

Opposition to Abortion Is Not Based on Alleged Rights to Life

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Laurence H. Tribe is a professor of law at Harvard Law School. In this excerpt from *Abortion: The Clash of Absolutes*, Tribe argues that if opposition to abortion were based on the rights of the fetus, then opponents would not allow exceptions for pregnancies resulting from rape; but they do allow exceptions for rape; hence their opposition to abortion is not based on the rights of the fetus.

Most of those who regard abortion as, at best, a necessary evil would nonetheless make an exception permitting abortion in cases of rape and incest. (This exception is really about rape. Most cases of incest probably involve an older relative and a young child, and so in most people's experience, incest is really a particular kind of rape.) Although polling numbers on abortion are notoriously sensitive to the wording of the questions (the *New York Times* has observed that "one of every six Americans says simultaneously that abortion is murder and that it is sometimes the best course"), the polls do reveal this truth quite starkly.

One nationwide poll, for example, showed that 40 percent of the American public oppose abortion when it is sought because "the mother is an unmarried teenager whose future life might be seriously affected." Yet 81 percent favor abortion "if the woman became pregnant because of rape or incest." Only 17 percent oppose abortion in such cases. This suggests that almost 60 percent of those who oppose abortion for the unmarried teenager would support it in cases of rape or incest.

Regional polls corroborate the hypothesis that people who generally oppose abortion would nonetheless permit it in cases of rape and incest. For example, polls in Florida in the weeks after the *Webster* decision showed that although 59 percent of the registered voters said they agreed that during the first trimester of pregnancy the decision to have an abortion "should be left entirely to a woman and her doctor," 53 percent of those polled said that abortion should be "illegal" when sought because the woman's family "has a very low income and cannot afford to have any more children," and 60 percent said that abortion should not be permitted where sought because "the pregnancy would interfere with the mother's work or education." Still, 78 percent of those polled thought abortion should be available in cases where the pregnancy resulted from rape or incest. Only 13 percent said it should not. This suggests that more than 75 percent of the people who oppose abortion in circumstances of economic or personal hardship may well accept it in cases of rape and incest.

A similar poll in Utah found that, although 58 percent of the adult population thought abortion should not be available "to women who choose it in the first trimester" and 68 percent thought it should not be available to women who choose it in the second trimester, prior to viability, again an overwhelming majority (81 percent) agreed that abortion should be available in cases of rape and incest. Only 11 percent disagreed. This suggests that up to 80 percent of Utah residents who oppose

abortion on request in the first trimester of pregnancy may nonetheless support the availability of abortion in cases of rape and incest.

Support of a rape exception makes plain that most people's opposition to abortion, unlike their opposition to murder, *can* be overridden. It therefore suggests that antiabortion sentiment is not *entirely* rooted in a belief that abortion constitutes the killing of an innocent human being. It is hard to see how any such justification for limiting abortion could plausibly be put forward by anyone who thinks that abortion should be permitted in cases of rape. A fetus conceived as a result of a violent rape is no less innocent than one conceived in a mutually desired act of love. The fetus obviously is not responsible for the circumstances surrounding its conception. Yet the vast majority of people who oppose abortion would permit such a fetus to be destroyed, even if they were rewriting from scratch the constitutional rules governing this thorny topic.

If support for a rape and incest exception suggests that most opposition to abortion is *not* entirely about the destruction of innocent human life it might also reveal something about the views, conscious or unconscious, that lie at the heart of the belief that in general, access to abortion should be restricted.

Surely there should be nothing abhorrent about the *particular* fetuses that are the products of rapes. It is true that a position in favor of denying criminals the right to reproduce has at times been expressed in the United States—for example in the Oklahoma law struck down in the 1940s by the Supreme Court in *Skinner v. Oklahoma*, a law that provided for the sterilization of anyone previously found guilty two or more times of “felonies involving moral turpitude.” But a desire to deny the rapist his child could hardly explain a willingness to make abortion available to women who have been raped. And any notion that the fetus itself is tainted by a kind of “original sin” seems most implausible. After all, when the woman who has been raped *chooses* to give birth to the rapist's child rather than to abort, she is commended, not condemned.

Right-to-life advocates who would allow abortion for a woman who becomes pregnant after a rape are probably reacting out of compassion for the woman; they don't think she should have to live through having her rapist's child develop within her. But the only thing to distinguish that from any other unwanted pregnancy is the nature of the sexual activity out of which the pregnancy arose. A fetus resulting from rape or (in most cases) from incest is the product of a sex act to which the woman did not consent. It is only the *nonconsensual nature of the sex* that led to her pregnancy that could make abortion in the case of rape seem justified to someone who would condemn all other abortions not needed to save the pregnant woman's life.

This in turn suggests that one's opposition to such *other* abortions reflects a sense that continued pregnancy is simply the price women must pay for engaging in *consensual sex*. The lack of sympathy toward women who have experienced contraceptive failure suggests that many of us have no discomfort at the idea that women who choose to have sex simply cannot be allowed to avoid *some* risk of a pregnancy that they will just have to carry to term.

As we have seen, this feeling may be partly rooted in the belief that in general, this is the way of nature. In this view, opposition to abortion may reflect an ambivalence about the use of technology in general, in this case medical technology, to overcome that which always before seemed “natural”: that sex would lead to pregnancy and pregnancy to childbirth.

But notice how often this feeling about abortion is held by people who generally welcome the energetic uses of new technologies. Especially if such people regard nervousness about nuclear reactors or computers or other “unnatural” developments as silly or childish, their 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. The fact that opposition to abortion rights may in large part be about sexual morality is reflected, too, in the attitude, noted earlier, of those who oppose abortion and seem willing to do almost anything to stop it—*except* take the effective pregnancy-reducing step of providing birth control education and better contraceptives.

At least to *these* “pro-life” activists, it seems to be more important to prevent the marginal increase in sexual activity that they believe will follow from sex education and the availability of birth control than to lower the number of abortions being performed. Theirs is thus a position in which sexual morality is primary, with any claim of a fetus’s right to life taking a very distant backseat.

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