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Susan Q. Wombwoman v. State of California

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*by Laura Weinstock**

In a seminar I took on judicial process, we were asked to examine a "hypothetical" fact pattern and write a judicial opinion as if we were writing for the majority on the California Supreme Court. For the purpose of the assignment, we assumed that the California Legislature had amended the state child abuse statute, Penal Code section 273(a), to include fetuses. A woman who was both pregnant and abusing cocaine was prosecuted under this amended statute and I, as the court, had to decide on appeal whether the amended statute was constitutional.

The following opinion reflects my dissatisfaction with current equal protection and privacy doctrine analysis, especially in the area of reproduction. Although this particular fact pattern was created for the classroom, it is far from "hypothetical." Women's reproductive rights are being increasingly curtailed in the name of fetal rights. Indeed, fetal rights legislation has resulted in such intrusive control over women's lives that one can not help but wonder whether this control over women via their reproductive abilities is the masked intention of the proponents of these laws. How much better off the world would be if the Supreme Court produced opinions such as the one that follows.

SUSAN Q. WOMBWOMAN,
Appellant,
v.
STATE OF CALIFORNIA,
Respondent.

Opinion
WEINSTOCK, J.

The facts of the case at issue are uncontested. The State of California brought suit against appellant for violation of the recently amended California felony child abuse statute, Penal Code section

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273(a).[1] Appellant, a welfare recipient and cocaine addict, was eight months pregnant when she was arrested for possession of cocaine. When tested, traces of cocaine were found in her urine. Two months prior to the arrest, appellant's physician had warned her that continued use of the drug would endanger the fetus's life.

The trial court found appellant guilty of California felony child abuse due to her willful ingestion of cocaine with the full knowledge that it would harm her fetus. The Court of Appeal upheld the conviction. Appellant appeals on behalf of herself and all women, contesting the validity of the statute as violating women's rights to privacy and equal protection under the California Constitution. We reverse.

The History of Fetal Rights Legislation

We recognize that the expansion of legal protection afforded fetuses has been motivated by legitimate concerns. Through no fault of their own, increasing numbers of babies are being born with mental and physical defects due to their mothers' use of drugs or alcohol during pregnancy. Unfortunately, much of the recent legislation involving fetal protection has not analyzed how best to address these legitimate concerns. The drafters and proponents of fetal rights have not considered the long-term consequences of new legislation on women, as carriers and potential carriers of fetuses.[2]

Until recently, courts have been hesitant to grant fetuses legal rights except in narrowly defined instances where the rights were contingent upon a live birth.[3] Thus, a fetus in existence when a testator died was considered a person for inheritance purposes, if it was subsequently born alive. Similarly, if a fetus was injured before birth, the subsequently born child was allowed a cause of action for its prenatal injuries. The fetus, in these circumstances, was not given any rights independent of its mother. At birth, it acquired rights to compensate the

1. Section 273(a) states, "(1) any person, who under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child [or fetus] to suffer, or having the care or custody of any child [or fetus], willfully causes or permits the person or health of such child [or fetus] to be injured, or willfully causes or permits such child [or fetus] to be placed in such situation that its person or health is endangered, is punishable by imprisonment . . . . CAL. PENAL CODE § 273(a) (WEST 1988).

2. Note, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy and Equal Protection*, 95 YALE L.J. 599, 600 (1986).

3. Roe v. Wade, 410 U.S. 113, 162-163 (1973).

live child and her or his parents. The fetus "as a fetus" was not protected by these laws.[4]

Since *Roe v. Wade*, 410 U.S. 113 (1973), the law has increasingly granted fetal rights in circumstances not involving a live birth. Most states now consider fetuses to be persons in wrongful death claims or vehicular homicides. Such laws compensate the parents for losing their expected child and protect the mother who chooses to carry to term. Similarly, feticide laws protect pregnant women from violent attacks by third parties. All of these laws are favorable to the pregnant woman.[5]

When laws recognize the fetus rather than the woman as possessing rights where there is no live birth, the situation changes dramatically. By granting rights to the fetus "as a fetus" and not simply to compensate the subsequently born child or its parents, laws create an opportunity for fetal rights to be used against pregnant women. We are confronted with this situation in the instant case, in which a child abuse statute has been amended to include fetuses, to the detriment of the women who carry them.

The Statute Violates Women's Privacy Rights Under the California Constitution

This court wrote in *Committee to Defend Reproductive Rights v. Myers*[6] that basic principles of federalism permit and encourage construction of state statutes under the state constitution. The federal Bill of Rights was patterned after pre-existing state constitutions and not the reverse. In fact, state constitutions were once seen as the only protection for individuals against local officials.[7] By interpreting state constitutional guarantees, state courts fulfill their obligation to safeguard the rights of their citizens. In light of this obligation, we turn to the California Constitution to determine the validity of section 273(a).

Article I, section 1 of the California Constitution was amended by the people in 1972 to include the right to privacy as one of the inalienable rights afforded its citizens. Because the federal constitution does not explicitly mention the privacy right, this court has deemed the federal right to be narrower than the right granted by our state

4. Cowles v. Cowles, 56 Conn. 240 (1887); Medlock v. Brown, 163 Ga. 520 (1927); McLain v. Howald, 120 Mich. 274 (1899); Christian v. Carter, 193 N.C. 537, 538 (1927).

5. Note, *supra* note 2, at 603.

6. 29 Cal. 3d 252, 261 (1981).

7. *Id.* at 261.

constitution.[8] Included in the right to privacy is the fundamental right of procreative choice that this court recognized in *People v. Belous*[9] four years prior to the Supreme Court's decision in *Roe v. Wade*.

Because the California rights to privacy and procreative choice are fundamental rights, legislation that seeks to regulate these rights can only be upheld if it is narrowly drawn to foster compelling state interests. The state in the instant case asserts a compelling interest in protecting fetuses. However, the state, by imposing criminal penalties on pregnant women who injure their fetuses, has designed legislation that aims to protect fetuses by controlling the women who carry them. This violates women's fundamental constitutional right of procreative choice by severely restricting pregnant women's ability to control their bodies and daily lives during their pregnancies. Further, the statute does not seek to do this in the least intrusive manner, but seeks to incarcerate women, thereby completely impeding their ability to exercise their own fundamental rights. For this reason, section 273(a) fails to pass constitutional muster under the California right to privacy.

Granting fetal rights that can be asserted against the mother would create an unprecedented intrusion on women's bodies and lives. The United States Supreme Court has long held that the right to privacy includes the right to be free from bodily intrusion.[10] "No right is held more sacred, [nor] is more carefully guarded . . . than the right of every individual to the possession and control of his own person."[11]

Even isolated attempts at intrusions, similar to those that pregnant women would be subjected to under section 273(a), have been declared unconstitutional. The United States Supreme Court has held that states may not compel criminal suspects or involuntarily committed mental patients to undergo certain relatively minor and rapid medical procedures.[12]

Under the statute at issue, pregnant drug users would be forcibly detained for the length of their pregnancy and possibly longer. Clearly the privacy interest and expectation intruded upon by detaining a pregnant women for nine months are greater than those involved in the

8. *Id.* at 262-263.

9. 71 Cal. 2d 954 (1969).

10. Note, *supra* note 2, at 615.

11. Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891).

12. In Rochin v. California, 342 U.S. 165, 172 (1952), the Court held that the forcible pumping of a criminal suspect's stomach violated his fourteenth amendment due process rights even though the police saw him swallow two pills that they believed were illegal drugs. In Winston v. Lee, 105 S.Ct. 1611 (1985), the Court held that the surgical removal of a bullet from a suspect's body against the suspect's will (when said bullet was used as evidence) was unconstitutional. Note, *supra* note 2, at 616.

thirty-minute procedure involved in the removal of bullets from a person's body. If the more limited federal privacy right protects individuals from relatively minor and short-term bodily intrusion and detention, the fundamental privacy right under the California Constitution clearly protects women from forced detainment during their pregnancies.

Although the state argues it has a compelling interest in protecting potential human life, we are not persuaded that this statute is narrowly drawn to address this interest. There are less burdensome and more effective alternatives available to the state than imprisoning, policing, and monitoring pregnant women, such as education about the effects of drug use and drug rehabilitation programs. Furthermore, the woman has a fundamental right to be protected from state interference with her decisions involving childbearing. By restricting a pregnant woman's conduct in the guise of protecting a fetus, the state is appropriating her right to control her actions during pregnancy.

Given the fetus's complete physical dependence on the woman's body, every conceivable act of the pregnant woman can adversely affect the fetus. Under section 273(a), women could be held criminally liable for fetal accidents resulting from maternal negligence, improper diet, exposure to infectious disease or workplace hazards, residence at high altitudes, airplane trips, immoderate exercise, or sexual intercourse. They would live in constant fear that any error in judgment might result in criminal (or civil) prosecution. To protect a fetus from a drug-addicted mother such as the appellant, it would be necessary to detain the woman, severely threatening her constitutionally protected rights to autonomy and bodily integrity.[13]

This impingement of the pregnant woman's autonomy is caused by ignoring both the purpose behind the historically narrow recognition of fetal rights and alternatives that would more appropriately protect the fetus. The original drafters of section 273(a) intended the statute to protect liveborn children who are susceptible to "care and custody."[14] By expanding the statute to cover fetuses in response to the public outcry against drug abuse, legislators have created an adversarial relationship between the pregnant woman and her fetus that ultimately threatens rather than protects the fetus from this abuse.

The threat of criminal prosecution and infringement of women's liberty will discourage women from becoming pregnant or carrying their pregnancies to term. To avoid these penalties, pregnant drug abusers,

13. Note, *supra* note 2, at 608.
14. CAL. PENAL CODE § 273(a) notes 2, 4.

desperately in need of medical care, will refrain from seeking prenatal care altogether, endangering their own health as well as that of the fetus. In addition, state intrusion upon the mother's autonomy impairs important emotional bonds between the woman and her fetus. Mothers who are civilly or criminally detained typically pass their sense of helplessness on to their fetuses. Often the distress has led to pregnancy disorders, stillbirth, and premature delivery.[15]

Because the woman and her fetus are physiologically and emotionally connected, the fetus's needs cannot be met if the needs of the mother are unmet. Pregnant drug users need help, not criminal sanctions. They need education about the effects of drugs and alcohol on their fetuses and they need rehabilitation to conquer their addictions. They also need counseling to explore the origins of their drug use. By providing these much needed services to pregnant drug users, states will avoid infringing upon women's constitutional rights and will better protect their fetuses.

We are greatly dissatisfied with the privacy doctrine even under the California Constitution as a means of protecting women from discriminatory legislation. In *Myers,*[16] the court held that once the legislature had agreed to fund medical services for poor women, it could not prevent them from exercising their constitutional rights by withholding these funds for abortions. In so holding, the court noted that poor women are effectively prevented from exercising their right to abortion, if they are not provided with funds to pay for them. However, it also stated that the legislature is not compelled to provide medical care to the poor in the first place. In other words, the privacy doctrine is not sufficient, in and of itself, to grant poor women the means to "effectively" exercise their right to abortion.

Later in the opinion, the *Myers* court further demonstrated that women (including poor women) are not adequately protected by the privacy doctrine. The court noted that it was possible for the state to assert a compelling interest in protecting nonviable fetuses but that it could not do so by discriminating against poor women only.[17] Since we are cognizant of class issues and how they operate to circumscribe women in need of abortions, we now recognize that the analysis in the *Myers* decision is defective. The logical consequence of such thinking

15. Note, *Less State Intervention and Greater State Assistance Equals Greater Maternal Rights and Less Prenatal Abuse*, 1 HASTINGS WOMEN'S L.J. 129, 149 (1989).

16. 29 Cal. 3d 252, 281 (1981).

17. *Id.*

is to find that the state's right to favor fetuses over women may be upheld, so long as all women are discriminated against equally.

Under the privacy doctrine, the state restrains itself from interfering with activities involving the home, marriage, and heterosexual sexuality. Its basic tenet is that autonomous individuals interact "freely and equally" as long as the government does not interfere.[18] Injuries do not occur within or because of the private sphere, but result when the state crosses the line and infringes on the private sphere.

When this gender neutral analysis is replaced with a feminist critique, the inadequacies of the privacy doctrine in protecting women become clear. Women have not experienced autonomy in the private sphere; on the contrary, it is where they have been most oppressed. In the private sphere, women are exploited and devalued for their labor and experience marital rape and battery. By barring government interference in the private sphere, the privacy doctrine prevents women from changing their powerlessness in this sphere. "The existing distribution of power and resources within the private sphere will be precisely what the law of privacy exists to protect."[19]

Since inequality is pervasive in the private sphere, women require intervention, not government restraint, to protect their rights. To fail to recognize this inequality is to give to men the right "to oppress women one at a time."[20] Because we do not wish to perpetuate or reinforce this inequality, we find the privacy doctrine grossly inadequate to protect women and look to the equal protection clause instead.

The Statute Violates Women's Equal Protection Rights Under the California Constitution

Although the privacy doctrine recognizes that fetal rights laws threaten the autonomy of pregnant women, they do not address the sex-specific nature of that threat. Only women suffer from such laws because only women can bear children. Laws that control pregnant women restrict women as women. They also penalize women because of their unique child-bearing ability, a characteristic that has historically been used to perpetuate sexual inequality.[21]

The equal protection clause of the California Constitution protects women from sexual discrimination subject to the strict scrutiny

18. C. MACKINNON, FEMINISM UNMODIFIED 99 (1987).
19. *Id.* at 101.
20. *Id.* at 102.
21. *See generally* Note, *supra* note 2.

standard.[22] Under traditional equal protection analysis, women are granted equal protection only to the extent that they are "similarly situated" to men. Because women are dissimilarly situated to men in issues involving pregnancy, the United States Supreme Court has held that pregnancy related discrimination is based on biological differences between the sexes and is not sex discrimination at all.[23] According to the Court, discrimination on the basis of pregnancy does not discriminate against women but only differentiates between pregnant and nonpregnant PEOPLE.[24]

By dismissing sex discrimination claims where women and men are differently situated because of biological differences the Court evades the true purpose of equal protection: preventing the state from systematically using an immutable characteristic of a class of people as a basis for disadvantaging that class. Biological differences between women and men have historically been used to disadvantage women. In dismissing pregnancy discrimination claims from equal protection scrutiny, the Court rationalizes differential treatment as legitimate, instead of socially created.[25]

State and social regulations regarding reproductive differences have created and reinforced separate and unequal sex-segregated spheres.[26] Men and male norms dominate the public sphere. Many women are relegated to the private sphere where they perform socially necessary but socially unrewarded childcare and housework. Conformity to sex roles has occurred through the imposing of social, economic, and legal constraints that often use women's reproductive ability as justification for their exclusion from the public sphere.

The United States Supreme Court has upheld restrictions on the number of hours women could work because of a "public interest" in protecting the fetus. "The burdens necessarily borne by women for the preservation of the race" were used to justify women's exemption from

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22. Sail'er Inn, Inc v. Kirby, 5 Cal. 3d 1, 20 (1971). The United States Supreme Court subjects sex discrimination claims to the less rigorous, intermediate scrutiny standard. Craig v. Boren, 429 U.S. 190, 197 (1976).

23. Geduldig v. Aiello, 417 U.S. 484 (1974).

24. Note, *supra* note 2, at 622. Congress rejected the Supreme Court's conclusion in the employment setting by passing the Pregnancy Discrimination Act under Title VI, 42 U.S.C. § 2000e(k) in 1978. The Act states that pregnancy discrimination in employment is sex-based discrimination.

25. Note, *supra* note 2, at 622.

26. *Id.* at 623. The concept of "separate but equal" was held unconstitutional by the United States Supreme Court in Brown v. Board of Education, 347 U.S. 483 (1954). If "separate but equal" is not tolerable because of the detrimental psychological effect (among other negative effects) it produces, we find it impermissible for laws contributing to "separate but UNequal" conditions to be upheld.

poll taxes if they decided not to vote.[27] Women have been exempted from jury duty due to their "special responsibilities" in the home.[28] The rationale for restricting women to the private sphere is strikingly similar to the rationale used by fetal rights legislation that "protects" the fetus by imprisoning the woman who carries it.

"Despite the [United States Supreme] Court's pronouncements to the contrary, laws that disadvantage PEOPLE on the basis of pregnancy disadvantage only WOMEN."[29] For this reason, we hold that women are being denied equal protection of the laws under the California Constitution by the implementation of Section 273(a) which restricts, controls and imprisons only women during their pregnancies. Because traditional equal protection analysis perpetuates inequality between the sexes by requiring women to be similar to men (while men need not be similar to anyone in order to be entitled to their privileges) we are adopting a new equal protection analysis.

Under this new analysis, equal protection doctrine in California will scrutinize all laws governing reproduction to ensure that "1) the law has no significant impact in perpetuating either the oppression of women or culturally imposed sex-role constraints on individual freedom or 2) if the law has this impact, it is justified as the best means of serving a compelling state purpose."[30] It is clear that under this new approach, Section 273(a) fails to pass muster. The law perpetuates the oppression of women and culturally imposed sex-role constraints. It is clearly not the best means of achieving the state goals of protecting the fetus.[31] To the contrary, it leads to decreased protection of the fetus and of the woman who carries it.[32]

We recognize that judicial restraint demands adherence to the principles of stare decisis and judicial deference to the legislative branch. We have complied with our duties in this decision. First, we agree with the legal realists that society is in a state of flux and it typically moves

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27. Breedlove v. Suttles, 302 U.S. 277, 282 (1937).

28. Hoyt v. Florida, 368 U.S. 57, 62 (1961).

29. Note, *supra* note 2, at 624.

30. *Id.* This analysis was suggested by Professor Sylvia Law, who also writes, "Given how central state regulation of biology has been to the subjugation of women, the normal presumption of constitutionality is inappropriate and the state should bear the burden of justifying its rule in relation to either proposition." *Id.* We hereby adopt her suggestion in this opinion.

31. As discussed earlier in this opinion, education, counseling, and drug rehabilitation programs are all more effective and less intrusive means of protecting the unborn.

32. Because we have overruled section 273(a) on equal protection and privacy grounds we do not need to discuss the constitutionality of punishing drug addicts for addictions that they cannot control without help and support. However, we do note that a majority of this court finds such punishment to be morally reprehensible.

more quickly than the law. Since laws are supposed to serve society, judges must frequently re-examine the laws that come before them to determine how adequately they are achieving this purpose.[33] When a law is no longer appropriate (or is inappropriate from its inception), it is our duty to overrule it. Such is the case with the amended version of 273(a).

We agree with the critical legal scholars that neither the laws nor the judges who interpret them are value neutral. Legislative drafters and judicial interpreters alike have all of the racist, sexist, classist, homophobic and institutionally-imposed biases so prevalent in the rest of society. "Traditional jurisprudence largely ignores social and historical reality, and masks the existence of social conflict and oppression with ideological myths about objectivity and neutrality. The dominant system has been declared value free; it then follows that all others suffer from bias and can be thoughtlessly dismissed."[34]

It is our duty therefore, to recognize our biases as well as the fundamental class, sex, and race conflicts in society and seek to eradicate, rather than perpetuate the oppression based on these conflicts.[35] Although we are not an elected body of officials like the legislature, it has always been the solemn duty of the courts to protect disadvantaged groups which might not be protected sufficiently by officials concerned about re-election.

This decision does not circumvent the will of either the citizens or the legislators of California. Since the 1970s both groups have striven to equalize the laws and the Constitution. In 1972, when privacy was added by California voters to article I, section 1 of the Constitution, they also substituted the word "people" for "men."[36] In 1975, the legislature passed the Family Law Act to bring state laws in line with changes

33. Llewellyn, *Some Realism About Realism,* 44 HARV. L. REV. 1222, 1236 (1931).

34. D. KAIRYS, THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 4 (1982).

35. Because of the diversity of this Court it has been easier to examine our own biases and those which exist in the laws. We consider ourselves fortunate that the Court is comprised of Asian, Latin, Black, and Native American justices, that four out of seven of us are women, and that two of our members are openly gay. Former California Supreme Court Justice Grodin was also aware of the importance of a diverse court. In his book, *In Pursuit of Justice*, he writes,

> The diversity within our court . . . made me realize that the significance of including women and minorities on a tribunal is much more than symbolic. Bird, Broussard and Reynoso brought to our discussions perspectives that went beyond my own experience; but even apart from anything they said, their very presence tended to heighten my own sensitivity toward those perspectives, and I believe the same was true for other judges as well. J. GRODIN, IN PURSUIT OF JUSTICE 58 (1989).

36. CAL. CONST. art 1, § 1.

brought about in the family by the women's movement.[37] Finally, virtually all wording in statutes and in the California Constitution have discarded the gender-biased "generic," he/him, for the gender inclusive he/she and him/her. This decision, therefore, merely extends the efforts toward gender equality already begun by Californians in their desire to eliminate all forms of oppression.

In sum, we hold that section 273(a) of the California Penal Code as amended to include fetuses is unconstitutional under the California Constitution. It violates appellant's, as well as all women's rights to equal protection and privacy. We have now officially recognized the inadequacy of traditional privacy and equal protection analyses as applied to women's reproductive freedoms. Consequently, we have adopted a new equal protection approach designed to eradicate, rather than perpetuate, the oppression of women. Reversed and remanded for a new trial consistent with this opinion.

37. West's *Street Law* 517 3d ed., (1987).