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## THE CASE OF *VALERIE D.* AND THE TREND TOWARD FETAL PROTECTION

Doris Y. Ng\*

In 1991, the United States Supreme Court handed down a controversial decision in the case of *Auto Workers v. Johnson Controls, Inc.*,<sup>1</sup> holding that Title VII forbids sex-specific fetal protection policies in the workplace. This opinion, however, in no way concludes the debate over the existence and extent of fetal "rights," and the responsibility charged to those who injure a fetus. In fact, when the issue is which punitive sanctions to impose on pregnant women who engage in behavior deemed dangerous to their fetuses, courts around the United States have demonstrated no reluctance to enter the fray.

In a case decided a few months after *Johnson Controls*, the Connecticut Appellate Court held that a pregnant woman's prenatal conduct alone constituted sufficient cause to terminate her parental rights.<sup>2</sup> Eight to ten hours prior to giving birth, the mother used cocaine. Her baby, Valerie, showed signs of withdrawal after birth, and a urine test revealed that Valerie was born with cocaine in her bloodstream.<sup>3</sup>

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1. 111 S. Ct. 1196 (1991).

2. *In re Valerie D.*, 25 Conn. App. 586, 595 A.2d 922 (1991).

3. In addition, the lower court apparently based its decision to terminate the mother's parental rights in part upon evidence that, after Valerie's birth, the mother refused inpatient drug treatment, did not bond with her child, had psychological problems apart from her drug addiction, and otherwise failed to comply with the court's conditions of visitation, housing, and drug treatment. Moreover, the lower court found the lack of an ongoing parent-child relationship between Valerie and her mother. *Id.* at 594, 595 A.2d at 926. This latter ground is subject to attack, however, because the state sought and received custody a few days after Valerie's birth. *Id.* at 588, 595 A.2d at

After analyzing the rights of the unborn under both criminal and tort law, the Appellate Court affirmed the lower court's decision to terminate the mother's parental rights, based upon her use of drugs. While the applicable statute for parental neglect or termination proceedings defines a "child" as "any *person* under sixteen years of age,"<sup>4</sup> the *Valerie D.* court stressed that, under tort law, "[a]n infant who has sustained injuries prior to birth, whether the infant is viable or not at that time, has a cause of action in negligence against the alleged wrongdoer."<sup>5</sup> By comparison, under criminal law, injury to a fetus (whether viable or not) resulting in its death does not constitute murder.<sup>6</sup>

The Connecticut Appellate Court reasoned that the disparity in treatment stems from the different objectives of tort and criminal law. Without explaining what those policies are, the court decided to apply tort law principles to the termination proceeding because of the similar objective underlying tort law and child welfare statutes: protecting children from injury and neglect.<sup>7</sup> Thus, according to the Connecticut Appellate Court, prenatal conduct alone can sustain a child neglect or custody termination proceeding.

Furthermore, the *Valerie D.* court stated that its decision comported with *Roe v. Wade*,<sup>8</sup> which grants the state a compelling interest in the fetus at viability:

Our holding is supported by reasoning . . . in *Roe v. Wade*. In *Roe*, the court held that with respect to the State's important and legitimate interest in potential life, the 'compelling' point is at viability. . . . State regulation protective of fetal life after viability thus has both logical and biological justifications.<sup>9</sup>

Therefore, the *Valerie D.* court found:

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923. In any event, the Appellate Court explicitly based its decision solely on the mother's conduct *prior* to the birth. *Id.* at 587, 595, 595 A.2d at 923, 926.

4. CONN. GEN. STAT. § 46b-120 (1990) (emphasis added).

5. 25 Conn. App. at 590, 595 A.2d at 924.

6. *State v. Anonymous* (1986-1), 40 Conn. Sup. 498, 516 A.2d 156 (1986). In reviewing Connecticut's statutes defining murder, the Connecticut Superior Court held in this case that "person" meant a human being who had been born alive. According to the court:

If an unborn viable fetus was to be considered a 'human being' . . . then, conceivably, a pregnant woman, who smokes and drinks alcoholic beverages during pregnancy and thereby causes the death of her unborn, might be charged with negligent homicide. One would not expect the legislature to have intended such a result unless it did so explicitly.

*Id.* at 500, 516 A.2d at 158.

7. *Valerie D.*, 25 Conn. App. at 588-89, 595 A.2d at 924-25.

8. 410 U.S. 113 (1973).

9. 25 Conn. App. at 592, 595 A.2d at 925.

[T]he state has a compelling interest in protecting Valerie, a living child born with a dangerous drug in her system because her mother used that drug . . . before her birth. The fact that Valerie is at risk because of her mother's actions before her birth in no way negates or dilutes this compelling state interest.<sup>10</sup>

In late 1991, the Connecticut Supreme Court granted *certiorari* in this case.<sup>11</sup> The Connecticut Supreme Court certified several questions for review, most significantly whether Connecticut law permits a determination of neglect or termination based solely on the prenatal conduct of the mother, and whether such termination violates either the mother's due process or equal protection rights.<sup>12</sup>

While the appellate court's holding in *Valerie D.* was unique, Connecticut is not the first state to take some form of punitive action against pregnant women who allegedly injure their fetuses. In some jurisdictions, the "punishment" for prenatal conduct deemed injurious to the fetus takes the form of criminal prosecution or loss of custody.<sup>13</sup> The first case that brought prenatal conduct national attention involved Pamela Rae Stewart,<sup>14</sup> a San Diego woman who in 1986 took drugs while she was pregnant. Authorities charged her with failing to provide the fetus with necessary medical care. Ms. Stewart was prosecuted for child abuse, although at the time

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10. *Id.* The court did not address the mother's constitutional rights because it claimed that these arguments were not properly raised or developed. Moreover, according to the court, her case did not rise to the level of a "truly extraordinary situation" where review is granted despite the failure to raise claims below. *Id.* at 594, 595 A.2d at 925-26.

11. *In Re Valerie D.*, 221 Conn. 903 (1991). Sixty-one organizations and individuals, including social workers' organizations, medical professionals, and women's organizations, sought *amicus curiae* status to oppose the Appellate Court's holding. See Thomas Scheffey, *High Court to Hear Valerie D. Prenatal Conduct Case*, CONN. L. TRIB., Dec. 30, 1991, at 13.

12. 221 Conn. at 903. The high court will also consider the following issues: 1) whether the termination of parental rights on the ground that there was no ongoing parent-child relationship was unconstitutional because the state was responsible for the lack of such a relationship; 2) whether the conclusion that there was no ongoing parent-child relationship was proper; 3) whether the trial court's waiver of the one-year waiting period in which to terminate the parental rights violated the mother's state or federal due process rights. *Id.*

13. See *In re Troy D.*, 215 Cal. App. 3d 889, 263 Cal. Rptr. 869 (1989) (declaration of a minor as a dependent child of the juvenile court upheld on the basis of a petition alleging that the minor was born under the influence of harmful drugs); *Johnson v. Florida*, 578 So. 2d 419 (1991) (criminal prosecution of a drug-using mother upheld on grounds that, during the moments after birth, but before the umbilical cord was cut, she passed drugs to a minor).

14. Unreported case discussed in Denise Gellene, *Protecting Fetuses at Mom's Job*, L.A. TIMES, May 6, 1991, at A1; Katha Pollitt, *Fetal Rights: A New Assault on Feminism*, THE NATION, Mar. 26, 1990, at 409; Rorie Sherman, *Keeping Babies Free of Drugs*, NAT'L L.J., Oct. 16, 1989, at 1.

she took drugs, the fetus was not yet a child as defined under any California law.<sup>15</sup> The ACLU Reproductive Freedom Project defended Ms. Stewart and succeeded in getting all charges dropped on the grounds that California imposed no duty to care for a fetus on a pregnant woman.

More recently, in Florida, a woman who took drugs while pregnant was convicted of delivering drugs to a minor.<sup>16</sup> The court reasoned that, in the minutes after birth but before doctors cut the umbilical cord, the mother passed traces of drugs to her newborn infant.<sup>17</sup> During oral argument before Florida's Fifth District Court of Appeals, the state conceded that its theory, based on state drug trafficking statutes, would apply equally to conduct such as smoking and drinking.<sup>18</sup>

These cases underscore American society's increasing obsession with controlling women's behavior during pregnancy. This movement, fueled largely by fetal rights advocates, urges that a mother is a separate being from her fetus and that a fetus has rights that compete with, and generally supersede, those of its mother. The issues involved touch on the abortion debate as well. Can society compel a woman to continue her pregnancy? Can society compel a woman to undergo life-threatening surgery in order to protect her fetus?<sup>19</sup> Will a woman who continues a pregnancy despite her drug addiction be put in jail for her conduct?

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15. CAL. PENAL CODE § 273a, construed in *Reyes v. Superior Court*, 75 Cal. App. 3d 214, 219, 141 Cal. Rptr. 912, 915 (1977) (unborn fetus is not a child for purposes of felony child abuse); see also *Justus v. Atchison*, 19 Cal. 3d 564, 579, 141 Cal. Rptr. 912, 921 (1977) (stillborn fetus not considered a fetus within California's wrongful death statute). Ironically, during Ms. Stewart's pregnancy, her husband took drugs with her and also beat her. Yet, no charges were ever brought against him. See Pollitt, *supra* note 14.

16. *Johnson v. Florida*, 578 So. 2d 419 (1991).

17. *Id.* at 419-20.

18. ACLU REPRODUCTIVE FREEDOM PROJECT, ANNUAL REPORT 16 (1990) [hereinafter ACLU REPRODUCTIVE FREEDOM PROJECT]. The ACLU Reproductive Freedom Project has taken over the appeal of this case and believes that it will be overturned on the ground that the statute was not intended to be applied to these facts. *Id.*

19. In the tragic case of Angela Carder, a pregnant woman with terminal cancer, a judge issued an order to the hospital to perform an emergency cesarean section to save the life of her 26-week old fetus. This action was taken over the objections of Ms. Carder, her husband, and her family. The judge reasoned that, because the woman's death was imminent anyway, some measures should be taken to save the fetus. Both the fetus and Ms. Carder died within days. See ACLU REPRODUCTIVE FREEDOM PROJECT, *supra* note 18, at 13. In an *en banc* decision, the Court of Appeals for the District of Columbia overturned the lower court's decision and concluded that, in virtually all situations, a pregnant woman has the right to make the decision on behalf of herself and her fetus. *In re A.C.*, 573 A.2d 1235 (1990).

Feminists fear that the women in these cases are being treated as vessels for the next generation.<sup>20</sup> A recent case in the District of Columbia illustrates all too clearly the validity of these concerns. In that case, a judge sentenced a pregnant drug user to jail after she pleaded guilty to falsifying checks.<sup>21</sup> He imposed the stiff sentence to insure that the woman would not use drugs for the remainder of her pregnancy, thus protecting her fetus. The sentence had nothing to do with the offense with which she was charged.

The danger of the fetal protectionist trend is obvious: How soon will it be before all pregnant women become subject to the control of the government in the name of fetal rights? The judicial opinions in the above cited cases give little consideration to a woman's constitutional rights to bodily integrity or equal protection.<sup>22</sup> In emphasizing the health of the fetus as paramount, these decisions ignore women's need for affordable and effective prenatal care, drug rehabilitation, and access to safe abortions.<sup>23</sup> As one commentator has noted:

[T]he worst thing about fetal rights is it portrays a woman as having only contingent value. Her work, her health, her choices and needs and beliefs, can all be set aside in an instant because, next to maternity, they are perceived as trivial. For the middle class, fetal rights is mostly symbolic, the gateway to a view of motherhood as self-sacrifice and endless guilty soul-searching. . . . For the poor, for whom it means jail and loss of custody, it becomes a way of saying women can't even be mothers. They can only be potting soil.<sup>24</sup>

The trend toward fetal protection policies, like other strains of legal doctrine directed at women in general, burdens certain racial and socioeconomic groups in particular. For example, a recent

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20. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1458 (1991). ("Forced treatment decisions equate women with inert vessels, disregard their own choices, and value them solely for their capacity to nurture the fetus."). Professor Roberts believes prosecutions of drug-addicted mothers punish these women for having babies. She argues that these prosecutions violate the Equal Protection Clause because most of those prosecuted are poor African-American women. *Id.*

21. *U.S. v. Vaughn*, Crim. No. F 2172-88 B (D.C. Super. Ct. Aug. 23, 1988). In the *Vaughn* case, the judge explicitly announced his reasons for incarcerating the defendant. However, he and others have speculated that other judges behave similarly, albeit covertly. See Jean Davidson, *Pregnant Addicts; Drug Babies Push Issue of Fetal Rights*, L.A. TIMES, Apr. 25, 1989, at A1.

22. See Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights To Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986).

23. Roberts, *supra* note 20, at 1446-50. See also Pollitt, *supra* note 14.

24. Pollitt, *supra* note 14.

study conducted in Pinellas County, Florida, showed that white children are just as likely as African-American children to suffer from prenatal substance or alcohol abuse. Yet, where state policy requires hospitals to report all instances of infants born with drugs in their systems, African-American women are 9.58 times more likely than white women to be reported.<sup>25</sup>

Equally troubling is the singular emphasis the fetal rights movement places on the conduct of *women*, ignoring the often enormous role men play both in reproduction and in creating a healthy environment for the fetus. On a biological level, a recent study shows that cocaine attaches to sperm.<sup>26</sup> This study raises a host of questions about whether women are being singled out for punishment. It also points to a weak causal link between the behavior of pregnant women and the effects on newborn infants: how can we know with any certainty whose conduct caused the injury?

On a broader social level, the law appears not to recognize the many injuries to fetuses (and children) caused by violent or abusive men. In Wyoming, a pregnant woman was arrested for intoxication when she came to a hospital seeking treatment for injuries inflicted upon her by her husband.<sup>27</sup> Although the charges against her eventually were dropped, the authorities never instituted any charges against her spouse. Studies indicate that one in twelve women are beaten during pregnancy.<sup>28</sup> "We do not know how many miscarriages, stillbirths, and damaged newborns are due, or partly due, to male violence. This is itself a comment on the skewed nature of supposedly objective scientific research."<sup>29</sup>

Courts, along with other policy-making bodies, need to consider the practical consequences of sending women to prison or terminating their parental rights for drug use. Faced with these prospects, pregnant women will avoid prenatal care, give birth in places other than hospitals, and seek abortions. Sending women to prison will cause increased strains on the foster care system, along

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25. Sherman, *supra* note 14. See also Roberts, *supra* note 20, at 1432-36.

26. Janny Scott, *Study Finds Cocaine Can Bind to Sperm*, L.A. TIMES, Oct. 9, 1991, at A1. See also Pamela Warrick, *The Pregnancy Police; These Days, Mothers-to-Be Are Likely to Get Orders, Not Just Advice, From Complete Strangers*, L.A. TIMES, Oct. 30, 1991, at E1 ("Recent studies have shown that men's lifestyles might play a greater role than once thought in prenatal development. For example, some research suggests that alcohol and cocaine use by men might contribute to low birth weights and birth defects.").

27. Pollitt, *supra* note 14.

28. *Id.*

29. *Id.*

with increased need for jails. Alternative remedies would be to provide pregnant women drug rehabilitation facilities, access to health care without fear of incarceration, and for those women who decide to terminate their pregnancies, greater access to safe abortions. We all would like to avoid harm to babies caused by the drug use of their parents. However, the legislature and the judiciary must realize that punishing mothers often exacerbates, rather than prevents, the problem.

Beyond these pragmatic considerations, however, looms a larger question: what accounts for this groundswell of concern for the "rights" of the fetus? And why does the obsession with the welfare of the fetus end so abruptly at its birth? Author Katha Pollitt suggests that this focus on safety in the womb (and the corresponding lack of interest in the plight of children growing up without adequate housing or medical care) fits neatly into a pattern. According to Pollitt:

what fetal rights is really about [is] controlling women. It's a reaction to legalized abortion and contraception, which have given women, for the first time in history, real reproductive power. . . . The threat to newborns is interesting when and only when it can, accurately or fancifully, be laid at women's doorstep.<sup>30</sup>

In the case of *Valerie D.*, laying blame at her mother's doorstep and severing any hope of a parent-child relationship does nothing to better the plight of these two individuals. Rather, this decision sends a powerful message to women that their rights, indeed their lives, take a back seat to the finely tuned functioning of their wombs.

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30. *Id.*



