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JUSTICE O'CONNOR, THE CONSTITUTION, AND THE TRIMESTER APPROACH TO ABORTION: A LIBERTY ON A COLLISION COURSE WITH ITSELF

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When the United States Supreme Court handed down its most recent ukase on the abortion liberty in *Akron v. Akron Center for Reproductive Health, Inc.*,¹ I, like so many people concerned with the protection of the unborn, initially reacted with despair. The total victory of the abortion ideology over biological reality and human compassion appeared to be reflected in the Court's intolerance for even the most insignificant restrictions on abortion passed by democratically elected state and local legislatures.² Indeed, the *Akron* case, which struck down a number of provisions of a local ordinance regulating the performance of abortions in Akron, Ohio, seemed to declare the nearly absolute nature of the abortion liberty (and perhaps the ultimate extension of the culture of the "me generation") when it invalidated, as impermissibly vague under the due process clause of the fourteenth amendment, a provision of the ordinance requiring abortionists to "insure that the remains of the unborn child are disposed of in a humane and sanitary manner."³ Astonishingly, not only

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¹ 462 U.S. 416 (1983). As Professor John T. Noonan, Jr. recently observed, the abortion clinic referred to in the title of the *Akron* case was "named with Orwellian aptness." Noonan, *The Root and Branch of Roe v. Wade*, 63 *NEB. L. REV.* 668, 675 (1984).

² See Noonan, *supra* note 1, at 677.

³ *Akron*, 462 U.S. at 751-52. As further evidence of the proliferation of the politics of self-interest, consider Germaine Greer's recent argument that abortion "is not a stopgap be-

did the abortion liberty override the right to life of the prenatal human being, it also transcended his or her entitlement to a minimally decent interment. However, more than a year has passed since the *Akron* decision, and, on reflection, it appears that the seeds of destruction of the abortion liberty are contained in both Justice Powell's insecure majority opinion, and Justice O'Connor's powerful dissent.

I. ROE V. WADE AND THE ABORTION LIBERTY

The constitutional liberty of abortion in the United States was invented not by the Framers of our written Constitution, but rather by Justice Blackmun and six of his colleagues on the Supreme Court in *Roe v. Wade*,⁴ a 1973 decision that regrettably remains the law of the land. The *Roe* Court held that the abortion liberty is a fundamental constitutional right that can be restricted only on the basis of a so-called "compelling" state interest;⁵ that the state's interest in protecting the health of the mother becomes "compelling" at approximately the end of the first trimester of pregnancy, because medical evidence existing in 1973 established that "until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth";⁶ and that the state's interest in protecting the "potential life" of the unborn child becomes "compelling" at viability, "because the fetus then presumably has the capability of meaningful life outside the mother's womb."⁷

Under this trimester (or three-stage) approach to the abortion liberty, the state is powerless to inhibit the mother's choice of abortion for approximately the first three months of her pregnancy, because the government's interest in protecting the life of the child and the health of the mother is superseded by the mother's right of privacy.⁸ Therefore, in the first stage of her pregnancy a woman is free to abort her unborn son or daughter for any reason, or for no reason at all. The conscience of the mother offers the only hope that the life of the child may be spared.⁹

During the second stage of the *Roe* formulation, beginning at "approximately the end of the first trimester," the state may regulate the

tween here and some future perfect contraceptive; it can very well be the chosen method of birth control for more and more women." G. GREER, *SEX AND DESTINY: THE POLITICS OF HUMAN FERTILITY* 231 (1984) (emphasis added).

⁴ 410 U.S. 113 (1973).

⁵ *Id.* at 153-56.

⁶ *Id.* at 163.

⁷ *Id.* "If a moving, kicking, urinating baby is only potential life, it would be instructive to know what actual life is." Noonan, *The Akron Decision: A Pragmatic Politician's Parody of Solomon*, *HUMAN LIFE REV.* 16 (Summer 1983).

⁸ See *Roe*, 410 U.S. at 163-64.

⁹ See J. NOONAN, *A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES* 10 (1979).

abortion procedure in ways that are reasonably related to maternal health.¹⁰ Thus, at least some laws governing the place and manner of abortions are permissible at this point.¹¹ Justice Blackmun's myopic view of the Constitution, however, continues to prevent representative government from protecting the life of the child against the will of the gravida.¹²

The state's interest in preserving the life of a child was not recognized as compelling by the *Roe* majority until the third stage of pregnancy, the point of "viability."¹³ According to the Court, viability occurs when the child is "potentially able to live outside the mother's womb, albeit with artificial aid."¹⁴ During this period, the state may act on behalf of the child by regulating or even prohibiting abortion, "except where [abortion] is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother."¹⁵ Applying the logic of the character Major Major from the novel *Catch 22*,¹⁶ the Supreme Court of the United States concluded that not until the child was able to live on its own outside the womb could its existence in the womb be protected by the state. However, even this slight recognition of the state's interest in protecting the life of the unborn child was cruelly deceptive, because Justice Blackmun's insensitive interpretation of the Constitution demanded that a viable child's right to existence must yield to his or her mother's interest in "health," defined in *Roe*'s companion case, *Doe v. Bolton*,¹⁷ in terms of maternal well-being "in the light of all factors—physical, emotional, psychological, familial, and the woman's age."¹⁸ As Professor Noonan has observed, the abortion liberty created in *Roe* extends throughout the nine months of pregnancy subject to only two restrictions—the mother "must find a licensed clinic after month three; and, after her child [is] viable, she must find an abortionist who believe[s] she need[s] an abortion."¹⁹

II. THE Akron CASE

The plaintiffs in *Akron*, an abortionist and three abortion clinics, challenged the constitutionality of five provisions of a local ordinance,

¹⁰ *Roe*, 410 U.S. at 163.

¹¹ *See id.*

¹² *See J. NOONAN, supra note 9, at 11* ("liberty to abort remained in its essentials absolute").

¹³ *Roe*, 410 U.S. at 163.

¹⁴ *Id.* at 160.

¹⁵ *Id.* at 163-64.

¹⁶ J. HELLER, *CATCH 22*, 97-98 (1961).

¹⁷ 410 U.S. 179 (1973).

¹⁸ *Id.* at 191-92.

¹⁹ *See J. NOONAN, supra note 9, at 12; see also Colautti v. Franklin*, 439 U.S. 379 (1979) (striking down on vagueness grounds post-viability standard of care provision).

duly enacted by the city council of the municipality, regulating the performance of abortions. Specifically, those provisions: (1) required all abortions taking place after the end of the first trimester to be performed in certain accredited hospitals; (2) provided for notification of and consent by parents prior to performance of abortions on unmarried minors; (3) required the attending physician to make specified statements concerning the status of the pregnancy, potential risks and complications of the abortion procedure, and the characteristics, development, and humanity of the unborn child from the moment of conception; (4) required a 24-hour waiting period between the time the woman signed a form of consent and the time the abortion was to be performed; and (5) required the abortionist to insure that the remains of the aborted infant were "disposed of in a humane and sanitary manner."²⁰ Justice Powell and the majority in *Akron* reaffirmed *Roe* and the trimester approach,²¹ and held that each of the challenged provisions was unconstitutional.²²

A. Justice O'Connor's Dissent

The dissenting opinions of today frequently become the majority opinions of tomorrow. In the *Akron* case, Justice Sandra Day O'Connor authored a powerful dissent that fell only two votes short of restoring reverence for prenatal human life to our Constitution. Justice O'Connor's approach to the abortion issue is two fold. First, she rejected the *Roe* trimester approach as an inappropriate framework for reviewing challenges to abortion legislation.²³ Second, she offered a substitute test that recognizes that (1) a challenged regulation is subject to strict constitutional scrutiny only if it "unduly burdens the right to seek an abortion," and (2) the state's compelling interests in promoting maternal health and protecting the life of the unborn child are present *throughout the nine months of pregnancy*.²⁴ The startling contrast between Justice O'Connor's bold, realistic approach to the abortion question and Justice Powell's uncertain adherence to *stare decisis* and the fiction of the *Roe* trimester approach is encouraging, particularly when one anticipates the prospect of upcoming personnel changes on the antediluvian Supreme Court.²⁵

²⁰ *Akron*, 462 U.S. at 422-24.

²¹ *Id.* at 429 n.11.

²² *Id.* at 452.

²³ *Id.* (O'Connor, J., dissenting).

²⁴ *Id.* at 453, 459 (O'Connor, J., dissenting) (emphasis added).

²⁵ Five members of the *Akron* majority—Chief Justice Burger and Justices Brennan, Marshall, Blackmun, and Powell—are older than 75 years of age.

1. *The Trimester Approach*

As previously noted, the trimester approach adopted by the Court in *Roe* attempts to resolve the conflict between individual rights and state interests by dividing the human gestation period into three approximately equal stages. Those lines were drawn based upon the Court's understanding of the state of medical knowledge existing at the time *Roe* was decided. Thus, since the respective rates of mortality indicated that abortion was safer than childbirth until the end of the first trimester, the Court reasoned that the state's interest in regulating abortion to further maternal health did not become compelling until the second trimester.²⁶ Likewise, because the Court closed its eyes to the essential humanity of the unborn child until the point of viability, the state's interest in acting to protect unborn life did not become compelling until the third trimester of pregnancy.

The basic flaw inherent in the trimester approach is that it is based on the unrealistic premise that the state's compelling interests in regulating and restricting abortions ripen at some arbitrary point in time.²⁷ Clearly, the state has a strong interest in protecting maternal health and fetal life through the nine months of pregnancy. Although abortion may have a lower mortality rate than childbirth during the first trimester of pregnancy, it does not follow that unregulated abortions are as safe as regulated ones, or that the state has no interest in ensuring that abortions are performed as safely as possible during all stages of pregnancy.²⁸ Similarly, the state's interest in protecting the potential life of the unborn child does not commence at viability; "[a]t any stage in pregnancy, there is the *potential* for human life."²⁹ Therefore, it is absurd to proscribe the state from regulating the safety of the abortion procedure during any particular stage of pregnancy, and, it is insensitive to compel the state to close its eyes to the biological reality of human life in the womb prior to the point of viability.³⁰

Moreover, recent developments in medical science lessening the risks to the mother of various second-trimester abortion procedures and pushing backward toward conception the point of fetal viability have blurred the arbitrary lines drawn by the Supreme Court in *Roe*. For example, increased use of the dilation and evacuation (D & E) procedure and the prostaglandin technique in second-trimester abortions have resulted in a

²⁶ *Roe*, 410 U.S. at 163.

²⁷ See *Akron*, 463 U.S. at 459 (O'Connor, J., dissenting).

²⁸ See *id.*; Epstein, *Substantive Due Process By Any Other Name: The Abortion Cases*, SUP. CT. REV. 159, 182-183 (1973).

²⁹ *Akron*, 462 U.S. at 461. (O'Connor, J., dissenting) (emphasis in original).

³⁰ See NOONAN, *supra* note 7, at 13-17.

significantly lower maternal death-to-case ratio for these abortions.³¹ Similarly, Justice O'Connor pointed to medical evidence of fetal viability much earlier than the 24 to 28 weeks suggested by the Court in *Roe*, and stated that "[i]t is certainly reasonable to believe that fetal viability in the first trimester of pregnancy may be possible in the not too distant future."³² Thus, under the *Roe* formulation, the state's interest in regulating abortion to promote maternal health is continually moving forward toward the time of birth, while its interest in acting to protect unborn life is moving backward toward conception. As this scientific reality intrudes upon the artificial logic of the abortion liberty, it becomes evident that the days of the trimester approach are numbered. In the words of Justice O'Connor, the *Roe* formulation is "clearly on a collision course with itself."³³

Justice O'Connor's assault on the *Roe* rationale has disquieted proponents of the trimester approach and sharpened the arguments of those who have recognized its irrationality. Nevertheless, the *Akron* Court clung desperately to this approach despite technological advances that have emasculated its credibility. To see how the majority and dissenting opinions in *Akron* responded to the scientific developments, let us focus on their respective analysis of three provisions in the *Akron* ordinance: the post-first-trimester hospitalization requirement, the informed consent requirement, and the 24-hour waiting period.

1. Hospitalization

Section 1870.03 of the *Akron* ordinance, which required all abortions taking place after the end of the first trimester to be performed in accredited hospitals, appeared to be a permissible second trimester maternal health regulation under *Roe v. Wade*. Indeed, in *Roe*, Justice Blackmun expressly referred to a second trimester hospitalization requirement as an example of a valid state regulation.³⁴ Both the district court,³⁵ and the Court of Appeals for the Sixth Circuit³⁶ upheld the constitutionality of the requirement. Remarkably, the Supreme Court reversed and, without abandoning the trimester framework, held that section 1870.03 was an

³¹ See Cates, Schulz, Selik, Smith & Tyler, *Second Trimester Induced Abortion in the United States*, in *SECOND TRIMESTER ABORTION: PERSPECTIVES AFTER A DECADE OF EXPERIENCE* 17-20 (1981); see also *Akron*, 462 U.S. at 436-37.

³² *Akron*, 462 U.S. at 457 (O'Connor, J., dissenting) (emphasis added).

³³ *Id.* (O'Connor, J., dissenting).

³⁴ *Roe*, 410 U.S. at 163.

³⁵ See *Akron Center for Reproductive Health, Inc. v. City of Akron*, 479 F. Supp. 1172 (N.D. Ohio 1979), *aff'd in part, rev'd in part*, 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 462 U.S. 416 (1983).

³⁶ See 651 F.2d 1198 (6th Cir. 1981), *aff'd in part, rev'd in part*, 462 U.S. 416 (1983).

unconstitutional "obstacle in the path of women seeking an abortion."³⁷

Justice Powell obviously was uneasy with the intellectual contortion that was required to uphold the trimester framework while striking down the hospitalization requirement of the Akron ordinance. His approach was to take cover behind the doctrine of *stare decisis*, while simultaneously improvising a new amendment to the Constitution requiring state legislators to keep current with advances in medical knowledge, to tailor second-trimester abortion legislation to "accepted medical practice," and to limit the effect of maternal health regulations to the period in the trimester during which the state's health interest is furthered.³⁸ Thus, since present medical knowledge teaches that some second trimester abortions may be performed safely in an outpatient abortion clinic, the hospitalization requirement was inconsistent with the abortion liberty and therefore invalid.³⁹ This holding is astonishing, because it requires the state to confine its health regulations concerning abortion to the minimum standards of the industry being regulated. It is as though the Court were to hold that in matters of environmental policy representative government must conform its regulations to the standards of the polluting industries. Yet all this is mandated by Justice Powell's freestyle perception of our written Constitution!

Justice O'Connor's analysis is more realistic. The dissent pointed out that *stare decisis* is not an absolute principle and, that " 'when convinced of former error, this Court has never felt constrained to follow precedent' " in determining constitutional questions.⁴⁰ Justice O'Connor also challenged the notion that the Constitution requires the state to "continuously and conscientiously study contemporary medical and scientific literature [in order to ensure that regulations intended to protect the health of its citizens do not] 'depart from accepted medical practice.' "⁴¹ Simply stated, Justice O'Connor concluded that both logic and sound constitutional theory reject any analytical approach to the abortion question "that varies according to the 'stages' of pregnancy, where those stages, and their concomitant standards of review, differ according to the level of medical technology available when a particular challenge to state

³⁷ *Akron*, 462 U.S. at 434.

³⁸ *Id.* at 431.

³⁹ *Id.* at 435-37. "By preventing the performance of D & E abortions in an appropriate nonhospital setting, Akron has imposed a heavy, and unnecessary, burden on women's access to a relatively inexpensive, otherwise accessible, and safe abortion procedure. Section 1870.03 . . . therefore unreasonably infringes upon a woman's constitutional right to obtain an abortion." *Id.* at 438 (footnote omitted).

⁴⁰ *Id.* at 458 (O'Connor, J., dissenting) (quoting *Smith v. Allwright*, 321 U.S. 649, 665 (1944)).

⁴¹ *Id.* at 456 (O'Connor, J., dissenting).

regulation occurs."⁴²

Having first rejected *Roe v. Wade* and the trimester framework,⁴³ Justice O'Connor proposed a realistic and workable alternative approach for constitutional challenges to abortion legislation. First, the Court should consider whether the legislation "unduly burdens" the woman's right to choose abortion. If the impact of the regulation is not "unduly burdensome," the legislation will be upheld provided it is supported by a rational basis.⁴⁴ Apparently, Justice O'Connor would give great weight to the considered judgment of the state legislatures and would find an undue burden only in situations involving "absolute obstacles or severe limitations on the abortion decision."⁴⁵ Second, if it is determined that the legislation is "unduly burdensome," the state would be required to justify the restriction by demonstrating that it is supported by a compelling state interest.⁴⁶ However, unlike the *Roe* formulation, Justice O'Connor's test recognizes that the state has compelling interests in promoting maternal health and protecting the life of the unborn child throughout the nine months of pregnancy.⁴⁷

It appears that even an outright prohibition of abortion would be valid under Justice O'Connor's approach, at least so long as the proscription contained an exception for abortion in cases in which the mother's life was threatened by the continuation of the pregnancy. Thus, under the O'Connor view, the Akron hospitalization requirement would have been upheld; it was not unduly burdensome because it did not interfere with the woman's abortion decision, and it was rationally related to the state's legitimate interest in promoting maternal health.⁴⁸

2. Informed Consent

Section 1870.06(B) of the Akron ordinance was designed to ensure that women engage in rational self-direction when deciding whether to abort an unborn child. Prior to performing an abortion on a pregnant woman, the attending physician was required to make a number of specified statements to the woman concerning the status of her pregnancy, the potential risks and complications of abortion, and the characteristics, development, and humanity from the moment of conception of her unborn child. Additionally, section 1870.06(C) required the attending physician to advise the woman of the "particular risks" associated with her own

⁴² *Id.* at 452 (O'Connor, J., dissenting).

⁴³ *Id.* at 453-54 (O'Connor, J., dissenting).

⁴⁴ *Id.* at 463-65 (O'Connor, J., dissenting).

⁴⁵ *Id.* at 463-64 (O'Connor, J., dissenting).

⁴⁶ *Id.* at 464 (O'Connor, J., dissenting).

⁴⁷ *Id.* at 459 (O'Connor, J., dissenting).

⁴⁸ *Id.* at 466-67 (O'Connor, J., dissenting).

pregnancy and the abortion technique to be performed on her.⁴⁹

Justice Powell held that section 1870.06(B) was an invalid obstacle in the path of the abortion liberty inasmuch as it intruded upon the discretion of the attending physician and because "much of the information required is designed not to inform the woman's consent but rather to persuade her to withhold it altogether."⁵⁰ Moreover, the provision requiring the physician to inform the woman that her unborn child is a human life from the moment of conception was inconsistent with *Roe* in that it adopted a particular "theory of when life begins to justify its regulation of abortions."⁵¹

Section 1870.06(C) posed a different question; even Justice Powell had to admit that the required information concerning the risks of a particular case was clearly related to the state's legitimate interest in promoting maternal health and informed consent.⁵² However, Justice Powell's view of the Constitution nevertheless was offended by this provision, because it unreasonably required the disclosures to be made by the attending physician rather than by some other qualified individual.⁵³

It is astonishing that Justice Powell could discern all of this in our written Constitution—not only does the right to an abortion prevent the state from prohibiting the destruction of innocent human life, it also acts as a censor against the state's efforts to have the truth about abortion and human life spoken to a female citizen engaged in what well may be the most important decision of her life.⁵⁴ Surely the state has a sufficient interest in the well-being of unborn children about to be put to death to support its attempt to intercede for mercy on their behalf.

Under Justice O'Connor's approach to the abortion liberty, the informed consent provisions would have been upheld.⁵⁵ They did not impose an "undue burden or drastic limitation" on the abortion decision, and they were clearly related to the state's legitimate interest in ensuring that the woman's decision of childbirth or abortion is made intelligently.⁵⁶

⁴⁹ *Id.* at 423 n.5.

⁵⁰ *Id.* at 444.

⁵¹ *Id.*

⁵² *See id.* at 446.

⁵³ *See id.* at 448.

⁵⁴ *See Noonan, supra* note 7, at 13.

⁵⁵ *See Akron*, 462 U.S. at 471-72 (O'Connor, J., dissenting). Justice O'Connor did not analyze the constitutionality of the most controversial provisions, because the City of Akron had conceded their unconstitutionality in the proceedings before the lower courts. However, they would appear to be valid under her two-part framework for analyzing challenges to abortion legislation. *See id.* at 453, 459.

⁵⁶ *See id.* at 470-72 (O'Connor, J., dissenting). However, because the plaintiffs in Akron did not raise first amendment objections to the legislation, Justice O'Connor did not consider

3. The 24-Hour Waiting Period

Section 1870.07 of the Akron ordinance provided that no abortion could be performed until 24 hours had elapsed from the time the pregnant woman signed a form of consent.⁵⁷ This requirement was designed to allow the woman a brief opportunity for reflection before making a final decision concerning the handling of her pregnancy. In light of the grave and irreparable consequences of abortion for the being in the womb facing extinction, a 24-hour waiting period would seem to be only a small burden on the woman's freedom. Surely if the abortion liberty were not absolute, this provision ought to have been valid. Moreover, it is at least arguable that the requirement actually *enhances* the woman's exercise of her right to decide the outcome of her pregnancy, because it allows her to consider carefully the information provided her by (or on behalf of) the attending physician. However, Justice Powell recoiled in horror when he discovered that this small concession on behalf of unborn life and informed consent would increase the cost of the abortion "by requiring the woman to make two separate trips to the abortion facility," and held that the "arbitrary and inflexible waiting period" was violative of the Constitution.⁵⁸ The state was without power to require even a short delay in a woman's decision to abort.⁵⁹

Again, under Justice O'Connor's approach, the waiting period would have been upheld.⁶⁰ The dissent found that the increased costs resulting from the requirement were not unduly burdensome, and that, in any event, "the state's compelling interests in maternal physical and mental health and protection of fetal life clearly justify the waiting period."⁶¹

CONCLUSION

If abortion is not wrong, nothing is wrong.⁶² Friends of the unborn should not be discouraged by the Supreme Court's most recent decision in the *Akron* case. Although the case reaffirms *Roe v. Wade* and appears to signify the Court's acceptance of a nearly absolute abortion liberty, it

whether the provisions violated the first amendment by requiring the physician to communicate a particular ideology to the pregnant woman. *Id.* at 472 n.16 (O'Connor, J., dissenting).

⁵⁷ *Id.* at 460 n.6. This waiting period was not required for abortions involving medical emergencies. *See id.* at 449 n.42.

⁵⁸ *Id.* at 450.

⁵⁹ *Id.*

⁶⁰ *Id.* at 473-74 (O'Connor, J., dissenting).

⁶¹ *Id.* (O'Connor, J., dissenting).

⁶² *Cf. Steiner, Slavery, Socialism, and Private Property*, in *NOMOS XXII: PROPERTY* 244 (1980) (quoting Abraham Lincoln's perception of slavery: "[i]f slavery is not wrong, nothing is wrong.").

also introduces a new voice for life on the Supreme Court, Justice Sandra Day O'Connor. The contrast between Justice O'Connor's powerful, realistic, and articulate dissent and Justice Powell's weak, myopic, and illogical majority opinion is startling. Clearly, the days of the trimester approach are numbered, and Justice O'Connor has proposed a thoughtful alternative that recognizes the State's strong interests in protecting maternal health and unborn human life throughout the nine months of pregnancy. I believe we are near the end of our long wait to see reverence for prenatal human life restored to the Constitution.