This November, the U.S. Supreme Court is scheduled to hear argument in *Gonzales v. Carhart*, a case that challenges the validity of the federal Partial Birth Abortion Ban Act of 2003 (PABA). Among other potential problems, the statute lacks a health exception - the very gap that led the Supreme Court in 2000 to invalidate a similar statute passed in Nebraska. Defenders of the PABA point to Congressional findings that a woman's health never requires the banned procedure - findings that many doctors dispute. More fundamentally, supporters of the PABA argue that the abortion procedures in question are morally equivalent to infanticide and should therefore fall outside the scope of women's reproductive rights. This column will take seriously this claim about moral equivalence and consider some of the implications of doing so.

**Infanticide and Partial-Birth Abortion**

**The Definitions**

Infanticide is, literally, the killing of an infant. Once a baby has been born, if a person - whether the mother, a health care professional, or some third party - kills the baby, this act constitutes infanticide. Absent extenuating circumstances, the person who deliberately commits infanticide is guilty of murder.

The statutory term "partial-birth abortion" refers to a procedure in which the abortion provider removes a significant portion of an intact, living fetus's body from inside its mother; uses scissors or some other sharp instrument to puncture the fetus's head; and then compresses the head for complete removal of the body. Referred to as "Intact Dilation and Evacuation" or "Intact D&E," the procedure is also called "Dilation and Extraction" (or "D&X") if the lower part of the fetus's body is removed from the birth canal first.

It is difficult to describe (and, indeed, to read about) such abortions without cringing. The procedures in question - though relatively rare - typically take place very late in pregnancy, beyond 16 weeks gestation, and the fetus therefore resembles a baby in many respects. Perhaps for this reason, large numbers of people polled - even those who consider themselves generally pro-choice - support bans on "partial-birth abortion."

What gives rise to the "infanticide" comparison is the fact that the abortion provider kills the fetus at a point when a significant portion of its body has already emerged from the woman. The PABA explains that "[a] child that is completely born is a full,
legal person entitled to constitutional protections afforded a 'person' under the United States Constitution." It goes on to state, accordingly, that the procedure in question in the legislation "blurs the line between abortion and infanticide in the killing of a partially-born child just inches from birth."

If one looks at the matter in this way, it may seem utterly arbitrary to allow a doctor to kill the fetus so long as some part of it, however small, remains inside the woman's body, but to consider the same act infanticide - murder - as soon as that body part is no longer inside the woman.

There is, however, another line-drawing problem that presents itself when an abortion takes place prior to fetal viability -- the developmental stage at which the fetus can survive outside the womb, and a crucial legal moment. Prior to this point in pregnancy, the PABA necessarily draws a distinction between delivering a live fetus (the "birth" from which the partially-born fetus is literally "just inches"), on the one hand, and killing the fetus through partial-birth abortion, on the other. It is a distinction that may not withstand critical analysis.

To remove a fetus from its mother's body prior to viability is - by definition - to end the fetus's life. As women who have endured undesired pre-viability labor can attest, "birth" leads inevitably to the baby's death. Like taking a fish out of water, removing a nonviable fetus - even one that is intact, alive, and healthy at the moment of "birth" - from inside its mother will inevitably and promptly result in its death.

Distinguishing between intact D&E, on the one hand, and the "birth" of a nonviable fetus, on the other, as though one is actually discussing the difference between life and death, is therefore misleading.

**Implications of the "Partial-Birth Abortion"/Induction Distinction**

Nonetheless, the distinction between leaving the fetus to die, and killing it, is already found in the Supreme Court's Due Process cases - the precedents that form the foundation of the substantive right of privacy that underlies the right to abortion announced in *Roe v. Wade*.

In 1997, in *Washington v. Glucksberg*, the Court ruled unanimously that the states may criminalize physician-assistance in dying for terminally-ill patients. This means that if a terminal patient is suffering excruciating pain and emotional anguish and wishes to hasten his own death, the doctor who intentionally provides him with access to a morphine overdose may - consistent with the U.S. Constitution - be criminally punished for doing so.

The Court has also said, however, -- in the 1990 case of *Cruzan v. Director, Missouri Dept. of Health* -- that a person has a constitutional right to refuse unwanted life-saving (or life-preserving) treatment and that such "treatment"
includes the continued use of a respirator or the provision of nutrition and hydration through a feeding tube. If a doctor or nurse turns off a respirator or removes a feeding tube at the patient's request, then, the Constitution stands in the way of the law's punishing the doctor or nurse for her actions.

The upshot of these two decisions is that a person has the right to choose to have a respirator turned off and die of lack of oxygen (or have a feeding tube removed and starve to death or die of thirst), but he lacks the right to die of a morphine overdose. This is true even though anyone who removes a patient's respirator or injects the patient with an overdose of painkillers against her wishes and thereby causes the patient's death is guilty of murder.

Given these precedents, it makes some sense to say that it is one thing to allow a woman to terminate a pregnancy by delivering a live, nonviable fetus (thereby cutting off the fetus's living "respirator"), but quite another to kill the fetus affirmatively once it has begun to emerge from the woman's body (or indeed, even before it has begun to do so).

Like giving a patient a morphine overdose, the compression of a fetus's skull is a dramatic event that upsets and outrages many. And like the removal of a respirator, the delivery of a nonviable fetus may seem, at least aesthetically, more like letting death happen than positively inflicting it. Why drama, or the absence thereof, would drive policy - in the context of either abortion or the right to die with dignity - is, of course, not entirely clear. With Justice Sandra Day O'Connor's retirement and replacement by Justice Samuel Alito, the Court will likely uphold the federal PABA. In doing so, moreover, it will be acting in a manner consistent with the Glucksberg precedent approving laws prohibiting physician assistance in dying.

With this parallel in mind, those who support the right to terminate a pregnancy up until the point of fetal viability might take some heart. Though distinguishing between the removal of life support and killing strikes some as arbitrary, the Court is comfortable with the distinction. It can therefore be expected to stop short of overruling Roe v. Wade completely.

If and when the Court approves laws banning other actively violent forms of late-term abortion, then the right to a late-term abortion may ultimately require the removal of an intact, live fetus from the mother without any affirmative measures to end the fetus's life. Ironically, this practice - in the name of avoiding infanticide - would most closely resemble the infanticide of old, in which unwanted babies were "exposed" or left to die after birth.

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