



A Debate on the Ethics of Partial Prohibitions of Abortion

(Transcript of presentations at the 2009 LifeCanada Forum on Gestational Legislation: The Requirements of Justice—edited for space requirements)

PART I: Partial Prohibitions on Abortion are Unjust

Colin Harte has been active in the pro-life movement in the UK for 25 years and in recent years has been at the forefront in the anti-euthanasia movement there, acting as media spokesperson for the organization Alert. His book Changing Unjust Laws Justly presents a particular challenge to the pro-life movement in its argument that most legislative proposals to restrict abortion are unjust and thus unsupportable.

I was once a committed supporter of attempts to change the law incrementally. It makes sense in some ways—if you cannot stop all abortions, surely you'll want to stop some. I was involved in support of a bill in the UK in 1987 that was introduced by a pro-life member of Parliament to lower the gestational limit for abortion from 28 weeks to 18 weeks. The reason given above all to justify support for the bill was that it would save lives.

The first point that has to be made in support of any bill is - why are we supporting it? If a bill to establish a gestational limit were introduced here in Canada, how would the pro-life movement respond if surveys were to show that Parliament would be unlikely to accept the bill without exceptions for the so-called hard cases—abortion on the grounds of disability or after rape. That is, a lower gestational limit applied to most abortions and a higher limit to others. If saving lives is the ethical principle which justifies supporting an 18 week limit, than surely that same principle would justify excluding disabled or rape babies from the protection given to other babies. But [that justification] led me to question whether “saving lives” is in fact the correct principle.

The incremental approach constitutes an abandonment of the principle that the right to life of each and every child is non-negotiable.

It was the pro-lifers who proposed that some lives should be protected when you couldn't protect others, but who are we to propose or to agree that some shall live and some shall die, when as a matter of fundamental principle, all have the right to live and an equal entitlement to protection in law?

When our pro-life action is in the legislation or judicial arenas, we are specifically concerned with law. Our primary focus must be on law, and therefore on what is just. I believe the pro-life movement's approach to legislative change must be a “just law” approach.

Before supporting a bill for law on any subject, the fundamental question must be answered – is it just? Law is truly law only when it is just. Law has to be just. An unjust law so lacks the character of law that it is not properly a law at all. The first question must not



be “will it save lives”, or “will it enable parents to stop their minor children from having abortions, or will it by providing a delay for counseling give women the opportunity to change their minds, or will it assist our overall goal one day to protect all of the unborn”. These are second-level questions that should only be asked if and only if the bill is judged to be just, and then these questions must be answered in the light of prudence. If the bill is unjust, it is unsupportable.

The relevant moral principle refers to something more fundamental than that of saving lives, or of affirming the true pro-life view, or of upholding the personhood principle. What counts as an unjust law on abortion? – A law that authorizes or permits abortion or a law that tolerates abortion. Any law, in fact, which leaves any abortion unprohibited and thus unpunished in human law, is unjust. Only a few laws can be said to be intrinsically unjust. It is noteworthy that the term applies to abortion laws.

In a country where all abortions were banned and you introduced a law permitting abortions up to 20 weeks, we would all agree that such a law would be unjust. A law that prohibits abortions after 20 weeks but tolerates abortions up until 20 weeks would [also] be intrinsically unjust. You might argue that the law is not tolerating those pre-20 week abortions, they were already tolerated before the law was passed. Yes, they were previously tolerated, but the new law tolerates them too.

The principle of toleration is “not to impede” something. A law prohibiting abortions after 20 weeks gestation does not impede abortions before 20 weeks. A law would be enacted in that form specifically in order not to prohibit abortions before 20 weeks. And the non-prohibition, that is the toleration of abortions in this very law, which is clearly deliberate, is intrinsically unjust. So the intrinsic unjustness is a property of the law itself, it makes no difference in appealing to the circumstances with pro-lifers saying we supported this law only because we were in the minority and couldn’t get a majority to enact a fully protective law. It makes no difference in appealing to the possible consequences, believing this law will save lives, or will make people consider the question of abortion more carefully, or that it will give impetus for the pro-life movement’s push for full protection.

It’s the law we are looking at, not all of the circumstances and the motivations and the possible hopes and expectations or anything else. It is the character of the law itself that matters. Those other factors cannot undo its unjustness. The reason why a law allowing any abortion is intrinsically unjust is that the very protection of human life is essential to any system of law. It can never be just to tolerate, let alone authorize or make compulsory any abortion.



PART II: Partial Prohibitions on Abortion Serve to Limit an Existing Evil

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When prohibitions of a social evil are impossible because of obstacles and forces beyond our control, it can be both moral and effective to enact legislative limits as a means to reach short term as well as long term goals.

Partial prohibitions and regulations that seek to limit an evil are not intrinsically unjust under either the *Congregation for the Doctrine of the Faith's Declaration of 1974* or *Evangelium Vitae #73*. I refer to these Catholic documents even though I happen to be an evangelical because they reflect the prudential reasoning of a dominant Christian denomination and because they are understood to be a reflection of divine or natural law and right reason, which should guide all of us without regard to our religious beliefs, and because they are most often appealed to when a determination is made about partial prohibition and regulations. Even if we put these documents aside and did not specifically refer to them, reason would lead us generally to the same principles about prudence and cooperation.

Do partial measures permit or authorize abortions? Is there any authoritative church teaching that says restrictive abortion laws that attempt to replace a more permissive abortion law, are considered as intrinsically unjust? The answer is no.

Laws which legitimize abortions in principle are unjust. Laws which authorize abortion in principle are unjust. There is no authoritative church teaching that legal fences which prohibit some but not all abortions are intrinsically unjust. When legislators intend to restrict an evil that is already existing and already authorized, are they permitting abortion? No, they are not. It has already been permitted. They are injecting a condition on the authorization that has been otherwise given.

Legislators are not tolerating abortions by passing a more restrictive law. Abortions have been authorized by courts or by countervailing political majorities that cannot be undone at this time. Abortion fences do not tolerate or permit abortions. They limit what has already been authorized.

When we examine partial prohibitions or regulations on abortion, it's important that we apply first a prudential analysis and secondly the doctrine of cooperation.



Prudence

Prudence is practical wisdom, wisdom in action. Wisdom is “knowing what’s right”, but prudence is making good decisions and implementing them well.

With regard to politics, prudence in politics challenges us with four key questions. The first is - are we pursuing good goals? Our goal should be complete human protection for human life from conception to natural death without exception. Until we have complete human protection for human life from conception to natural death without exception, we are not done yet.

The second challenge is - are we exercising good judgment about what’s possible in the circumstances? We don’t exist in a vacuum. We are constantly surrounded by obstacles. We cannot avoid them—metaphysical obstacles, the fallen world, practical, political, legislative and procedural obstacles.

Third - are we effectively connecting means and ends? Good intentions are not enough. Fourth - do we preserve the possibility of future progress when all of the good can not be immediately accomplished? We need to avoid any final compromise.

What is incrementalism? An increment is a step. But it doesn’t tell us what the goal is, it doesn’t tell us where we are going by itself. You can have an increment in the wrong direction or an increment in the right direction. Prudence supplies the moral purpose that incrementalism alone lacks. Prudence determines if incrementalism is the right strategy. It may or may not be the right strategy, it may or may not be prudent.

Cooperation

The second moral doctrine that should guide all of us is cooperation. Cooperation is assisting someone in their evil act, giving someone aid in carrying out their evil act. There is an ethical distinction between material and formal cooperation with evil, but if there is no aid or assistance whatsoever, you are not cooperating with it.

Fences:

As part of this framework we have to think in terms of fences. The intent of abortion regulations or legislative limits is to impose fences. Fences can legitimately be used to limit an evil. For example, we fence in our yard to protect our children from the neighbor’s pit bulls. By setting up this fence are we cooperating in the care and feeding of these pit bulls? No, we are responding to the situation within the legal limits and constraints that are upon us.

We should not underestimate the importance of building political momentum.

Row vs. Wade created huge negative momentum for abortion in the US, and like a speeding train we can’t stop it on a dime. We have to slow it before it can be reversed. One of the purposes of legislative limits is to slow that speeding train.

Who imposes exceptions or exclusions in abortion regulations? Who imposes the limits [to an abortion ban], who writes them in? The court (or a political or legislative majority) says you can’t limit abortion. We don’t invite limits in ourselves, they are imposed by courts or a political majority. [For example], parental consent laws do not authorize abortion. They



step in and interject a condition between the court's authorization and the abortionist or the individual woman. The parental consent law steps in and interjects a condition, recognizing that the authorization has already been given by the courts or political majority. Informed consent laws do not authorize abortions. They interject a condition between the previously given authorization and the abortionist or the individual woman. Legislators are trying to limit an evil in the face of opposition.

Partial prohibitions are not compromise. Compromise means the voluntary giving-up or concession of something by parties with equivalent power in order to reach an agreement. Fighting tooth and nail for whatever limits you can achieve is not a concession, and therefore not a compromise.