

Now, curbs are not supplied by nature. The world of curbs was made—made by and for us, the walking, running, jumping types. It took federal law that mandated tearing up the sidewalks at nearly every intersection in this country to jar us into realizing that many of the problems people in wheelchairs faced lay not in them but in the fact that *we* had *made* a world that excluded them, and then, like the Giants, had assumed *that* world was *the* world.

Unavoidable Unfairness

The world of Giants—the world of curbs—the world of whites and men: imagine, if you will, a world built over a long time by and for men, by and for whites. In that world there would be a thousand and one impediments to women and blacks working effectively and successfully. That world and its institutions would be suffused through and through with inhospitality to blacks and women—just as Giant Land was inhospitable to us little people, and Curb World was inhospitable to wheelchair people. Imagine that world—or do we have to imagine it? That's the world we still live in, isn't it?

Isn't it plausible that strong measures may be needed to change it? Are those strong measures, if they in-

volve racial or gender preferences, unfair to white men? Of course they are. Well, doesn't that settle the matter? It would if we could always be fair without sometimes being unfair. Does that sound puzzling?

Think a moment. What are our options? Consider the civil rights bill George Bush vetoed, and threatens to veto again. If we set high burdens of proof on businesses, some of them may resort to quotas—and that's unfair discrimination. But if we don't set high standards, some businesses won't make the necessary effort to change practices that still hinder blacks and women—and *that's* unfair discrimination. Sometimes we may be faced *only* with the choice of risking unfairness in one direction or risking it in another. Sometimes we may have no choice except to impose one unfairness or allow another to persist. Then what do we do?

President Bush vetoed the civil rights bill because it created the risk of quotas. Does he believe, then, that vetoing it creates no risks that some blacks and women will continue to be discriminated against, or is the unspoken premise this: that the risk of victimization is tolerable if the victims are not white men?

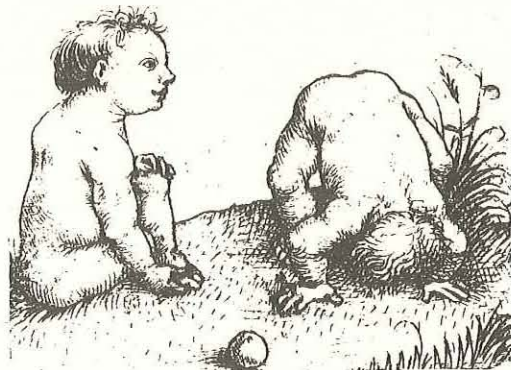
—Robert K. Fullinwider

Protecting Children, Born and Unborn

If the courts speak for the American people, then the American people must be deeply ambivalent about children. Granted, some of the ambivalence might stem from metaphysical uncertainty. After all, when courts are expected to rule on everything from actual children, to the potential children that are fetuses, to the potentially potential children that are spermatozoa or unfertilized eggs, it's natural to flounder. But even with regard to a single metaphysical category, such as potential children, we seem to be inconsistent. And so, one suspects, the inconsistency comes less from metaphysical floundering than from moral conflict—from a conflict of values that reflects, among other things, the mixed feelings and incompatible beliefs we have about children.

Take, for example, the recent Supreme Court decision in *Automobile Workers v. Johnson Controls*. Johnson Controls, a battery manufacturer, had barred all women except those with medical proof of infertility from jobs that exposed them to high levels of lead. The stated reason for the ban was benign: the company wanted to protect the future children of its employees.

The UAW filed suit, claiming sex discrimination under Title VII of the Civil Rights Act, and the Supreme Court ruled in favor of the union. "The bias in Johnson Controls' policy is obvious," said Justice Blackmun, delivering the opinion of the Court. "Fertile men, but not fertile women, are given a choice as to whether



they wish to risk their reproductive health for a particular job."

Advocates of women's rights applauded, albeit with a certain hesitation. What a triumph to have the same choice that men do, yet what a burden when one must choose between holding a decent job and risking her reproductive health.

The greatest interest of the Court's decision, however, lay in its general rejection of employers' fetal protection policies. "Decisions about the welfare of future children must be left to the parents who conceive, bear, support, and raise them rather than to the employers who hire those parents," Blackmun wrote. And what

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holds for employers apparently also holds for the courts: "It is no more appropriate for the courts than it is for individual employers to decide whether a woman's reproductive role is more important to herself and her family than her economic role. Congress has left this choice to the woman as hers to make."

Considering the Court's decision in *Webster v. Reproductive Health Services*, along with the bitter fights over abortion it has triggered in state legislatures, it comes as news that women have such vast freedom to choose their reproductive roles. Factor in the recent trend toward state intervention in pregnancy, and the picture becomes even more confusing. Courts have allowed hospitals to detain pregnant women and have themselves ordered such detention to protect the fetus. Courts have ordered not only blood transfusions but also cesarean sections over women's objections. In one case, a judge even sentenced a woman convicted of an unrelated crime to a jail term in order to ensure that her fetus would not be exposed to drugs.

Though not all cases like these involve drug addicts—in fact, quite a few are connected with religion—the increase in state regulation of women's conduct during pregnancy surely results in part from spreading alarm over drug abuse. Indeed, many of these efforts have focused on the arrest and prosecution of pregnant women under existing child abuse or narcotics distribution statutes. But how do state efforts to protect the fetus from drugs jibe with the *Johnson Controls* decision? Why is a woman free to decide whether her future child will be exposed to lead but not whether he will be exposed to cocaine?

There are two easy answers. First, most of the women affected by the *Johnson Controls* ban were not

pregnant. Some had even made a firm decision not to become pregnant. So the comparison is largely between pregnant women and potentially pregnant women, or perhaps between potential children (conceived but unborn) and only potentially potential children (not even conceived). Second, the *Johnson Controls* case had to do with employment discrimination. The women involved weren't seeking exposure to lead: they wanted decent jobs, and lead exposure was simply a risk they were willing to run in order to have those jobs. Since the craving for a decent job, unlike the craving for cocaine, benefits society, and since federal law prohibits sex discrimination in employment, women's rights presumably took precedence over the rights of fetuses and hypothetical fetuses.

Alas, this superficial consistency masks a deeper ambivalence. On the one hand, we want to prevent harm to "innocent" third parties—and while we may have our doubts about adults, and even teenage children, we certainly regard the unborn as "innocent." On the other hand, we tend to see the parent-child relationship as both private and privileged. The law doesn't permit me to give my neighbor's child a swat on the bottom, but I am well within my rights in giving my own child a swat, for my own child is *my* child.

Much of John Locke's *First Treatise of Government* goes to show that parents do not, and cannot, *own* their children. If they did, he argues, then every human being would be born into slavery. With the exception of a few diehard libertarians, most of us would surely agree with Locke: our children are not our *property*. Yet we do feel intensely proprietary about them; we have rights with regard to our children that we have with regard to no other human beings; and if they want to escape our control, they may even need to petition a court for "emancipation." Our rights as parents, then, even if not the rights of property owners, should not be taken lightly.

As a society, our desire to protect the innocent pulls us in the direction of fetal protection. *Johnson Controls* notwithstanding, we take an active interest in protecting the unborn. The state's interest in potential life has been declared so "compelling"—to use the language of *Roe v. Wade*—that state law may even prohibit all but medically necessary abortions in the third trimester of pregnancy. The irony, and tragedy, is that parental rights and privacy seem to prevail once the child is actually born.

In this regard consider the Supreme Court's decision in *DeShaney v. Winnebago County*, a suit brought by four-year-old Joshua DeShaney and his mother under the Due Process Clause of the Fourteenth Amendment. Joshua's parents were divorced; he lived with his father, who beat the boy severely. County social workers received repeated complaints about the abuse (especially from hospital personnel), and they had reason to believe the complaints justified. Nevertheless, they did not remove the child from his father's custody. Joshua's father finally beat him so badly that the boy suffered serious, irreversible brain damage. (In all likelihood, he will have to be confined to an institu-

tion for the rest of his life.) The DeShaney suit claimed that the county's failure to act deprived Joshua of "his liberty interest in bodily integrity," in violation of his rights under the Due Process Clause.

The Supreme Court held that "nothing in the language of the Due Process Clause requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." A person has no right to governmental aid, not "even where such aid may be necessary to secure life."

How odd: The state claims, *and exercises*, the right to protect fetuses from the women carrying them; yet when a toddler is beaten so severely by his father that he needs repeated hospitalization, the state does nothing. The toddler has no right to expect protection, the state no obligation to provide it. In his *DeShaney* dissent, Justice Blackmun condemned the "sterile formalism" that led to this interpretation of the Fourteenth Amendment. "Like the antebellum judges who denied relief to fugitive slaves..." he wrote, "the Court today claims that its decision, however harsh, is compelled by existing legal doctrine."

The DeShaney case, when considered together with the growing trend toward state intervention in pregnancy, raises troubling questions. Is the state's interest in potential children more "compelling" than its interest in actual children? Is the fetus "innocent" in some way that a four-year-old isn't? If we, as a society, care so much about children that we will intervene in a woman's pregnancy, why don't we move more decisively to protect children—children who are already born and breathing?

To say that a toddler has no constitutional *right* to our protection is hardly an answer. Neither does a fetus. Perhaps we should think a bit less about children's legal rights and a bit more about our own moral obligations.

— Bonnie Kent

Sources used in preparing this article include: *Roe v. Wade*, 410 U.S. 113 (1973); *Webster v. Reproductive Health Services*, 109 S. Ct. 3040 (1989); *DeShaney v. Winnebago County*, 489 U.S. 189 (1989); *Automobile Workers v. Johnson Controls*, 111 S. Ct. 1196 (1991); "Rethinking (M)Otherhood: Feminist Theory and State Regulation of Pregnancy," *Harvard Law Review*, vol. 103, no. 6 (1990).

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