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# ABORTION AND THE LAW: A PROBLEM WITHOUT A SOLUTION?

*Robert F. Drinan, S.J.\**

ABORTION: THE CLASH OF ABSOLUTES. By *Laurence H. Tribe*. New York: W.W. Norton. 1990. Pp. xvi, 270. \$18.95.

Most Americans are weary of the controversy over what the law should say or do about abortion. Millions of Americans want to avoid the crossfire between the partisans of the Right to Life and the Right to Choose. Indeed, many advocates of both positions are embarrassed, even ashamed of some of the extreme measures engaged in by demonstrators for both sides. Many observers hope that peace may come soon when the French drug RU486 becomes generally available in the United States and surgical techniques are no longer necessary.<sup>1</sup>

The ambivalence of the American public finds its counterpart in the legal profession. In February 1990, the House of Delegates of the American Bar Association, by a vote of about 2-to-1, adopted what was, in essence, an endorsement of *Roe v. Wade*.<sup>2</sup> In August 1990, the same body shifted its position to one of so-called neutrality. The Right to Life movement had organized the opposition to the freedom of choice position, and persuaded the necessary number of ABA delegates that by retracting the ABA's earlier decision they would not be repudiating the right of women to choose, but only making the ABA neutral.<sup>3</sup>

It seems almost certain that the American Bar Association will be urged — perhaps soon — to revert to its acceptance of the contours of *Roe v. Wade*. In the interim, the 350,000 members of the American Bar Association and the Section of Individual Rights and Responsibilities, which this reviewer chairs in 1990-1991, will be searching for some way to bridge the gap between the clashing groups in America's legal profession. These lawyers will be seeking to accomplish the same thing that Professor Laurence Tribe of the Harvard Law School has attempted in *Abortion: The Clash of Absolutes*.

It is difficult to say whether Professor Tribe has succeeded in his objective since the questions involved in abortion and the law are so

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1. See, e.g., Cole, *Abortions Will Be Moot Soon*, N.Y. Times, Oct. 9, 1989, at A17, col. 1.

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

3. See Margolick, *Bar Group, in Shift, Adopts Neutral Policy on Abortion*, N.Y. Times, Aug. 9, 1990, at A20, col. 1.

complex, and the emotions and prepossessions of everyone are so convoluted. In addition, there is little consensus on what a "successful" resolution of the problem would look like. What can be said is that Professor Tribe's book is the most comprehensive analysis to date of the seemingly unsolvable problem of what, if any, stance the civil and criminal law of America should have toward abortion.

The extensive material about the history of abortion in the United States brought together by Professor Tribe raises the question whether or not the repeal of laws criminalizing abortion might have occurred even without the *Roe v. Wade* decision in 1973. Prior to that time, Alaska, New York, and Hawaii had repealed virtually all restrictions on abortion. Professor Mary Ann Glendon of the Harvard Law School has documented that between 1967 and 1973 nineteen states had reformed their abortion laws,<sup>4</sup> and has argued that even without *Roe v. Wade* abortion in the first trimester would have become generally available.<sup>5</sup> Professor Tribe disputes that contention, indicating that the Right to Life movement had started prior to *Roe v. Wade* and that, without that decision, it might have defeated most of the proposed changes in laws regulating abortion (p. 51).

Professor Tribe explains in his chapter "Locating Abortion on the World Map" that in virtually every country of the world, abortion before viability is permitted. Professor Tribe summarizes the arguments Professor Glendon makes in her book *Abortion and Divorce in Western Law*, but he also disputes her conclusion that European laws are better because they recognize the right of the fetus rather than exclusively exalting the right of the woman to terminate an unwanted pregnancy. Professor Tribe feels that Professor Glendon "underestimates the strength and value of the uniquely American ideology of individual worth that has led us to a largely rights-based legal system" (p. 74). Professor Tribe is adamant that a "system that permits some government agent . . . to hold such a life-affecting decision as abortion in his or her hands . . . disempowers and disrespects women" (p. 74).

After his survey of the place of abortion in American and world law, Professor Tribe tackles the core of the constitutional controversy: Can abortion rights be found in the Constitution? Professor Tribe's answer is clearly yes, but he concedes that *Roe v. Wade* should have manifested "more restraint than the Court exhibited" (p. 110). But Professor Tribe is strong and eloquent when he writes that a woman under the Constitution has a "right to decide that her body will not be used to incubate and give birth to another" (p. 114). A woman has the "liberty" guaranteed in the Constitution "to resist the conscription of her body as a vessel and a vehicle for another life" (pp. 114-15).

Professor Tribe raises the issue of whether the abortion question is

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4. M. GLENDON, *ABORTION AND DIVORCE IN WESTERN LAW* 48 (1987).

5. B. MOYERS, *A WORLD OF IDEAS* 478 (1989) (interview with Mary Ann Glendon).

ultimately one of religious conviction. He is fair to this point of view, but not everyone will be satisfied with his relatively brief treatment of what is, by everyone's admission, a tormenting part of the abortion puzzle (p. 116).

Even if a reader does not agree in the end with Professor Tribe's conclusions about *Roe v. Wade*, all readers would be impressed by his reasoning and would be convinced by the argument he adduces to support his conclusion that *Roe v. Wade* "has much to commend it and cannot fairly be dismissed as indefensible or flatly wrong" (p. 138).

Professor Tribe provides an account of the turbulent, political movements that followed *Roe v. Wade* that is as complete as could be expected in a comprehensive volume of this kind. But the unprecedented alliance of Catholic pro-life groups and religious fundamentalists like the members of the Moral Majority could be the subject of a separate and needed study. Professor Tribe's pages (pp. 161-96) on the politics of abortion tend to be sheer information with little analysis and are the least profound part of this book. But, they make their point: "[I]nterest in the abortion issue may ultimately trigger a political realignment in the United States and the rise of new and powerful coalitions in other areas of American politics" (p. 196).

In his search for a compromise, Professor Tribe describes the controversies over the requirement of consent by the father of the unborn child and the parents of the minor pregnant girl. Professor Tribe chronicles the struggles over notification provisions, waiting periods, abortion funding, and other legal measures designed to deter abortion (pp. 197-228). But despite the contentiousness these measures have generated, they seem to have had only a limited impact on the number of abortions sought and received.<sup>6</sup>

Not a few readers will regret that Professor Tribe's last chapter "Beyond the Clash of Absolutes" is only thirteen pages. He recognizes the depth of feeling that separates the Pro-Life and the Pro-Choice forces, and asks for a "greater measure of humility" on both sides (p. 240). He concedes that he is asking for "an unaccustomed and in some way almost unnatural forbearance" (p. 240). But he implores both sides to remember that "[i]n a democracy voting and persuasion are all we have" (p. 240; emphasis omitted).

The readers of Professor Tribe's carefully crafted book will have formed their views about abortion before they come to this study. The more vigorous advocates of the Right to Life movement will feel that Professor Tribe has predictably justified his well-known convictions that the results of *Roe v. Wade* were better than the opposite results

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6. In Minnesota, for example, the law requires a minor to obtain parental permission, or in the absence of such permission, to petition for a judicial decree. But of the 3573 petitions for judicial bypass, in the first 4-1/2 years of the Minnesota statute's operation, only nine were denied. See p. 209.

would have been. The followers of the National Organization of Women may feel that Professor Tribe is so anxious to present a balanced view of a thorny topic that he diminishes the centrality of the right of a woman to choose abortion.

Is there any point therefore in trying to work out a consensus or a compromise between the clashing parties? Obviously, the answer has to be yes. Lawmakers have as one of their supreme roles the bringing together of contrary opinions, and the framing of morally and legally accepted formulas for the operation of the administration of justice.

But the evolution of some mutually satisfactory resolution of the way in which the law should handle abortion is a task which goes beyond the competence of the legal profession. It is one of the central problems of modern American society. No one would deny that the 1.6 million abortions each year in the United States lessen the nation's view of the sanctity of all human life, including unborn life. Consequently, religious, medical, and social teachers of all kinds have the most solemn obligation to work to diminish the number of abortions — by preventing unwanted pregnancies, by counselling women thinking about an abortion, and by taking appropriate measures to enhance the dignity and beauty of every unborn human being however unwanted that potential human being might be. But that is not necessarily the role of law in American society. At least, there is no clear consensus that civil and criminal law in America should be used to force women to go forward with a pregnancy they do not desire. The rights of women in such a case have been deemed, in the judgment of American and world society, to have priority over the rights of a non-viable fetus to be born. Millions of persons in America and elsewhere will continue to oppose that balancing of interest; they will continue to express their conviction that society is allowing mothers and their physicians to indulge in the equivalent of infanticide. Professor Tribe makes it clear that these voices should be listened to and heeded — but not to the point that the sanctions of American law should punish those pregnant women and physicians who feel that the morally more correct decision, in certain cases, is to terminate an unwanted pregnancy.

No one feels very good on either side of this torturous and awesome problem. The differences between the parties go to the very root of what human existence is all about. The clash of views is more fundamental than differences about any other moral problem in modern society. But even that does not mean that people in America should be fighting each other in the streets about moral dilemmas that theologians, physicians, and lawyers cannot resolve to the satisfaction of everyone.

The legal and political struggle about abortion and the law has divided American society in ways that are more intense than any other

previous controversy — including those over slavery, prohibition, or divorce. Nor is there any clear signal at this time that the proponents or opponents of abortion will soon give up their struggle in the courts, the legislatures, and the streets. Consequently Professor Tribe's calm and comprehensive story of abortion and the law deserves the attention and the constructive criticism of every individual who is involved in the resolution of the legal-moral issues of contemporary society.