

# THE DAILY RECORD

LAW, REAL ESTATE, FINANCE AND GENERAL INTELLIGENCE SINCE 1908

## Legal Currents

### When intent is in the eye of the beholder

This column, to be featured every Monday, will tackle timely issues important to the local legal community.

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There are few issues as divisive and polarizing as abortion.

For those who oppose it, it is a matter of life and death, and for those who believe it should not be outlawed, the issue revolves around the belief that women have a fundamental right to control their bodies and destinies. Analysis of the issues involved requires a delicate balance of these competing interests.

A recent 5-4 U.S. Supreme Court decision, *Gonzales v. Carhart*, is a prime example of the deep fissures created by this controversial subject. Reasonable minds can differ, as evidenced by the fact that this panel of intelligent and thoughtful justices was unable to come to an agreement as to how the legal principles at issue should be framed, let alone decided.

In *Gonzales*, the court upheld a federal statute that bans a controversial abortion method known as "partial birth abortion."

One issue raised by opponents of the law is that the statutory language relating to the required *mens rea* is indeterminate and, therefore, unconstitutionally vague.

Writing for the majority, Justice Kennedy attempted to explain why the statute at issue is not void for vagueness: "Respondents likewise have failed to show that the Act should be invalidated on its face because it encourages arbitrary or discriminatory enforcement. ... Just as the Act's anatomical landmarks provide doctors with objective standards, they also 'establish minimal guidelines to govern law enforcement.' The *scienter* requirements narrow the scope of the Act's prohibition and limit prosecutorial discretion. It cannot be said that the Act 'vests virtually complete discretion in the hands of [law enforcement] to determine whether



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the [doctor] has satisfied [its provisions].' ... This reasoning, however, does not take account of the Act's intent requirements, which preclude liability from attaching to an accidental intact dilation and evacuation (D&E). If a doctor's intent at the outset is to perform a D&E in which the fetus would not be delivered to either of the Act's anatomical landmarks, but the fetus nonetheless is delivered past one of those points, the requisite and prohibited *scienter* is not present."

Justice Kennedy's somewhat convoluted logic on the issue of proof of intent is likely to make criminal defense practitioners cringe.

Criminal prosecution for an alleged violation of this contentious procedure will not occur in a vacuum, and the personal, moral and religious beliefs of law enforcement officers will no doubt affect their judgment when the determination is made regarding whether there was sufficient evidence of intent to commit the crime.

As such, the blanket assertion that the Act provides clear *mens rea* guidelines, thereby rendering arbitrary and baseless prosecution unlikely, is questionable at best.

One wonders what will trigger a prosecution for an alleged violation of this law. Will each occurrence of an intact D&E be investigated to determine the intent of the physician performing it? Or will law enforcement place undercover agents in all abortion clinics who will report back as to the suspected intent of the physician at the outset of the procedure?

How might a physician go about proving that, when the procedure began, the original intent was to avoid an intact D&E? Would a notation in the patient's chart suffice? Or would a notarized affidavit signed by the ob/gyn prior to the procedure be necessary to protect a physician from prosecution?

One's stance on this contentious issue does not change the fact that the statute is poorly drafted, rendering it difficult, if not impossible, to enforce. Prosecution will require law enforcement to divine the *mens rea* of a physi-

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cian prior to commencing this complex medical procedure, and the determination of intent will most certainly be influenced by one's personal beliefs regarding abortion.

In other words, intent cannot help but be in the eye of the beholder.

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