



## Perspective

### The Intimidation of American Physicians — Banning Partial-Birth Abortion

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A Dutch oncologist was describing to an audience of American physicians in Amsterdam the circumstances under which euthanasia was performed in the Netherlands at a time when the

practice was illegal yet widely used. Each act of euthanasia was reported, after the fact, to the local prosecutor, who investigated the case and routinely declined to prosecute any treating physician who had acted transparently and in the best interest of the terminally ill patient. The American physicians were incredulous that their Dutch colleagues were willing to place themselves at risk for criminal prosecution by providing care that might, on later review, be determined to have violated criminal law. The Americans had no confidence that their own judicial system would judge them fairly under similar circumstances, even if they had acted in good

faith and in the patient's best interest.

This lack of confidence that the U.S. judicial system would treat them fairly has cast a pall over those who practice reproductive medicine as they consider the recent decision by the Supreme Court, in *Gonzales v. Carhart*, to uphold the Partial-Birth Abortion Ban Act of 2003. The ruling creates an intimidating environment surrounding pregnancy terminations at more advanced gestational ages. The decision to pursue a second-trimester abortion is never taken lightly and usually results only after anguished discussions among the patient, her loved ones, and her health care

providers. Once the decision has been made to perform a second-trimester surgical abortion, the last thing a provider needs is to have to worry that the procedure could potentially evolve into a criminal act if a fetus in breech presentation should slip out intact through a partially dilated cervix. But this is exactly the situation created by the partial-birth abortion bill.

Defenders of the law point out that its *scienter* requirement means that physicians can be prosecuted only if it can be demonstrated that the provider "deliberately and intentionally" delivered a living fetus and performed an "overt act" to kill it. But this protection seems fragile to practitioners. In the situation just described, how would the vital status of the partially delivered fetus be determined, and by whom? The only way to complete the delivery

through the incompletely dilated cervix may be to reduce the size of the after-coming head. Would any procedure to accomplish that goal be seen as facilitating the delivery? Or as intentionally killing the fetus? Once the prosecutor knocks on the door, the onus will be on the physician to show that there was no intent to perform a banned procedure. Lacking confidence in the judicial system, physicians may choose to avoid performing second-trimester surgical abortions, thus restricting access to them, perhaps even if the mother's life is in jeopardy.

In the same way that it might be difficult to discern the intent

of a physician during the conduct of a pregnancy-termination procedure, it is difficult to know the true intent of the 108th Congress when it passed the partial-birth abortion bill in 2003. Was the intent, as the law claims, simply to ban "a gruesome and inhumane procedure that is never medically necessary"? Or was this law the carefully calculated first step in a larger strategy for the gradual erosion of access to abortion services?

No aspect of medicine seems to attract as much popular and political attention as reproductive medicine. In recent years, our government has restricted women's options for preventing con-

ception and now for coping with pregnancies that threaten their health or are simply unplanned and undesired. Both health care providers and patients should be alarmed by the current degree of intrusion by our government into the practice of medicine and even more so by the apparent trajectory that it seems poised to follow in the near future.

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