of the female preborn by sex selection abortions. Tribe reports on the prevalence of this practice in India, where female children are considered an economic hardship. TRIBE, *supra* note 1, at 65-66. There is also increasing evidence of this use of abortion in the United States. See, e.g., Charlotte Allen, *Boys Only*, THE NEW REPUBLIC, March 9, 1992, at 16. Allen writes that “[t]he emergence of sex-specific abortion represents . . . an acute dilemma for pro-choice feminists. What’s at stake is a clash of absolutes: a woman’s right to an abortion for any reason versus sex discrimination of the most vicious kind.” *Id.* at 17. The chief response of American pro-choice leaders has been “denial.” *Id.*

Denial is Tribe’s approach as well. He writes that sex selection abortion “rarely happens in the United States.” TRIBE, *supra* note 1, at 137. Characteristically, Tribe then charges that those who seek to prohibit such abortions may well have an ulterior purpose: “to advertise the implied message that women who have abortions do so for inconsequential or even morally despicable reasons. . . .” *Id.* Tribe thus appears to suggest that abortion for sex selection is “morally despicable.” See *id.* at 65 (“the discriminatory use of abortion [in India] . . . raises significant moral and ethical concerns about abortion upon request.”). If so, one wonders why? Tribe in *Abortion* defends the *Roe* regime of abortion on demand. As pointed out by Dr. Michael Golbus, “‘it is very hard to make a moral argument about terminations for sex when you can have abortions for any reason.’” Gina Kolata, *Fetal Sex Test Used as Step to*

Surveys of aborting women tell a sad story of women who often want their babies, women who often are aware of abortion as killing, women who are uncertain of their decisions but who abort because they are alone or because the father has urged it, or because they have accepted society's message that this is a reasonable solution to their "problem." In the end, however, it is the woman—usually alone—who is left with the realization that she has killed a baby that she would, under other circumstances, have wanted to keep and love.²¹⁵

This description, founded in women's accounts of their own abortions, contrasts sharply with Tribe's contention that it is permissive abortion laws which assure that women are not viewed as "ghosts." We agree with Professor Smolin that such laws instead "constitute simply an easy way out for men and society, and a sad continuation of the tradition that relegates the actual needs and desires of women to second-class status."²¹⁶

CONCLUSION

In *Abortion*, Tribe's premise is that prochoicers see only the woman in the abortion equation, rendering the preborn child a "ghost," while proliferators fail to see the woman, thereby rendering her a "ghost." Tribe defends *Roe's* prochoice perspective as avoiding the dehumanization of either child or mother. We have shown instead that Tribe's approach dehumanizes both preborn children and women.

The preborn child is nothing more than a "ghost" to Tribe. The child's meaning and worth, if they exist at all, are found only in the subjective eye of his/her mother. The bigger the preborn baby, the more pangs of sorrow Tribe acknowledges for his/her death, should death be the mother's choice. Nonetheless, the child, denied any meaningful protection of his/her life, is effectively dehumanized.

So too, Tribe's autonomous and equal woman is dehumanized. By requiring that a mother have the autonomy to destroy her child in order to be considered an equal by society, Tribe releases women from that moral accountability which is the hallmark of taking another person seriously. At the same time, Tribe denigrates the unique reproductive capacity of women, treating it as an impediment to women's equality. Tribe also completely ignores evidence of the devastating effect which abortion is having upon women.

Abortion, N.Y. TIMES, Dec. 25, 1988, at A1. Regardless of how Tribe would justify his apparent inconsistency, we hope that Tribe indeed is repelled by sex selection abortions. We further hope that one day he will recognize the full ramifications of his abhorrence: that "from the undeniable truth that it is wrong to kill a baby simply because she is a girl will emerge the larger truth that it is wrong to kill a baby at all." Jo McGowan, *In India, They Abort Females*, NEWSWEEK, Jan. 30, 1989, at 12, 12.

215. Smolin, *supra* note 5, at 640-41.

216. *Id.* at 641.

According legal protection to the preborn from the time of conception is the only way to take both the preborn and women seriously, the only way to turn neither into a "ghost." We are not so naive as to think, however, that this step would eradicate abortion in our society. While demand for abortion would undoubtedly decrease,²¹⁷ there still will be women whose difficult circumstances lead them to view abortion as their only choice. A comprehensive prolife position must include helping to provide alternatives. While significant prolife energies are now being devoted to this effort,²¹⁸ at least one proliferer is concerned that the movement's

217. As noted by prochoicer Frances Olsen, the status or lack of it which the preborn are accorded by the law helps "construct reality." Olsen, *supra* note 26, at 131. If the law again begins to protect the preborn as persons, women will begin to view them in that way too. Cf. REARDON, *supra* note 188, at 291 (legalization of abortion "caused a ten to fifteen-fold increase in the number of abortions performed").

218. Professor Glendon states that there are "some 3,400 local [prolife] organizations that afford financial and other assistance to enable women to continue with their pregnancies." Glendon, *supra* note 12(A), at 56. Glendon states that Tribe "does not mention" this effort. *Id.* In fact, he does refer to such prolife activities. What would the reader's prediction be as to how Tribe characterized them? Initially, it might be thought that Tribe would applaud proliferers for helping to provide genuine choice to women. But, in view of Tribe's consistent denigration of prolife motives, see *supra* notes 55-56 and accompanying text; *supra* note 214, it is not surprising that he criticizes proliferers here as well:

Some [proliferers] have sought to intimidate women seeking abortions by setting up sham pregnancy "counseling" centers. These centers, rather than provide the counseling they advertise, have traumatized unsuspecting pregnant women with films of abortions and with pro-life literature graphically depicting aborted fetuses. Such centers have been known to counsel women falsely that abortion often leads to death, disease, insanity, and sterility.

TRIBE, *supra* note 1, at 171.

We do not contend that there are no prolife crisis pregnancy centers which have engaged in inappropriate conduct. Tribe, though, strongly suggests that all such centers are "sham." His reasons for doing so corroborate our opinion that Tribe is part of that "conspiracy of silence" seeking to surpress evidence of the harm which abortion inflicts upon women. See *supra* note 200 and accompanying text. In view of the increasing evidence of the trauma women experience when after-the-fact they realize that they have killed their babies, see *supra* notes 206-09 and accompanying text, it would seem that one truly concerned for women's welfare would want the abortion decision to be fully informed. Instead, Tribe disparages those who would tell women the truth about the preborn child's development and the grim reality of how abortion kills. Similarly, in view of the evidence of the grave physical risks of abortion for women, see *supra* note 204 and accompanying text, it would seem that one with women's best interests at heart would want such information disclosed. Instead, Tribe describes as liars proliferers who communicate these risks.

Tribe also criticizes the prolife movement for not working to provide public services to make childbirth more attractive. TRIBE, *supra* note 1, at 73. The services Tribe has in mind—"maternity leaves and benefits . . . child care, cash grants, and tax benefits to women with dependent children," *id.* at 72—may very well have a part to play in a comprehensive prolife approach. See *infra* notes 223-24 and accompanying text. Tribe's criticism, however, is unwarranted. To the extent that it reflects a belief that all proliferers flatly oppose deterring abortion by "making childbirth more attractive," TRIBE, *supra* note 1, at 73, Tribe's view is untenable. See *supra* note 12 (where we recount Nat Hentoff's criticism of Tribe for adopting this stereotype of proliferers). Tribe is on firmer ground in his suggestion that establishing such

commitment is not deep enough to withstand the strain which would result from the abolition of legalized abortion on demand.

In a provocative essay, "What If We Win?," Will Liegel, Jr.,²¹⁹ asks proliferers to envision such a future:

Witness . . . hundreds of thousands of babies born each year only to grow up without permanent homes or loving parents . . . children shunted from foster homes to group homes to institutions to the streets . . . minors abused by parents unwilling or unable to care for their offspring . . . perhaps even later, ready to take it by force from a nation that has cheated them.²²⁰

Liegel, speaking specifically to Christians, criticizes them for "focus[ing] on the *value* of the pre-born and cast[ing] only a side-long glance at the *needs* of these children once they are born, avoiding the real situation of so many American kids today."²²¹ He urges white Christians seeking to adopt to move beyond the exclusive preference for a "normal, white infant."²²² He also wonders how "[one] can march for life and yet vote to disembowel the social service system that we will soon need so desperately."²²³

Fully to evaluate Liegel's position is unnecessary here. Not everyone would agree with him as to the nature and extent of the assistance that should be provided to mothers who give birth rather than abort. After all, as this article has argued, the primary moral responsibility for the child rests upon the father and mother. Nonetheless, we believe that a thoughtful positive response to Liegel's challenge is necessary if our society is to achieve our goal of treating neither the preborn nor women as "ghosts." Saving fetuses from abortion and saving mothers from killing their babies are essential steps.²²⁴ Terminating one's concern for either child or mother at

programs has not been a priority objective of the general prolife movement. Surely, however, it is not surprising that the movement's main focus has been to overturn the legal regime of abortion on demand. Until that is accomplished, to criticize the movement for its perceived lack of devotion to Tribe's particular ideas for what social programs would best assist mothers, is hardly fair. For the argument that insistence upon abortion rights undermines any effort to increase societal assistance to mothers, see *supra* note 196.

219. Will Liegel, Jr., *What If We Win?*, THE PCA MESSENGER, Apr. 1991, at 13.

220. *Id.*

221. *Id.*

222. *Id.*

223. *Id.* at 14. This sentence suggests that Liegel has accepted the stereotype of proliferers which Nat Hentoff criticizes Tribe for adopting. See *supra* note 12.

224. As our previous discussion of illegal abortion shows, see *supra* note 202, we recognize that generally prohibiting abortion will not guarantee full accomplishment of these goals. This point is corroborated by a recent article on the revival of a home abortion technique known as menstrual extraction. Ann Japenga, *The New Abortionists*, IN HEALTH, Nov. 1991, at 51. The article describes the cross-country trek of two prochoice activists to teach the procedure to various groups of women. The technique, which can be used "to abort a fetus up to about eight weeks of pregnancy . . . is not to be done by a woman on herself, but only in groups that have been trained in the method." *Id.* at 52, 53. Should abortion again become illegal,

birth, however, turns them into "ghosts" at that point. This is hardly consistent with the compassion for both which underlies the prolife movement.

the difficulty of actually preventing women's use of this method is obvious. *See id.* at 56. Proponents therefore hail menstrual extraction as conferring "upon women ultimate control over the right to abortion." *Id.* at 52. After one training session, the participants had a celebratory dinner: "They entered the restaurant with the swaggering attitude of a pack of middle-aged men who had just won a football game. Conquering heroines." *Id.* at 57.

Our reaction to this development is quite different. Since menstrual extraction kills preborn persons just as surely as any other abortion method, we can only view its use as morally abhorrent. Any abortion, even one performed "[by] housewives . . . in their living rooms," *id.* at 56, represents a complete devaluation of fetal life. Women are devalued too. Although the technique's advocates describe one of the needed implements, a speculum, as having "the shine of self-reliance," *id.* at 52, the procedure does not reflect "self-reliance" in any morally commendable sense. If a woman who uses menstrual extraction is "self-reliant," then so is a man who deserts his children. Each is more aptly described as self-seeking, as each is shirking parental responsibilities. The result is self-debasement, the inevitable result of unfulfilled moral obligations.

One final point should be made. We have previously described the many harmful consequences of abortion to women. These include physical risks and psychological trauma following the realization that the abortion in fact killed one's preborn child. The same potential harm to women exists from menstrual extraction. With respect to physical risks, "all sides" of the abortion debate condemn the technique as "potentially deadly in the hands of laypeople." *Id.* *See* Richard Lacayo, *Abortion: The Future Is Already Here*, *TIME*, May 4, 1992, at 26, 32 ("Many doctors and abortion-rights groups consider . . . menstrual extraction far too risky to contemplate."). Concerning psychological trauma, the risks are especially severe. Abortion as it is performed in the United States today, in part due to its clinical surroundings, at least "distances" a woman somewhat from what she is doing. Despite this, many women later experience guilt and suffering. How much greater will the anguish be for women who through menstrual extraction have a greater personal involvement in their abortion? The psychological toll for many women could be devastating. Not, though, for all women. The members of the group whose celebratory dinner we recounted, for example, seem to have exhibited just the type of "radical feminis[t] . . . machoism" which Professor Smolin described as inducing guilt suppression. *See supra* note 209. Such women might very well be able to abort through menstrual extraction with no subsequent remorse. The fact remains, though, that these women would have killed their own children to achieve their objectives. We believe that both the slayers and the slain are to be pitied.