

Consent to what? And other foibles

By John E. Archibold

Don't be fooled by the ambiguous and seemingly innocuous title of this article. It's a lot more serious and history shaping than it might first appear. It is my hope that this article will help us think more clearly about legally securing the human right to life.

In 1967, Colorado was the first state in the nation to allow abortion, by way of a positive law, for certain "hard" cases such as life of the mother, rape, incest and fetal deformity. Prior to that time, some states provided "hard" case affirmative defenses to criminal prosecutions for abortion, but an affirmative defense is categorically different and distinct from positive *permission* by statute. As practically everyone knows, 35 years ago, the United States Supreme Court, in a 7-2 decision, overturned the abortion laws of all 50 states in *Roe v. Wade*.

It would be a historical inaccuracy and oversimplification to assume that there was a response to *Roe* by the pro-life community. After all, there is no one pro-life community. Instead, there are a number of organizations and aggregates of people who lay claim to the title of being "pro-life."

Consequently, there has been no single response—legal, political or otherwise—to the tragedy that is embodied in *Roe*. Since that massive hammer blow against what many of us believed was an impregnable given, to wit, the sanctity of life in American jurisprudence, it is probably understandable that there was and is confusion and disagreement about the best way to respond. Hence, those of us who believe in the sanctity of life were hurled into the position of playing defense.

Two predominant approaches

It has been said that there are two basic but incompatible approaches of responding to *Roe*.

One approach has been described as the "all-or-nothing" strategy. It seeks the protection of all persons from

the moment of fertilization. This is also called a "hammer" or "purist" or "ideological" approach.

The other approach has been described as "incremental" and it is framed as the "realistic" or "chipping away" method, in addition to a "practical" approach.

At this point, it's important to distinguish that in some situations, an "incremental" tactic may well be appropriate and not in violation of the moral law or sound legal principles. For example, banning the method of partial-birth abortion would have been a legitimate incremental step.

However, the Partial-Birth Abortion Ban Act of 2003, passed by Congress and signed into law by President George W. Bush, contains exceptions. It says, "Any physician who, in or affecting interstate or foreign commerce, knowingly performs a partial-birth abortion and thereby kills a human fetus shall be fined under this title or imprisoned not more than 2 years, or both. This subsection does not apply to a partial-birth abortion that is necessary to save the life of a mother whose life is endangered by a physical disorder, physical illness, or physical injury, including a life-endangering physical condition caused by or arising from the pregnancy itself."

Therefore, this law is not a ban. Instead, an abortionist could manufacture an excuse under the stated "exceptions." Accordingly, the act really does nothing to save a baby from an abortionist who wants to kill him or her via the torturous procedure of vacuuming out the child's brains.

Other incremental approaches are not only morally wrong, but also tactical and strategic disasters. Let's take a hard and sensible look at one area where this has occurred: namely, "informed-consent" laws.

Informed-consent precedents

While I do not know how many "consent" laws are on the books or how many survived (or in what manner, if at all) the various judicial challenges by pro-abortion forces, it's important to consider this tactic and its implications. Moreover, if some informed-consent laws pass judicial muster, isn't this a

good thing to be celebrated? Are not these proposals or laws sponsored by pro-life legislators and opposed by pro-abortion forces in state legislatures and Congress? If the pro-life legislators are for it and the pro-abortion forces are against it, isn't that a sign that the bill is good and should be supported? And besides, will not these kinds of laws cut down on the incidences of abortion and save lives? To answer these questions, let's look at one example.

Last year on January 22, Senate Bill 356 was introduced in the United States Senate by a veritable litany of pro-life senators. A twin bill was submitted to the U.S. House of Representatives. Both are entitled the Unborn Child Pain Awareness Act of 2007.

The stated purpose of this proposed legislation is to ensure that women seeking abortions are fully informed regarding the pain that would be felt by an unborn child during an abortion. The legislation would require the pregnant mother seeking an abortion to explicitly request or refuse the administration of pain-reducing drugs, such as anesthesia, to her unborn child. It would require that a form be signed indicating the woman's receipt of the aforesaid pain-reducing information and indicating her choice as to its administration or non-administration to the unborn victim. The abortion provider would be required to sign a statement that he has complied with the notification to the mother on a form that would be developed by the U.S. Department of Health and Human Services.

However, the informed-consent provisions of the Senate bill's Section 2902 "shall not apply to the abortion provider in the case of a medical emergency."

Apparently the sponsors of the act are hopeful that knowledge of an unborn child's capacity for pain during the abortion procedure will encourage some women not to have an abortion, or if she decides to have the abortion anyway, at least the mother could choose to reduce her child's pain. So, how could anyone who is pro-life *not* support such legislation as the Unborn Child Pain Awareness Act? Furthermore, if this bill is passed by Congress and signed by the president, but only effectively stops a few abortions, isn't the bill worth it to save *some* lives? And what's wrong with the act?

This act, like many of its antecedents in federal and state arenas, attempts to reduce abortion by unwittingly or unknowingly *enshrining* direct abortion as legitimate or lawful, *so long as certain conditions are present and certain requirements have been met*. Put succinctly, the Unborn Child Pain Awareness Act would further cement into the legal and psychic fabric of our laws and culture the horrible legal doctrine and immoral principle meaning that it's okay to commit a bedrock injustice, the murder of an innocent human being, as long as the mother and the abortionist comply with certain procedural requirements.

In short, the underlying legal and moral premise of the Unborn Child Pain Awareness Act is not that abor-

tion is wrong, but that the abortionist is at legal risk if he fails to comply with the procedural requirements—albeit, requirements with an “emergency” exception left to the abortionist's discretion.

Ultimately, all the argumentation over pragmatic outcomes is beside the point, since the Unborn Child Pain Awareness Act flies in the face of two eminent moral imperatives: the inalienable right to life and the maxim that *it is never* (not sometimes) *right to do wrong*.

The legitimate solution to informed consent is *information*. A law requiring that “healthcare workers” inform all pregnant mothers with a pamphlet that shows and explains the human child's development *in utero* would be a legitimate incremental method. Furthermore, the pamphlet should include information on the unborn child's capacity for pain. So, effectively, abortion would not be recognized as a legitimate procedure or occupation and all mothers would be given the opportunity to be informed.

What now?

Many pro-life groups and lawmakers in the past 40 years have bobbed, weaved and swerved around the abortion crisis instead of confronting it head-on. Had pro-lifers been united in confronting legalized abortion head-on by relentlessly and consistently working towards the Human Life Amendment to the U.S. Constitution *year after year*, perhaps we would have passed it by now.

Now there are real opportunities. So, let us keep the flame alive in proclaiming and working for what God wants us to do—to love Him and our neighbors, including the unborn. Let us resolve to love the unborn and not destroy them by misguided legislation that, however unwittingly, is a compromise with evil and unwise.

Now overcoming the *Roe* decision by legally declaring that human beings are persons from the moment of fertilization is a real possibility. In my home state, Colorado for Equal Rights urgently needs help getting its human life amendment passed. Georgia Right to Life needs help getting a human life amendment passed and, in Mississippi, Pro-Life Generation needs help. In Montana, State Representative Rick Jore is working to get an amendment to the voters as well.

I am doing my part. Will you work towards a human life amendment in your home state?

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