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WADE AND BOLTON: FUNDAMENTAL LEGAL ERRORS AND DANGEROUS IMPLICATIONS†

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On January 22, 1973, in the companion cases of *Roe v. Wade*¹ and *Doe v. Bolton*,² the Supreme Court of the United States overturned, as an unconstitutional invasion of the right of personal privacy, the anti-abortion statutes of Texas and Georgia. The Court found that unborn children are not Fourteenth Amendment persons at any time during gestation; that the state has no compelling interest in the protection of unborn children until viability, which the Court put at 28 weeks and perhaps earlier, "even at 24 weeks";³ that during the first trimester of pregnancy, the State may not interfere with the effectuation of a decision to abort reached by a woman and her physician (exercising his medical judgment);⁴ that after the first trimester, a state may regulate abortion to the extent that the regulation reasonably relates to the preservation and protection of maternal health;⁵ and that after viability, the state may effectuate its compelling interest in "protecting the potentiality of life" (93 S. Ct. 731) by prescribing abortion subject to an exception for abortions necessary to preserve the life or health of the pregnant woman.⁶ Health was defined in *Bolton* to include "all factors—physical, emotional, psychological, familial . . . relevant to the well-being of the patient."⁷ Obviously, it will be a rare medical abortionist who cannot justify his fee under this definition of health.

In short, under *Wade*, the unborn child is not a Fourteenth Amendment person—he is not a live human being—he has, for practical purposes,

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¹ 410 U.S. 113 (1973).

² 410 U.S. 179 (1973).

³ *Id.* at 160.

⁴ *Id.* at 164.

⁵ *Id.*

⁶ *Id.* at 164-65.

⁷ 410 U.S. at 192.

been deprived of all legal protection and a state is free to legalize his killing up to birth.

Justice Rehnquist and White, in dissent, did not quarrel with the majority holding that unborn children are not Fourteenth Amendment persons. Their dissents are essentially on "states' rights" grounds.

Wade and *Bolton* arose out of challenges to the abortion statutes of Texas and Georgia. A three-judge Federal District Court had declared the Texas abortion statutes unconstitutional on privacy and vagueness grounds but had refused to issue an injunction against enforcement.⁸ The Georgia abortion statute had suffered a similar fate before a three-judge court which placed its decision on privacy grounds only.⁹ Appellants in the Supreme Court were the plaintiffs below, appealing (a) the denial of the injunctions in both cases and (b) in *Bolton*, so much of the District Court's decision as left standing certain statutory procedural and medical requirements as pre-conditions to abortion.

The Texas statutes permitted abortion only "for the purpose of saving the life of the mother."¹⁰ The Georgia statutes added preservation of maternal health, grave fetal defect and rape as exceptions to criminal abortion.¹¹

The Supreme Court's substantive holdings are contained almost exclusively in *Wade* and I should like to concentrate mainly on this decision, passing over the Court's discussion therein of jurisdiction, justiciability, standing and abstention.¹²

I would note parenthetically that the Supreme Court did not strike down a "conscience" clause in the Georgia abortion status,¹³ nor did it pass on the rights of the father of an unborn child or the parents of a minor pregnant girl to object to the abortion decision.¹⁴

I. The Fundamental Errors in *Wade*: In General

Upon analysis, it becomes evident that the structure of the Court's opinion in *Wade* is defective. The Court agreed that if the Fourteenth Amendment personhood of the unborn child were established, "the appellant's case, of course, collapses, for the fetus' right to life is then guaranteed specifically by the Amendment."¹⁵ Hence, the approach of the Court should have been to decide: (a) whether the unborn child, as a matter of fact, is a live human being, (b) whether all live human beings are "persons" within the fourteenth amendment, and (c) whether, in light of the

⁸ *Roe v. Wade*, 314 F. Supp. 1217 (N.D. Tex. 1970).

⁹ *Doe v. Bolton*, 319 F. Supp. 1048 (N.D. Ga. 1970).

¹⁰ 314 F. Supp. at 1223.

¹¹ GA. CODE ANN. ch. 26 § 26-1202 (1971).

¹² 410 U.S. at 123-29.

¹³ *Id.* at 197-98.

¹⁴ *Id.* at 165 n.67.

¹⁵ *Id.* at 156-57.

answers to (a) and (b), the state has a compelling interest in the protection of the unborn child; or to put it another way, whether there are any other interests of the state which would justify denying to the unborn child the law's protection of his life. Instead, the Court reversed the inquiry, deciding first that the right of privacy includes a right to abort, then decided that the unborn child is not a person within the meaning of the Fourteenth Amendment, and finally, refusing to resolve the factual question of whether an abortion kills a live human being. In effect, the Court raised a presumption against the (constitutional) personality of unborn children and then made it irrebuttable by refusing to decide the basic factual issue of prenatal human-beingness.

The refusal to resolve the threshold question of the fact at the outset is the crucial error in *Wade*. This fundamental error may have been caused by the Court's misapprehension of the common law of abortion and the motivation behind early American anti-abortion statutes. This, in turn, apparently led the Court to forego researching the intent of the framers of the fourteenth Amendment: to bring within the aegis of the due process and equal protection clauses every member of the human race, regardless of age, imperfection, or condition of unwantedness. Left without any reliable historical basis for constitutional interpretation, the Court both failed to allude to its own prior explication of "person" under section one of the fourteenth amendment and mistook the general status in law of unborn children. Further, it adverted to a number of criteria which it erroneously interpreted as proof that the unborn child is not a person at all under the fourteenth amendment. In short, error was piled upon error.¹⁶

II. The Historical Errors

Even a cursory reading of *Wade* leads to the inevitable conclusion that the Court was deeply influenced by its own interpretation of the Anglo-American history of the law of abortion. Unfortunately the Court's understanding of history is both distorted and incomplete.

A. *The Common Law*

The Court painted a picture of a common law "right" to abort, at least prior to quickening, and perhaps up to birth.¹⁷ The Court erred. A detailed examination of the common law is not possible in the time allotted here.¹⁸ The more plausible view of the common law is this: (a) even the earliest common law cases do not support the proposition that abortion was regarded as a "liberty" or "freedom" or "right" of the pregnant woman or

¹⁶ *Id.* at 156-59.

¹⁷ *Id.* at 132, 135, 138.

¹⁸ For such an examination of the common law, see Byrn, *An American Tragedy: The Supreme Court on Abortion*, 41 *FORD. L. REV.* 807 (1973).

anyone else; (b) "quickening" was utilized in the later common law as a practical evidentiary test to determine whether the abortion had been an assault upon the live human being in the womb; this evidentiary test was never intended as a judgment that before quickening the child was not a live human being (indeed, in all other areas of the law—unencumbered by the evidentiary requirements of the criminal law—he was precisely that) and (c) at all times, the common law disapproved of abortion as *malum in se* and sought to protect the child in the womb from the moment his living biological existence could be proved.

B. *The Early American Statutes*

Here again the Supreme Court attempted to denigrate traditional respect for unborn human life. The Court concluded that nineteenth century American anti-abortion statutes were intended solely to protect the pregnant woman against a dangerous medical procedure and were not meant to protect the life of the unborn child.¹⁹ The best that can be said of his conclusion is that it is absolutely wrong. All but the most superficial research would have revealed to the Court that the New Jersey abortion statute was amended in 1872 specifically to protect the unborn child by providing equal penalties for the death of the aborted child and the pregnant woman.²⁰ Other courts in the late nineteenth and early twentieth century specifically held that protection of the child's life was at least one of the purposes of their respective state's abortion statutes.²¹ One might fairly add to this list decisions which, in the context of the enforcement of abortion laws, refer to the lives of unborn children as "sacred" and "inalienable."²² Had the Court been interested in cases beyond the early twentieth century and before the abortion "reform" movement of the nineteen sixties, it might have referred to several other cases.²³

In none of these decisions was quickening a factor. The Court was as wrong about the intent of early American anti-abortion statutes as it was about the common law.

C. *The Fourteenth Amendment*

The Supreme Court admitted that "[t]he anti-abortion mood preva-

¹⁹ 410 U.S. at 151, citing *State v. Murphy*, 27 N.J.L. 112 (1858).

²⁰ *State v. Gedicke*, 43 N.J.L. 86, 90 (Sup. Ct. 1881).

²¹ *Trent v. State*, 15 Ala. App. 485, 487, 73 So. 834, 836 (1916); *Dougherty v. People*, 1 Colo. 514, 522 (1872); *State v. Miller*, 90 Kan. 230, 233, 133 P. 878, 879 (1913); *State v. Auspland*, 86 Ore. 121, 132, 167 P. 1019, 1022 (1917); *State v. Howard*, 32 Vt. 380, 399 (1859).

²² *State v. Moore*, 25 Iowa 128, 135-36 (1863). See *People v. Sessions*, 58 Mich. 594, 596, 26 N.W. 291, 293 (1886).

²³ *Bowlan v. Lunsford*, 176 Okla. 115, 117, 54 P.2d 666, 668 (1936); *Anderson v. Commonwealth*, 190 Va. 665, 673, 58 S.E.2d 72, 75 (1950); *State v. Cox*, 197 Wash. 67, 77, 84 P.2d 357, 361 (1938).

lent in this country in the late 19th century was shared by the medical profession. Indeed, the attitude of the profession may have played a significant role in the enactment of stringent criminal abortion legislation during that period.”²⁴ In 1859 and again in 1871, the AMA condemned abortion at every stage of gestation as the destruction of a living human being.²⁵ By the time the Fourteenth Amendment was ratified in 1868, 28 out of the 37 states proscribed abortion prior to quickening either by statute or by interpretation of the common law. Within 15 years that number rose to 35 out of 38 and, as we have already seen by the overwhelming weight of authority, one of the purposes of these statutes, at the very least, was the protection of the life of the unborn child.

Protection of *all* human beings was the purpose of section one of the Fourteenth Amendment. Congressman John A. Bingham who sponsored the Amendment in the House of Representatives, noted that it was “universal” and applied to “any human being.”²⁶ Congressman Bingham’s counterpart in the Senate, Senator Jacob Howard, emphasized that the Amendment applied to every member of the human race including “the humblest, the poorest, the most despised.”²⁷

The Court in *Wade* made no reference to the expressed intent of the framers. It did not explain how, in an era characterized by an “anti-abortion mood,”²⁸ by the proliferation of statutes intended to protect unborn children from abortion, by a war fought to vindicate the fundamental equality of every human being, and by outraged medical protests against the destruction of unborn human life,—in this era the framers of the Fourteenth Amendment and the states that ratified it could possibly have intended to create *sub silentio* an unarticulated right of privacy which includes the right to destroy a whole class of human beings whom the framers intended to exclude from the Fourteenth Amendment. Perhaps the reason for the lack of explanation is that none exists.

III. Human Life Errors

The *Wade* Court’s historical errors were compounded by equally erroneous holdings on the question of whether the unborn child is a human being in fact and a human person in modern law.

A. *The Failure to Resolve the Crucial Question of Fact*

The Court in *Wade* observed that “we need not resolve the difficult

²⁴ 410 U.S. at 141.

²⁵ *Id.* at 141-42.

²⁶ CONG. GLOBE, 39th Cong., 1st Sess. 1089 (1866).

²⁷ *Id.* at 2766.

²⁸ 410 U.S. at 141.

question of when life begins."²⁹ But the Court erred at the threshold when it failed to determine whether an individual life has already begun before an abortion takes place. There is a "long course of judicial construction which establishes as a principle that the duty rests on this Court to decide for itself facts or constructions upon which federal constitutional issues rest."³⁰

The Court noted, in justification of its position, a lack of "consensus" on the point.³¹ However, the lack of consensus is not on the *fact* of life before birth—that is established beyond dispute by medical scientific evidence—but on the value of unborn human life. And that value judgment was made over 100 years ago by the framers of the Fourteenth Amendment.

B. The Failure to Allude to the Court's Own Explication of "Person" Under Section One of the Fourteenth Amendment.

In *Levy v. Louisiana*, the Supreme Court identified the human persons protected by the equal protection clause as those who are "human, live and have their being."³² Further, in matters touching constitutional concepts of equality, government is not free to ignore the relevant "biological relationships."³³ Had the Court adverted to *Levy*, it would have been required to find that unborn children, all of whom are human, live and have their being, are, by that fact alone, Fourteenth Amendment persons.

C. Misunderstanding of the General Status in Law of Unborn Children.

Touching briefly on tort and property law, the *Wade* Court concluded that "the unborn have never been recognized in the law as persons in the whole sense."³⁴ The more startling error is the Court's complete omission even to mention those cases in which, contrary to purported rights of free religious exercise and personal and family privacy, courts have ordered blood transfusions of pregnant women to save the lives of their unborn children because the children "are entitled" to the law's protection.³⁵ Given the circumstances of these cases, only the unborn child's rights (as

²⁹ *Id.* at 159.

³⁰ *Napue v. Ill.*, 360 U.S. 264, 272 (1959), quoting *Kern-Limerick, Inc. v. Scurlock*, 347 U.S. 110, 121 (1954).

³¹ 410 U.S. at 159.

³² 391 U.S. 68, 70 (1968), citing Note, *The Rights of Illegitimates Under Federal Statutes*, 76 HARV. L. REV. 337 (1962).

³³ *Glonn v. Am. Guar. Co.*, 391 U.S. 73, 75-76 (1968).

³⁴ 410 U.S. at 162. The unequivocal status of the unborn child as a legal person in these areas of law has been analyzed at length. See, e.g., Note, *The Law and The Unborn Child: The Legal and Logical Inconsistencies*, 46 N.D. LAW. 349, 351-60 (1971).

³⁵ *Estate of Warner*, No. 71 P. 3861 (Cir. Ct., Cook City, Ill., May 5, 1971); *Raleigh Fitkin-Paul Morgan Mem. Hosp. v. Anderson*, 42 N.J. 421, 201 A.2d 537, cert. denied, 377 U.S. 985 (1964); cf. *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (1961).

a legal person) to live and to the law's protection could have justified the Court's decisions.

To go on with the Supreme Court's errors would consume the rest of the morning. I have analyzed elsewhere³⁶ certain gratuitous statements by the Court³⁷ intended as negative criteria of the unborn child's personhood.

Wade has a veneer of scholarship but it is only that and nothing more. Beneath the surface, there is little that is not error.

IV. The Dangerous Implications

The errors in *Wade* are fundamental; the implications of the opinion are frightening.

A. Compulsory Abortion

It must be remembered that the Court in *Wade* rejected any absolute right of a woman to choose whether or not to abort, and premised its holding on a limited right of privacy, subordinate to compelling state interests.³⁸ As one example of an appropriate state limitation on the right of privacy, the Court cited *Buck v. Bell*³⁹ which upheld the validity of a state statute providing for compulsory sterilization of mental defectives whose affliction is hereditary. The State "interest" in that situation was, of course, in preventing the proliferation of defectives.

It has been thought that *Buck v. Bell* died after the Nazi experience, and its revival now is rather frightening. By implication in *Wade*, the Court espoused the constitutional validity of state-imposed, compulsory abortion of unborn children diagnosed in utero as mentally defective. Neither the child's constitutional rights (of which the Court could find none) nor the mother's right of privacy (which the Court, by citing *Buck*, found limited by the state's "interest" in preventing the birth of mental defectives) could, according to the theory of *Wade*, be interposed to challenge such a statute.

B. Involuntary Euthanasia

Also very real and very frightening is the prospect of involuntary euthanasia. The Court in *Wade* refused to "resolve the difficult question of when life begins [because] medicine, philosophy, and theology are unable to arrive at any consensus,"⁴⁰ even though the Court expressed its awareness of "the well-known facts of fetal development."⁴¹ As previously

³⁶ Byrn, *supra* note 18.

³⁷ 410 U.S. at 157 nn.53 & 54.

³⁸ *Id.* at 155-56.

³⁹ 274 U.S. 200 (1927).

⁴⁰ 410 U.S. at 159.

⁴¹ *Id.* at 156.

pointed out, the controversy to which the Court referred involves not whether abortion kills a live human being, but whether that live human being is worth keeping alive or, to put it another way, whether he may be killed with impunity. The determination is not a factual one but a value judgment on whether the life of a human being, distinguishable from other human beings only by kind and degree of dependency, is meaningful. Thus in *Wade*, the Court held: "With respect to the State's important and legitimate interest in potential life, the 'compelling point' is at viability. This is so because the fetus then presumably has the capability of *meaningful* life outside the mother's womb."⁴²

The same kind of controversy might very well arise with respect to the end of life. Because of illness, age or incapacity, a live human being, indistinguishable from other live human beings except by kind and degree of dependency, might be claimed by some in the disciplines of medicine, philosophy and theology to be no longer alive in a "meaningful" way.

Given a carefully orchestrated controversy and the Court's unwillingness in *Wade* to recognize the fact of life unless there is a "consensus" on its value, a state might persuasively claim that it is free to remove a live human being (e.g., a senile elderly person) from the law's protection. Just as the *Wade* Court redefined the beginning of life as a "process,"⁴³ so too might death be viewed as a process which may be hastened by those who find that the care of a dependent live human being has forced upon them (as the Court said of the unwanted child in *Wade*) "a distressful life and future."⁴⁴

Conclusion

Three generations of Americans have witnessed Supreme Court decisions which have explicitly degraded a whole class of fellow human beings to something less in law than "persons in the whole sense." One generation was present at *Dred Scott v. Sandford*,⁴⁵ another at *Buck v. Bell*, and now a third at *Roe v. Wade*. Three generations of error are more than enough. And the last shall be called the worst.

⁴² *Id.* at 163 (emphasis added).

⁴³ *Id.* at 161.

⁴⁴ *Id.* at 153.

⁴⁵ 60 U.S. (19 How.) 393 (1856).