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Within the Confines of the Law: Abortion and a Substantive Rhetoric of Liberty

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BOOK REVIEW

Within the Confines of the Law: Abortion and a Substantive Rhetoric of Liberty

REVIEW OF *Laurence H. Tribe's* Abortion: the Clash of Absolutes

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Books about abortion end weakly. The nature of the issue almost inevitably leads one to slanted tirades, contorted posturing, or feeble pleas for tolerance. The conclusion to Professor Laurence H. Tribe's[1] new book about abortion takes the latter, most academically respectable, of these alternatives. This choice reflects a serious core weakness—Tribe's book does not advance us to new ground in the debate. In spite of this failing, *Abortion: The Clash of Absolutes*[2] is a broadly useful book; one would hope it might even become a socially important book.

Professor Tribe's contribution to the abortion debate includes a sound (if slightly slanted) historical overview, an excellent chapter comparing abortion laws and customs internationally, a good (if definitely slanted) recounting of abortion politics in the seventies and eighties, and the most detailed and broad defense of the constitutional soundness of *Roe v. Wade*[3] that I have read.

In covering this ground, *The Clash of Absolutes* rarely strikes an original note. Mostly, Tribe gathers the analyses of feminist activists, women's studies scholars, political theorists, and other lawyers. That he presents these arguments in a systematic and incisive manner is useful, but the crucial factor that gives this book socio-political importance is that it is Tribe who is doing the presenting. The extended and visible defense of *Roe* by a widely respected Harvard Law Professor (a person

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1. Ralph S. Tyler, Jr. Professor of Constitutional Law, Harvard Law School.
2. L.H. TRIBE, ABORTION: THE CLASH OF ABSOLUTES (1990).
3. 410 U.S. 113 (1973).

who is himself well-qualified to hold a Supreme Court berth) has the chance of carrying far more weight than all of the articles by feminists, women's studies scholars, and disaffected lawyers thrown together. In the face of the vociferous and plentiful attacks by conservative legal scholars on *Roe*, such a defense is vital. Although Supreme Court Justices and their clerks considering the fate of *Roe* may not be inclined to listen to the rest of the "democratic mob" outside their doors, one would hope that they would at least feel compelled to give Tribe a hearing.

If read seriously by the right people, Tribe's book may therefore be useful in maintaining, or eventually re-establishing, the liberty of women. This is the case largely because Tribe's constitutional argument is sound. Tribe outlines most of the reasons why a decision abrogating *Roe* would be inconsistent with a government of individual liberty and equality. In spite of all this, Professor Tribe's book could have done more. Ultimately, a Harvard Law Professor is writing this kind of book on abortion because the issue is fundamental; that is, it presents to the Court a challenge to the entire construction of legal liberalism as the protection of individual rights. As I will suggest below, the development of the abortion controversy has revealed that if women are to be protected by our Constitution, laissez-faire liberalism must give way to substantive liberalism. By focusing his attention within excessively narrow limits, Professor Tribe skates around this chasm in the legal structure, and ends up making a crucial error about the direction in which the Court is going.

The basic limitation in Tribe's analysis arises from the relationship he perceives between law and society. As is common today, he relates law to short-term electoral and legislative politics, rather than to long-term processes of social change. Consequently, he focuses his attention on the goal of persuading activists,[4] rather than on an address to the broader, less rabidly entrenched public. Like many scholars and journalists, Tribe frames the abortion issue in terms of the incommensurability of the activists' positions, rather than in terms of the mixed and changing ideological components held by the public at large. It is, however, only by focusing on the mixed ideological frames of the public that one can see the compromises that Tribe proposes as true solutions to the abortion problem. Birth control, which provides a better means for reducing abortion than does criminalization, would not placate the Right-to-lifers, but it might come to satisfy the majority of the citizens of the United

4. *See, e.g.*, L.H. TRIBE, *supra* note 2, at 6, 8.

States.[5] Tribe thus sets off after the wrong quarry; the abortion controversy is not a clash of absolutes; it is a clash of absolutists.

Tribe's legal-political blinders thus lead him to mistake the essence of the controversy. The interests at stake in the abortion controversy are not, as he would have it, "women's liberty" vs. the "life of the fetus." Instead, it is the liberty of wage-laboring women (those who make their identity as much or more from their wage labor as from their maternal labor), against the economic interests of all those groups who would bind these women as the producers of "potential human life."[6] Tribe attends too much to the propositions that have been explicitly advanced by the partisan advocates, and not enough to their broader motive structures.[7]

This leads to a basic misanalysis of the electoral issue as well. Tribe, like many Pro-choice activists, paints an excessively rosy picture of the current stasis of the issue in the minds of the electorate.[8] The best we can say is that the public is thoroughly fractured and ambivalent about this issue, and may eventually come to appreciate the value of women's liberty. The worst we can say, as Tribe's own citation of polls indicates,[9] is that the majority of the populace supports many restrictions on abortion rights and therefore does not support full liberty for women. The public is joined by at least four Supreme Court Justices.

Tribe fails to attack this central issue because he is bound, perhaps against his own conscious intentions, within the tradition-regimented, deductivist approach to the law. Tribe's book, while it does not read like

5. Imagine an opinion poll which asked, "Which of the following provides the best means of reducing abortion: criminalization, improved birth control, or maternity support?"

6. These 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. They also include conservative churches, who are interested in perpetuating established social order through established moral codes, as well as those men who profit from having parenting assigned to women as an unwaged labor.. For analysis of these groups see K. LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD (1984); M. FALIK, IDEOLOGY AND ABORTION POLICY POLITICS (1983).

7. As Luker and Falik's studies indicate, *supra* note 6, these motive structures are not "irrelevant" background details of interest only to historians. The motive structures are directly expressed in the discourse itself and they are essential to its argumentative soundness. *See* C.M. CONDIT, DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE (1990). A brief discussion of motive structure as a way of reading discourse in place of argumentative perspectives is provided below with regards to constitutionalism, *see infra* notes 39-43 and accompanying text, but for more depth see K. BURKE, PERMANENCE AND CHANGE: AN ANATOMY OF PURPOSE (1984); K. BURKE, LANGUAGE AS SYMBOLIC ACTION: ESSAYS ON LIFE, LITERATURE, AND METHOD (1966); K. BURKE, A RHETORIC OF MOTIVES (1969). *See also* W.R. FISHER, HUMAN COMMUNICATION AS NARRATION: TOWARD A PHILOSOPHY OF REASON, VALUE AND ACTION (1987).

8. *See, e.g.*, L.H. TRIBE, *supra* note 2, at 193.

9. *Id.* at 232.

a lawyer's brief, nonetheless is structured by sets of inter-connected sorites. More crucially, he does not, and cannot within received jurisprudential theory, admit that the concept of liberty for women is newly valued in America. For the majority of recorded human history around the globe, women were not perceived as self-actualizing individuals who might appropriately have liberty and human rights. Only in the 20th century have a significant minority begun to argue widely and publicly that the concept of women's liberty ought to be one of our fundamental collective values. It is unclear exactly how widespread the adherence to this value is, but at the least we can say that most people do not endorse many of the functional consequents of the principle. Tribe's book acts as though women's liberty is a universally shared notion, which can therefore serve as a deductive premise upon which abortion rights can be established.

This may seem like a tactically sound strategy. It is unlikely that any Supreme Court Justice will openly deny that women should have liberty under our form of government, though they may hedge on how "fundamental" liberty is. If one could then simply deduce abortion rights, even the most conservative Justices would be obliged to go along with *Roe v. Wade*, or even with a decision more radical. However, value terms such as "Liberty" only have meaning through their relationship to prior usages and to other linguistic components of the public vocabulary (especially other values, narratives, and characterizations).[10] Because women's Liberty is a newcomer to our political vocabulary, there are few of these prior and related usages to call upon in making the link between abortion and Liberty. If one is going to make a sound argument that women ought to have Liberty and that this entails abortion rights, one must, therefore, admit that this entails a social change of serious moment. For women to have Liberty entails not only massive economic shifts, but also major shifts in the ways in which we will reproduce and rear future generations, thereby ensuring the survival of the society and the species. To reallocate responsibility for the reproduction of the species from a de facto legal, social, and economic requirement of women, to other loci, is to make the most fundamental of alterations in our social fabric. It is not at all surprising that churches, which are charged with

10. *See* Condit, *Democracy and Civil Rights: The Universalizing Influence of Public Argumentation*, 54 COMMUNICATION MONOGRAPHS 1 (1987). Hereafter I will revert to the tradition, practiced in the era of constitution-founding, of capitalizing key value terms (called "ideographs" by rhetoricians). Hopefully, the theoretical importance of setting off these commitments in this fashion will become more clear as this essay proceeds.

the preservation of the existing social order, and other groups, which have profited from women's reproductive labor, have provided significant resistance to such a change. To counter fully this resistance requires argumentation that insists upon and defends the root value of women's Liberty, not merely its presumption.[11]

There is, however, a facet of this social change that transcends even the self-interested opposition of the Right-to-Life groups, and it goes to the heart of the law. This facet explains, I would suggest, why there is currently so much dispute about appropriate approaches to constitutional law. Enacting women's Liberty would require a complete revision in our constitutional commitments. It would require that we re-envision everyone's Liberty.

Professor Tribe, like most lawyers, journalists, and politicians, has an excessively limited understanding of what abortion and women's Liberty could imply. I do not mean here to suggest that Tribe is not compassionate, or that he fails to understand the suffering of individual women who seek abortions. He makes plain at several places that compassion for individual women is at the root of his concept of women's Liberty.[12] Rather, it is that Tribe does not understand that the protection of women's Liberty requires more than "law as usual," but rather a revision of the political philosophy of individualism.

To walk our way into this issue, let us begin by considering the weight that Tribe places on the "rational conduct" of women. At several points he notices that conservative legal restrictions on abortion presume that women will not make reasonable choices about abortion—either they will act hastily,[13] they will choose for frivolous reasons,[14] or they will misrepresent their situations.[15] He responds that we ought to have more faith in women's rationality than that.

Unfortunately, Tribe industriously overlooks the fact that women, albeit often with the complicity of or under coercion by male partners, routinely act "irresponsibly" with regards to procreation and abortion. As Tribe admits, half the women who have abortions have not been using

11. The tactical advantage of assuming the value in some argumentative forums is admitted, but it is also true that in some public forums we must address the root value in order to generate a narratively coherent and discursively complete public vocabulary supporting the ways of life we wish to enact.

12. *See* L.H. TRIBE, *supra* note 2, at 40-41, 203.

13. *Id.* at 13.

14. *Id.* at 205.

15. *Id.* at 181.

birth control.[16] Some women use abortion for sex selection or for other "frivolous reasons." The telling point, however, is that this is precisely what true Liberty allows us to do—to make individual choices that are less than optimal. Ideally, the only women who would "need" abortions are those who experienced contraceptive failure after careful and sustained use of multiple contraceptive methods. But given that we do not live in an ideal world, and that people are not ideally rational (or that they prefer short-term pleasure at risk of long-term pain), to predicate Liberty upon rationally optimal conduct is to make Liberty impossible. If women may have the abortion right only on condition that they always exercise it "rationally," that is, in accord with what the majority of the other people in the nation or state think they should do in a best case scenario, then women do not have Liberty. No one imposes such a rationality test upon men.[17] If men had to demonstrate that they would routinely act in an optimally rational manner before being given a right, we would live in a rather different nation.

There is, however, a crucial difference between women and men, and this is why Tribe runs afoul with his comparison. Historically, the laissez-faire version of Liberty as the dominant individual/state relationship has worked for most men because they were truly "individuals." The law restrained their freedom when they infringed upon the rights of others, but otherwise men were at liberty to do whatever foolish or wise things they chose to do.[18] This formula for Liberty, however, does not work for women. Women, traditionally and biologically, have strong tendencies leading them away from individuality.[19] Once she reaches the

16. *Id.* at 205.

17. Rational "person" standards are, of course, used in liability cases and the like, but these civil cases are treated differently from the conflicts between state interests and fundamental personal freedoms such as a right to vote or travel or choose a home, etc. where only certified insanity deprives men of the liberty to choose.

18. This is not to say that men as boys do not need other human beings to survive, nor that they do not profit from cooperation with others, nor that they do not come into the world in social relationships (especially through language). The socialist analysis of subjectivity has pointed out that all of these things provide boundaries to individuality. Within that framework, however, we can say that men have managed to live with a great deal of individuality. The difference between men and women on this point becomes clear if we note that we feel much more sorry for bag ladies than for bums.

19. I do not suggest here that this biological tendency is related to anything other than the bio-historical consequences of pregnancy and its reification through culture. That is, I know of no evidence that women are "naturally more social" than men, etc. By bio-historical I mean a biologically based relationship which is reified beyond the biological commitment by the fact of sharing history during the biological relationship.

point of "quickening," a woman is more than an individual.[20] 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. The case is different for men. Whether he experiences mere biological paternity or culturally grounded fatherhood, a man's impact on and relationship to the fetus is indirect. Consequently, it is not surprising that for mothers, the male-derived formula of "my freedom stops at another person's nose" simply is not adequate.

The mothering relationship, moreover, transcends pregnancy. As Tribe recognizes, "Pregnancy does not merely 'inconvenience' the woman for a time; it gradually turns her into a mother and makes her one for all time."[21] Most women develop a relationship with their children that most fathers never gain. Much of this is culturally conditioned, but some of it goes to the bio-historical link established in pregnancy and breast-feeding. Motherhood is a cultural and bio-historical relationship, whereas fatherhood is almost exclusively cultural.[22]

As a consequence of the biological component, even women who choose not to be mothers require cultural intervention in order to secure the status of "not-mother." To avoid being a mother requires at least cultural knowledge (*e.g.*, the importance of abstinence and protection to achieve it, methods of rhythm and withdrawal, or the Maginnis technique). Realistically, it requires a social system to deliver safe and effective abortion and contraception. To be a mother requires even greater social services, as the mother must provide not only for herself, but also feels compelled to provide for her children.[23] Except where resources are particularly lush, this requires grave sacrifice of "self." Some women may not gain much individuation within motherhood even if given ade-

20. Whether or not we see the fetus as a full individual in its own right, the historical significance of the category of quickening indicates quite clearly, as does the testimony of individual women, that the fetus is experienced relationally from that point.

21. L.H. TRIBE, *supra* note 2, at 104.

22. Paternity and fatherhood are separable in a way that maternity and motherhood are not, though even this may be a matter of degree, rather than a matter of absolutes. Even adoption leaves women in a motherhood relationship because of the history of shared biological experience—which is why many women vehemently resist adoption as an alternative to abortion.

23. When I assert this link as a biological predisposition, I do not mean to imply that it is a biological determination. Culture can override biological tendencies, and often we feel it should. Hence, a finding that women have a biological link that predisposes them to care for their children is not a finding that we ought to construct a culture in which women have sole or primary responsibility for caring for children. Similarly, even if men do not share this biological predisposition, we might choose to build a culture in which we established it by other means.

quate social support, but one certainly cannot expect the majority of women to develop much individuality when they are required to submit to complete "self"-sacrifice because of lack of resources.[24]

For women, therefore, laissez-faire Liberty is insufficient and unworkable. If women are to have freedom, then substantive Liberty—implying some level of social participation (and hence of governmental activism)—is necessary. In the past, this nation, like most others, chose not to provide women much Liberty, although we provided "protection" in the form of marriage laws.[25] Changes in abortion law are fundamental to that Liberty because they are the ultimate guarantor that no woman will have to be a mother against her will. However, abortion rights affect women who will never have an abortion because they affect our coding of female personhood. That coding in turn shapes women's Liberty in the workplace and in choices of leisure activities (*e.g.*, legal or illegal drug consumption) as well as financial standing and almost all other activities in which women do not now have Equality with men.

Abortion is currently central to our struggle over the definition of female personhood because it is the most effective means of controlling pregnancy, and pregnancy and childbirth are the *only* ways in which women are different from men in absolute function. All other differences (strength, aggressiveness, intelligence, moral capacity) vary as much or more among genders than between genders. Since pregnancy and childbirth currently define woman *qua* woman, and not simply as "person," they can serve, and are serving, as the fulcrum by which women can be distinguished from men and thereby discriminated against on a wide array of fronts. To change that, to bring about what Justice White calls a "free, *egalitarian*, and democratic society,"[26] requires that we enact laws protecting the liberty to control one's reproduction, because that will es-

24. I am aware that work by Carol Gilligan and others argues that women's cooperative morality is superior to men's rule-governed morality that is based on individuality, and that some people argue that individuality is undesirable. *See* C. GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (1982); A.M. JAGGAR, FEMINIST POLITICS AND HUMAN NATURE (1988). I disagree. I do not believe that either individuality or sociality are superior; I believe they are each necessary and desirable traits that ought to be cultivated, and I believe they are something that must be and can be developed, rather than merely something that happens naturally to all human beings in any social circumstances. The inclusion of "childishness" as a component of "femininity" is thus not merely a mask, but an enforced failure to develop individuality.

25. Basic liberties granted to women during the period in which the Constitution was framed included protection of life and trial by jury of peers, but not of economic liberty or political rights such as voting. The "protection" of marriage took away other liberties, such as freedom of movement, by assigning them to her spouse.

26. Thornburgh v. American College of Obstetricians and Gynecologists, 476 U.S. 747, 793 (1985) (White, J., dissenting with Rehnquist, J.) (emphasis in original).

tablish a legal status for women as persons, rather than as essentially proto-mothers. Such laws, as the conservatives are quick to tell us, will require a fundamentally different relationship between government and the people.

Professor Tribe does not see the legal implications of women's Liberty, for he is as blinded as any prominent lawyer by reverence for the time-worn political theories grounding American law. To change these basic political theories is threatening because it is almost always cast, by opponents and many supporters, as "socialism." The cold war and the decline of communist nations internationally have given us both sound and unsound reasons to fear such a change. To some extent, the asserted analogy between substantive liberalism and socialism provides a useful warning that helps us to be precise and cautious. Women will be ill-served by a social system in which "social good" outweighs "individual good." In such a system, women's bodies are put at the service of the collectivity (China and Rumania provide the real and chilling examples), and that is hardly an improvement over having them at the service of individual male "heads-of-households."

Socialism is, therefore, not an acceptable answer for women. Instead, we need a concept of individualism that treats Locke and Mill as progressive stepping stones, rather than as static foundations. We need to conceive of Liberty by focusing on individual development, not upon escape from tyranny.[27] We need a concept of substantive Liberty that sees the government much in the way our Puritan forebears saw it—as a way to protect each other from the wilderness.[28] In a political system organized around mutual protection of the substantive Liberty of indi-

27. *See* J. LOCKE, THE SECOND TREATISE OF GOVERNMENT (Bobbs-Merrill: Indianapolis, 1977) (1st ed. London 1690) (especially p. 7); J.S. MILL, UTILITARIANISM, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (Dent: London 1982) (1st ed. London 1863).

28. *See, e.g.*, "The Boston Massacre Orations, 1771-1783": J.W. Austin, An oration delivered March 5, 1778 (Boston: B. Edes and T.J. Fleet); B. Church, An oration delivered March 5, 1773: To commemorate the bloody tragedy of the fifth of March, 1770 (Boston: Edes and Gill); T. Dawes, An oration delivered March 5, 1781 (Boston: Thomas and John Fleet); J. Hancock, An oration delivered March 5, 1774: To commemorate the bloody tragedy of the fifth of March, 1770 (Boston: Edes and Gill); B. Hichborn, An oration delivered March 5, 1777 (Boston: Edes and Gill); J. Lovell, An oration delivered April 2, 1771: To commemorate the bloody tragedy of the fifth of March, 1770 (Boston: Edes and Gill); J. Mason, An oration delivered March 6, 1780 (Boston: John Gill); G. Minot, An oration delivered March 5, 1782 (Boston: B. Edes and Sons); P. Thacher, An oration delivered March 5, 1776 (Watertown: B. Edes); W. Tudor, An oration delivered March 5, 1779 (Boston: Edes and Gill); J. Warren, An oration delivered March 5, 1772: To commemorate the bloody tragedy of the fifth of March, 1770 (Boston: Edes and Gill); J. Warren, An oration delivered March 5, 1775 (Boston: Edes, Gill and Greenleaf); T. Welsh, An oration delivered March 5, 1783 (Boston: J. Gill).

viduals, government would be required to allow maximal development and substantive Liberty to all persons, but it would not be allowed to interfere with the major choices individuals make about the conduct of their lives.

I obviously cannot offer a full theory of such a system in a book review. It will suffice here to note that any political system in which public argumentation plays a serious role rests on its core values, and hence can best be understood by focusing upon those values. The current system in the United States is predicated upon individual liberty for "all men" and places "non-interference" as the highest directive for government; it is not fully successful (welfarism has encroached upon it, as has statist regulation), but this core value still provides the central legal understanding. By contrast, a socialist system is predicated on placing the collectivity as the central value, whether we call it state, community, society, or nation. In advocating "substantive liberalism" as an alternative to these two, I am advocating a political theory and practice that places individuals as the central value, but which sees government as a mechanism by which we may assist each other, rather than solely as a means of protecting us from each other.

Substantive liberty thus specifies that government is not inaugurated to allow us to develop on our own (the Locke-Mill variety). Rather, government is inaugurated to coordinate our cooperation with each other, in order to create liberties for one another that could not exist in a natural state. Such a rhetoric of Liberty specifies, and accurately, that all of the wealth, knowledge, growth, etc. that any one of us creates is only possible because of the cooperation between individuals. Donald Trump could not exist without public roads, building inspectors, government support of higher education, federal research programs, and the U.S. military.[29] Given that all individuals must cooperate in the creation of human wealth to some degree, the society has an obligation to make Liberty available to all persons, not merely to some. Consequently, society has the obligation to make available to each individual the minimal requirements for human Liberty. These are food, shelter, basic health care, reproductive support, and education.

Beyond these basic minimums, each person must strive independently in voluntarily chosen cooperatives. To limit the substantive elements of Liberty in this fashion is necessary for two reasons. First, the coercive element of cooperation (and government is precisely coerced co-

29. Libertarians and anarchists argue for private efforts at such cooperation, but their private cooperatives are simply governments under another name.

operation) must be minimized in order to maintain Liberty. Second, higher individuation requires self-directed effort.

There are, of course, practical problems in working out such a system of substantive individualism. Increasingly, we recognize that resources are not infinite, so that "development" opportunities cannot be infinite.[30] This means that there must be collective decision-making about allocation of support services. In addition, by slanting the resource availability, government can influence choices without mandating them. These difficulties cannot be eliminated—they are part of the rub of living on a planet with billions of other people. However, there are numerous ways to mitigate these difficulties. A minimum guaranteed income, for example, provides a centralized way of guaranteeing a broad range of choices without government interference. Taking a different tack, we might shift our welfare program to one that guarantees all children food and medical care through an expanded school system. Whatever the mechanics of the solution we arrive at, however, the fundamental requirement is a reorientation of our collective commitments. Once we adopt "substantive Liberty for all individuals" as a shared point of departure for our deliberations, we will have the potential for developing appropriate social procedures.[31]

Ultimately, to change our political system to give women Liberty is therefore to change the legal system significantly. We are currently in the process of doing this piecemeal. However, in order to do a more reasonable job of adapting our law and social procedures to this change, it is desirable for us to take the broad social view, rather than the narrow legal-political one. The entire self-understanding of the legal establishment runs against this grain. Clearly, the rise of "critical legal studies" reflects a dent in the legal establishment, but the current legal quagmire about judge-made law probably cannot be resolved by "critique" or "deconstruction." Living in a collectivity requires shared values and visions, and no shared values and visions can withstand deconstruction.[32]

30. The placing of individual human beings as primary does not necessitate the treating of other entities—including the human community, animals, and the eco-system—as though they were without substantive value.

31. I believe, with Michael Calvin McGee, that while public value terms are not logically grounded they are nonetheless the stuff of human collective action. *See* McGee, *The "Ideograph": A Link Between Rhetoric and Ideology*, 66 Q. J. OF SPEECH 1 (1980).

32. Defense of this claim would require a lengthy exposition on deconstruction, but it boils down to the claim that deconstruction is based on the fact that all terms are defined in relationship to other terms, especially their opposites, and therefore have no externally objectifiable veracity, which the deconstructionists, therefore, (ironically) take to mean that they have no legitimate social force.

Deconstruction provides a useful tool for finding out what is wrong; it actively works against all means of re-envisioning collective action.

A powerful alternative is to return to seeing law as a species of argumentation. Currently, lawyers follow the centuries-old Ramistic split and conceptualize the law as logic rather than rhetoric.[33] Even deconstructionist lawyers implicitly hold law to the standards of deductivism; they simply make a great deal of its failure to meet those standards. Outside of the legal educational establishment, however, there is a small cottage industry reconceptualizing law as argumentation—as a species of rhetoric.[34]

To conceptualize law as a practice of argumentation is to see it through the eyes of the court room lawyer rather than through the microscope of the appellate judge. It is to suggest that argumentation—the employment of all of the available means of rational persuasion by multiple advocates to affect the decision-making of third parties—is the best possible means available to human beings for deciding issues of a forensic type. Open argumentation does not guarantee certainty and the uniform production of truth; it merely offers the best shot at a consensually legitimate and reasonable decision that is available to fallible human beings in areas where probability, multiple principles, and competing interests are factors. Aristotle's promise cannot be improved upon—if advocates for both sides of a case work diligently, the odds of the better cause emerging triumphant are favorable.[35]

To view law as argumentation in this way may help to revise the

33. *See* M.A. Hasian, Jr., Legal Discourse and Public Argumentation: A Case Study of the Rhetorical Creation of the Right to Privacy (Master's Thesis, University of Georgia, 1990). This is true whether one conceptualizes the logic as being modern-scientific or classical-philosophical at the ontological level.

34. *See* Zarefsky & Gallagher, *From "Conflict" to "Constitutional Question": Transformations in Early American Public Discourse*, 76 Q. J. OF SPEECH 247 (1990); R. HARIMAN, *Performing the Laws; Popular Trials and Social Knowledge*, in POPULAR TRIALS: RHETORIC, MASS MEDIA, AND THE LAW 17 (R. Hariman ed. 1990); Lucaites, *Constitutional Argument in a National Theater: The Impeachment Trial of Dr. Henry Sacheverell*, in Hariman & Lucaites, *Between Rhetoric and "The Law": Power, Legitimacy and Social Change*, Q. J. OF SPEECH (forthcoming 1990); Makau, *The Supreme Court and Reasonableness*, 70 Q. J. OF SPEECH, 379 (1984); INTERPRETING LAW AND LITERATURE: A HERMENEUTIC READER 339-410 (S. Levinson & S. Mailloux eds. 1988). For early and varied formulations see Speech Communication Association, *Dimensions of Argument: Proceedings of the Second Summer Conference on Argumentation* (1981), as well as other editions of the proceedings; issues of the journal ARGUMENTATION AND ADVOCACY (formerly the JOURNAL OF THE AMERICAN FORENSIC ASSOCIATION); the "Project on the Rhetoric of Inquiry" as represented in a new series of publications of the University of Wisconsin Press; and the variety of conferences and publications coordinated through the "POROI" office at the University of Iowa.

35. ARISTOTLE, THE RHETORIC, I-I, 12-14. Though obviously the qualification that both sides must have reasonable option to do a good job must be taken more seriously under a system of

legal-political tunnel vision of lawyers, which derives from over-professionalization. As Stephen Toulmin's theory suggests, there are different "fields" of argument.[36] Many fields are highly technical as, for example, the sciences, accounting, and clinical practices. Some fields, however, partake not of "technical" knowledge, but of "social knowledge" as, for example, elections, morals, and popular sports.[37] The problem with the legal profession is that it has come to define itself exclusively as a technical field. Law cannot be a technical field. Because it must regulate the conduct of ordinary individuals, and because we operate in a society where "the consent of the governed" is taken with seriousness, law must partake both of social knowledge and technical knowledge. Consequently, when Justices like Antonin Scalia employ the name of democracy to refuse to listen to the voices of the *demos* on their doorstep, they are either naive or hypocritical.[38] The error Scalia has made is a typical one. He believes that, because law is a technical field, the judge should ignore those who are not technically qualified (and procedurally admitted). On the other hand, along with most restrictive constructionists, he believes that all questions that are tainted by issues of social knowledge must be thrown back to the public sphere—the legislature. Thus, he ends up in the awkward position of refusing to listen to the arguments of the people who he says must decide the issue. Such a position is wrong because, at both the trial stage and the appellate stage, law is based on both technical and social knowledge. The appellate judge, the trial judge, and the jury should be bound to deal conscientiously with both social and technical components of judicial decisions. While agents of the judiciary should not be bound by the preferences of the majority of the people, they should be bound to listen thoughtfully to the various voices of the people.

This requires, of course, an improvement in our understanding of the Constitution. Presently, the Constitution is treated as a series of major premises from which law is deduced. A better way of understanding the Constitution is offered by Kenneth Burke. Rather than seeing the document as a series of self-contained propositions, Burke notes that the Constitution, like all linguistically embodied entities, is really a structure

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substantive liberalism than it has been under laissez-faire liberalism. Note also that favorable odds is not the same thing as a guarantee that "truth always triumphs."

36. *See* S. TOULMIN, HUMAN UNDERSTANDING (1972); S. TOULMIN, R. RIEKE, & A. JANIK, AN INTRODUCTION TO REASONING (1979).

37. *See* Farrell, *Knowledge, Consensus, and Rhetorical Theory*, 62 Q. J. OF SPEECH (1976); Farrell, *Social Knowledge II*, 64 Q. J. OF SPEECH, 329 (1978).

38. *See* Webster v. Reproductive Services, 492 U.S. __, 109 S.Ct. 3020, 3064 (1989).

of motives.[39] It is a collection of values, along with characterizations of key agents, acts, scenes, agencies, and purposes, which must be worked out in terms of human living conditions. Appellate law then consists of assessing the extent to which different laws and actions are consonant with that motive structure. These motive structures should be explored by law schools, debated by law journals, and considered by judges.

This motivational perspective allows us to see the Constitution as a founding document that serves as a weighty touchstone for our political, legal and social lives, without treating it as a series of closed propositions. A rhetoric of motives thus strikes the middle ground between rootless nihilism (*i.e.*, law as political warfare) and reified objectivity (*i.e.*, law as timeless truth). The motivist approach may nonetheless appear threatening because, as we all know, deriving actions from values is a highly variable endeavor. That frightens us, however, only because we have been living with the comfortable but now largely exploded myth that deduction from premises is a determinate procedure. That myth has been made laughable by reverses such as those in the line of cases from *Dred Scott* to *Plessy* to *Brown*,[40] by the restrictive constructionists' notable willingness to make an exception to stare decisis in the case of *Roe*, and by the routinely split decisions of appellate courts.

The myth of judicial deductivism is, however, worse than laughable; it is destructive. The myth requires that we treat our constitution of our collective self as a fait accompli. That is dangerous in a time of great technological change.[41] It is morally evil in a time where collective moral progress is possible, because it prevents that progress.[42] The political conservatives have, as most progressives now recognize, simply been employing the myth of judicial restraint (which is, procedurally, "deductivism") as a rhetorical ploy to stave off progress. It is time to stop treating precedent as a near-sufficient set of decision-making criteria. As Bishop Whately noted, precedent grants one presumption in an argument,[43] but it does not grant one fiat.

There is, of course, always the fear that judges will "personalize"

39. *See* K. BURKE, A GRAMMER OF MOTIVES (1969) (especially at 323-401).

40. Dred Scott v. Sandford, 19 How. 393 (1857); Plessy v. Ferguson, 163 U.S. 537 (1896); Brown v. Board of Education, 347 U.S. 483 (1954). It is also ludicrous when advanced by those who would use the rationale to reverse *Roe*.

41. Hence the difficulties over urine tests, surveillance systems, new reproductive technologies, etc.

42. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905). *See also* Condit, *Crafting Virtue: The Rhetorical Foundations of Public Morality*, 73 Q. J. OF SPEECH 79 (1987).

43. R. WHATELY, ELEMENTS OF RHETORIC, part I, ch.3, § 2 (1872).

their decisions. The first tonic for that fear is the realization that judges already do. Because one always chooses among multiple possible precedents, one necessarily engages one's personal motive structures even in deductive approaches. What the vision of law as argumentation allows us to do is to question the motive structures of those whom we would appoint to the High Court, rather than ignoring these central elements of decision-making under the pretense that their deductive-apparati are all that will be in operation. There will remain judge-made law, but every appellate judge is checked by the opinions of her or his fellows, and every court is checked in a myriad of ways by elected officials, appointed officials, and the existence of other courts. Moreover, as the 19th century's widespread disregard for the 14th and 15th Amendments revealed, the courts are not able to exercise real power if they are too far out of line with the dominant reading of the Constitution offered by the other actors in the society. Our challenge remains, as in any humanly operated system, to select people who will judge our arguments by our social standards of goodness and reasonableness.

To the extent that we fail to do this, we will be drawn into ever more serious errors. One glaring illustration of this potential for error arises in Tribe's failure to analyze the emerging discursive structures employed by the anti-*Roe* court. Originally, the anti-*Roe* minority fell back on procedural arguments. Using procedural objections to stall consideration of an important issue is a time-worn rhetorical strategy for agents of a status quo faced by superior principles. The case as presented to the Court left the conservative Justices only the untenable option of declaring fetuses persons,[44] or the procedural gambit. Eventually, however, the conservatives have evolved a new approach, one which Tribe, because of his legal-political deductivism, does not acknowledge.

In the *Webster* decision, Rehnquist made two moves. The first was to suggest that the Court might find "fetal life" as "potential human life" (not as a human person) to be itself an interest adequately compelling to abrogate women's Liberty. While this is shocking to most progressives, it is not particularly surprising given that Rehnquist's view is that women are mothers, and hence their identity is one already bound to the care of "potential human life."[45] The conservative Justices were simply being explicit here about the real values and interests at stake in the issue. The leadership of the Right-to-Life movement has been moved to express their position as concern for the individual rights of the fetus be-

44. *See* L.H. TRIBE, *supra* note 2, at 113-38; C.M. CONDIT, *supra* note 7, at 109-10.

45. *See* C.M. CONDIT, *supra* note 7, at 106-7.

cause this is an appealing value position in an individualist society. This is, however, a distorted portrayal of their values. The Pro-life movement's leaders are interested in natalism—the birth of quantity of human life; they are not avid defenders of individual rights.[46] The conservative Justices cannot use that false cover because of the greater analytic precision of the appellate legal field of argument. Hence, they are forced to articulate the social interest in the potential for human life that women generate. Tribe's neglect of this move by the conservatives reveals the extent to which he underestimates the forces and interest of the political Right and the motives of those Justices bound by "tradition."

The other move Rehnquist and the rest of the majority make is to efface the distinction Tribe draws between "fundamental liberties"—those which require compelling interests to override them—and lesser liberty interests, which may be overruled by almost any state interest. Rehnquist, in *Webster*, says "there is wisdom in not unnecessarily attempting to elaborate the abstract differences between a 'fundamental right' to abortion . . . a 'limited fundamental constitutional right,' . . . or a liberty interest protected by the Due Process Clause, which we believe it to be."[47] This is a chilling claim, but it is an inevitable consequence of judicial "restraint" in an era where the Constitution can no longer be treated as a series of all-encompassing propositions. If, in an era of substantial social change, the conservative Justices *actively* interpret the Constitution as leaving all unenumerated rights, or even all liberties, open to "compelling state interests" as defined by legislatures, they return us to the tyranny of the majority.

The problem with any pure democracy, as political theorists extending back to Aristotle and Plato have recognized, is that it can become a tyranny. American folk wisdom has placed democracy as the opposite of tyranny, but that is largely an incidental consequence of the rise of our governmental system in opposition to the British monarchy. In practice, the reason for a constitutional form of government is to try to use the wisdom of distance and time to protect individuals from the heats of majoritarian tyranny. The system experiences strain, as it does at present, when the distance and time become too great, and the Justices who are its keepers read the Constitution anachronistically, but at least the constitutional-judge system provides some protection from the furthest extremes of the *demos*.

46. *Id.* at 61-63.

47. Webster v. Reproductive Health Services, 492 U.S. __, 109 S.Ct. 3020, 3058 (1989) (citations omitted).

All this is not to say that democratic governance is bad. It is simply to say that our national motive structure includes the values of "individual rights" and "justice" as well as "democracy." The concept of "checks and balances" must, therefore, include an active judiciary. Judges must exercise restraint by vetoing only those legislative encroachments that truly infringe upon the ability of individuals to conduct the broad courses of their lives. However, judges who allow all legislatively preferred interests to be "compelling," or who deny that there are any fundamental liberties, have abrogated their responsibilities under our Constitution. The conservative Justice's concern for the "state" merges indistinguishably with the socialist's concern for "the social good" and together they go about oppressing living, breathing, individual human beings. Given the increasing power that technology is giving the State to intervene in private lives, the decline of *Roe* reflects more than the decline of women's Liberty. It reflects an increasingly statist bent of the Court that may threaten the Liberty of all persons. An advanced concept of substantive Liberty based on the worth and dignity of individuals and an understanding of law as a mixed bag of technical and social argument are needed to hold off the ever-more frequently compelling interests of the State.

What stands behind *Roe v. Wade* is that complex. It requires an understanding of the law that is that broad. Perhaps such analyses await a new breed of legal scholars who are trained beyond the narrow confines of law school deductivism. Meanwhile, Tribe does the best job to date of out-running the conservative legal bean counters, and as such we can only hope his broadly interesting book will also be a socially important one.