

# BIOETHICS MATTERS ENJEUX BIOÉTHIQUES

November 2013

Volume 11, Number 5

---

## **Gradual Shifts in Abortion Laws: Will they be effective?**

*Moira McQueen, LLB, MDiv, PhD*

One of the interesting developments in the area of abortion is a small but real shift in the laws in some States in the US. As we know, Canada continues without a law regulating abortion, meaning that a woman could technically obtain an abortion right up until delivery. The reason is that the Canadian Criminal Code defines “person” as someone who has been completely delivered from the birth canal of his or her mother.<sup>1</sup> Until then, a child is not deemed to be a person, which means that the child has no rights whatsoever.

At the beginning of the journey down the birth canal the baby makes it known that it is positioning itself to enter the world, and, as the mother’s contractions intensify, maternity staff prepare to help guide its entrance into the world, intervening only when necessary to aid the process. The feelings of excitement, awe, relief and gratitude that occur when the baby finally appears are intense. Thank God, we say! Thank God, too, for all the personnel involved in safely delivering a new human infant. Everyone present *knows* this is a baby, a tiny human being, an independent and unique person, yet our law insists that he or she is not *legally* a person in Canada until “completely delivered from the birth canal.”

Why is legality so far from reality in this situation? The definition of “person” has been deliberately crafted and manoeuvred, so that *only* the mother has rights: she is a person, her unborn child is deemed by law not to be so. If an unborn person had rights then that would affect its mother’s absolute rights. We need to realize that this political agenda has shaped the way our society treats babies in the womb to their detriment. The fact that a child in the womb has no rights at all is so counter to logic that, unfortunately, even most Catholics do not fully appreciate the negative implications of the Code.

The steadfast refusal of the present government to review or amend this state of affairs is ostrich-like: if it is ignored, the issue will go away. (Not surprisingly, it does not). It is becoming increasingly clearer that political leaders do not want to risk losing votes in this contentious and divisive area. Sometimes people ask why the Catholic Church continues to oppose abortion, believing it to be a settled issue or a lost cause. Part of the answer is that many pro-life people continue to demonstrate the virtue of fortitude, one of the four cardinal virtues. This enduring conviction that killing a child is never a solution to a personal or social problem is beginning to show some results. In some countries and in the USA in particular, those with such endurance are now beginning to influence abortion legislation.

A glimmer of hope...

- Over the past few years, fifty bills have been enacted or introduced in the US at the state level to do with abortion.
- Restrictive abortion legislation has been introduced in 32 states.<sup>2</sup>
- Restrictive abortion legislation has been enacted in 9 states.<sup>3</sup>
- Already there are restrictions on later-term abortions in 40 states of the 54 States.
- Ultrasounds are required in 11 states.
- Counselling is required in 37 states.
- Provider regulations exist in 28 states.

This adds up to a very different picture from “abortion on demand,” and these requirements and regulations are seriously challenging the ideology that a woman’s “choice” is absolute, to be followed without question.

Let’s look at some places where the changes are in effect or where proposals have been made. In 2011, North Dakota passed a bill making the killing of the unborn from conception onwards a criminal act.<sup>4</sup> Every human being at every stage of life is to be recognized as a person under this legislation. It prohibits chemical abortifacients as well, such as RU-286, but exempts medical procedures that may lead to the death of a child in the womb when a woman’s life is in danger.

The new legislation requires that women seeking abortion must first wait three days, and be counselled at a pregnancy health centre.<sup>5</sup> An abortion can only be scheduled by a doctor who has met the woman in

person, and determined that she is not being coerced by a boyfriend or parent.

Currently, however, this legislation has been blocked by a federal judge, who claims that the new law is invalid and unconstitutional according to the United States Supreme Court precedent in *Roe v Wade*, 1973. This is, of course, legally accurate, and many had warned that any new legislation would face this challenge. An interesting dimension of *Roe v Wade* was that while it established the right to abortion up until the time of viability, it also left states free to place various restrictions, hence these current attempts by states to pass *restrictive* legislation, if not outright bans. It would seem that some of these legislative challenges, depending on their wording, are not automatically doomed to failure, given the leeway in the precedent.

Why is this shift taking place now? The Republicans made huge gains in the 2010 elections, expanding their control in many states. In 2012, 92 abortion restrictions were approved in 24 states. In 2012, 43 restrictions were approved in 19 states. In 2013, 45 have been passed so far in 17 states. What are these restrictions, and do they advance the pro-life cause?

Some of them deal with limits on insurance coverage for abortion; some require that women have an ultrasound test, where technicians point out the baby’s organs to the mother; some states require a longer waiting period before allowing abortion. The North Dakota legislation aims at reducing the numbers of women who may obtain an abortion, and at imposing new standards on doctors performing abortions. The state has only one abortion clinic, mainly staffed by

out-of-state doctors. New requirements for admitting privileges to a local hospital would preclude those doctors from obtaining permission, and the clinic could be shut down.

Inevitably, there is push back and all is not plain sailing: the North Dakota laws were blocked temporarily by a federal judge on July 22, 2013. The judge said that the new law is unconstitutional, based on *Roe v Wade*, as mentioned above.

Despite this, an interesting development in the North Dakota legislation is that “person” is defined as “an individual member of the species *homo sapiens* at every stage of development.” In the current Canadian context of non-personhood for babies from conception until complete delivery, it is near miraculous to see that concept stated *and* passed in a state legislature, indeed *any* legislature!

In Arkansas, Senator Jason Rapert, (R) was the driving force this March behind the passing of the strictest abortion ban so far, prohibiting abortion after detection of a heartbeat, or about 12 weeks. Previous legislation had been passed in February, 2013, prohibiting abortion after 20 weeks, which is closer to the time stated in the *Roe v Wade*’s definition of viability (approximately about 25-26 weeks, although survival is possible before that). These laws were blocked by a federal judge in May, 2013, on the grounds that they were “in all likelihood unconstitutional” (i.e., they do not meet the standard set in *Roe v Wade*).

Along the same lines, senators in Ohio had previously introduced a bill in February,

2011, called the “Heartbeat Bill,” one of the most stringent pieces of restrictive legislation proposed yet. The bill was introduced as grounded in science: if a heartbeat can be detected there is a person in place whose heart is beating. The bill was defeated, and in this case some pro-life groups did not endorse it. They knew it could not survive the *Roe v Wade* precedent, and perhaps feared that attempting something so unlikely to succeed might prejudice the overall pro-life cause.

Indiana endorsed a bill in 2011 which requires doctors to tell a woman requesting abortion that life begins at conception and that there are indications that the fetus might feel pain at or before 20 weeks. South Dakota passed a bill in 2011, requiring a three-day waiting period and counselling at health centres. Part of the rationale is that such explanations could help women who are being pressed by boyfriends or family to abort, by leading them to a better appreciation of the development of the child in her womb.

These attempts at reducing the numbers of abortions in the US are making some inroads. Some activists are concerned that some of the legislation is so contrary to *Roe v Wade* that it will be easily dismissed as unconstitutional. There is some validity to this: since this type of legislation is open to challenge, it could be seen as frivolous and a waste of courts’ time, ensuring the development of a negative attitude towards future legislative activity. It is clear to many that just the opposite is needed, in the form of a more sympathetic Supreme Court, as is also needed in Canada. James Bopp, a long-term right-to-life attorney, is concerned about

the possible negative effects, saying that “lower courts are virtually certain to affirm existing Supreme Court rulings.”<sup>6</sup>

On the other hand and in some ways favouring such legislation, a survey reported at the end of 2011 said that the overwhelming majority of Americans support restrictions on abortion.<sup>7</sup> While approval of abortion still exists, there is clearly *not* support for abortion at every stage in a pregnancy. Seventy-nine per cent of those polled said they would not allow abortion after the first three months of pregnancy. About 51% said abortion should only be allowed in cases of rape, incest or to save the life of the mother. This approach is frequently declared in nearly every reputable poll concerning the availability of abortion, and, if true, supports the credibility of some of the state legislation. Further, it is conceivable that these incremental changes will gradually amount to a more serious challenge to *Roe v Wade* over time.

In January of this year, a survey commissioned by *Time* magazine noted that pro-life advocates have been ‘winning the abortion war.’<sup>8</sup> This has come about mainly because of the legislative changes pursued by pro-life groups and like-minded politicians. It seems that fewer doctors are willing to perform abortions at least at abortion clinics, and the number of such clinics has dropped from 2908 in 1982 to 1739 in 2008.<sup>9</sup>

*The Huffington Post* published an article saying that at least 54 abortion providers have closed since these legislative changes started to take effect.<sup>10</sup> The article makes it clear that the legislation’s main effect has been to target abortion providers and make it

harder for them to operate. Some of the laws require not only counselling sessions, delays in obtaining permission, mandatory ultrasounds, etc., but also require abortion premises to be similar to ambulatory clinics. Meeting these latter demands will be costly and time consuming. This strategy, referred to as *Targeted Regulation of Abortion Providers* (or TRAP laws) is designed to protect women’s health by forcing clinics to widen hallways, install ventilation systems and other such measures, all of which will be costly and time-consuming.

According to a pro-life spokesperson, many providers had been operating their clinics while ignoring state laws on building requirements and safe locations, factors that have caught up with them now that state regulations are being enforced.<sup>11</sup>

Some of the facts brought to light in the recent Gosnell trial have been instrumental in enforcing more stringent monitoring of abortion clinics for more serious reasons—the killing of babies born alive after abortion procedures.<sup>12</sup> Dr. Gosnell was found guilty of murdering at least three babies at his clinic, having “snipped” the spines of at least three babies born alive after abortions performed by him.

This led to a public outcry even among many who support abortion, while pro-life activists also continue to protest that the civil rights of newborns and their mothers are routinely ignored. It was also found that Gosnell’s abortion clinic failed to meet public health standards after a woman patient died from lack of care there post-abortion. Such sad consequences deriving from lack of care and oversight add weight to the TRAP strategy

which will enforce standards necessary for ensuring women's life and health, as well as those of any children born alive there. This could save some lives and close down some abortion clinics.

What about Canada, where right-to-life movements are still striving to have an abortion law restored? Part of the solution rests with the voting public. It is still necessary to bring these matters to the attention of our parliamentarians at any and every opportunity. This is not a matter only for our church leaders—it is an area where the laity can and must act. It is true that there are many serious issues confronting Canadians today, and that most of us do not want to be single issue voters, but we can ask questions and, crucially, should let our MPs know what we think, especially if we vote for someone who is not pro-life in the most basic sense. We do not have to let the moment go unchallenged, showing up at the ballot box without registering any complaint whatsoever. If our political leaders do not hear from the members of the Church which consistently condemns abortion and promotes openness to life, from whom will they hear?

Pope Francis was recently and often inaccurately quoted as saying that as a church we spend too much time talking about abortion, contraception, and so on.<sup>13</sup> He immediately followed this the next day by a strongly worded condemnation of abortion.<sup>14</sup> The Pope consistently reminds us that there are many moral issues in society that we must deal with, and they *all* need attention. He always reminds us of the need for mercy, and we do well to remember this. We are to work in these areas in a non-condemnatory

fashion, keeping our eyes on the moral and political aspects of our pro-life activities. He asks us, as the Church always has, to persuade people through love and not condemnation, to work for change rather than to simply talk about it, to pray and do what we can.

In that regard, current strategies developing in the United States provide us with some ideas and hope for change, since they demonstrate a shift in the public and political approach to the abortion issue in favour of protecting life at all stages. We can build on that. ■

*Moira McQueen, LLB, MDiv, PhD, is the Executive Director of the Canadian Catholic Bioethics Institute. Prof. McQueen also teaches moral theology in the Faculty of Theology, University of St. Michael's College.*

---

<sup>1</sup> Canada's Criminal Code, Section 223

<sup>2</sup> "A guide to where abortion laws are being re-written, state by state." *The Washington Post*, blog updated July 26, 2013.

<sup>3</sup> *Ibid.*

<sup>4</sup> "North Dakota clinic is on front lines of abortion rights battle." Reuters.com, July 11, 2013.

<sup>5</sup> *Ibid.*

<sup>6</sup> "Arkansas adopts restrictive Abortion Law." *NY Times.com*, March 6, 2103.

<sup>7</sup> "Survey finds American Majority in favour of Abortion Restrictions." *Catholic News Agency*, January 24, 2012.

<sup>8</sup> "What choice?" *Time*, January 14, 2013

<sup>9</sup> *Ibid.*

<sup>10</sup> "Anti-Abortion Laws take dramatic toll on clinics nationwide." *Huff Post Politics*, September 11, 2013.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> "Pope says church obsessed with Gays, Abortion and Birth Control." *New York Times*, September 19, 2013.

<sup>14</sup> "Pope urges Catholic Doctors to refuse Abortions." *The Guardian*, September 20, 2013.