'Right' to abortion on loose scaffolding

Will Grigg

FOR THE SAKE OF ARGUMENT

The "right" to abortion is supported by a rickety scaffold of begged questions; ask the questions and the scaffold will collapse, taking the alleged right with it.

Utah needs an abortion law that will ask those questions. The strategy offered by Dr. Richard Wilkins of BYU is to avoid asking those questions while waging a war of attrition upon the abortion "right."

Wilkins has achieved unwanted notoriety for his role in defeating abortion bills in Utah and Idaho that he felt were ill-conceived. I am satisfied that he is sincere in his pro-life convictions. However, I take issue with his approach.

As a legal scholar, Wilkins confines himself to precedent; but regarding abortion the acceptance of Supreme Court precedent involves the acceptance of a premise deadly to the Right-to-Life position, namely that there is a constitutional right to abortion. It is this premise that must be challenged if Roe is to be defeated. The videotaped testimony Wilkins sent to the Idaho Legislature illustrates the dangers of accepting that premise.

As was the case in testimony offered in Wednesday's meeting of the Abortion Task Force, the chief concern in Wilkins' testimony is that abortion laws pass Justice O'Conner's "undue burden" test — as Wilkins puts it, "states cannot unduly burden the abortion choice."

According to Wilkins, such burdens existed in those provisions of the Idaho law that defined the rape, incest and health exceptions, as well as the provisions for punishment.

Wilkins suggested that the "health" exception be defined to permit abortions, "when in the judgment of a reaonably prudent physician, the abortion is reasonably necessary to save the life of a mother, or to prevent serious damage to her health." "Health" would include mental distress; the woman, in consultation with the physician (often an abortionist with a vested interest) would make the crucial determination. This is not unlike the standard of "health" which was produced by the Supreme Court.

The rape exception proposed by Wilkins would dispense with the necessity of contacting legal authorities; the determination would be made by the abortionist. We are left with a court empowered to define "health," and physicians empowered to make criminological findings. Such role-reversal games become necessary in order to avoid placing an "undue burden" on the exercise of an apocryphal right.

The Idaho bill would have allowed injunctive and civil damages of up to $50,000 to be brought by a husband or the parents of an unemancipated minor. Wilkins complained that such damages would be an "unconstitutional burden on the abortion choice," as they ignored "the woman's consent and the judgment of her doctor," and that "no doctor, once the statute was passed, would dare perform an abortion in the state of Idaho." Horrors. Shouldn't such a state of affairs be the objective of Right-to-Lifers in Idaho?

Wilkins contends that an outright reversal of Roe is unlikely, but that the court may continue to pare down the abortion right until Roe is effectively reversed. However, Pro-Lifers shouldn't be sanguine about this proposal. At some point somebody will have to challenge the central principle of the Roe decision, and this will involve a confrontation over the role of the court in creating the abortion "right."

Wilkins' approach is a pragmatic one, but in matters of principle pragmatism isn't pragmatic — it doesn't work. Regarding abortion, Utah is in need of unflinching, principled leadership, and Gov. Bangerter — whose mind is changed as easily as a 25-watt bulb — isn't about to succumb to a fit of principle.

The Abortion Task Force is scheduled to produce legislation by Nov. 7. If the final bill reflects Wilkins' approach, its only significant effect will be to dissipate the political will to challenge Roe vs. Wade.