CIVIL LIBERTIES *By Harvey A. Silverglate*

The right to private pee

THE U.S. SUPREME Court recently agreed to review a case that presents a relatively narrow question of search-and-seizure law but nonetheless raises one of the knottiest issues to land at the court in years.

On Feb. 28, the court agreed to decide whether a public hospital in South Carolina violated the Constitution's ban on unreasonable searches and seizures when it tested the urine of certain pregnant women for drugs and sometimes turned over positive results to prosecutors.

Prosecutions, when they followed, charged distribution of illegal drugs to minors—the minors being viable fetuses in the last trimester of pregnancy. (Under South Carolina jurisprudence, a viable fetus is considered a child for purposes of the state's child endangerment laws.)

Hospital policy

The case arises out of a lawsuit brought by patients challenging the hospital's policy of testing, for the presence of cocaine, the urine of pregnant women who showed outward signs of drug use. Those who tested positive were given a choice of being arrested or entering a drug treatment program.

The test results of those who chose to enter a program were not turned over to prosecutors unless the woman tested positive a second time, in which event the woman was arrested. Even then, she could avoid prosecution if she completed the drug program successfully.

While the contentious issue of abortion is not directly involved, it does linger in the background. The court's 1973 decision in *Roe v. Wade*, 410 U.S. 113, hardly ended the controversy between those who consider abortion the murder of a child and those who view a ban as an infringement on a woman's autonomy over her own body.

The high court compromised by giving the mother the right to abort in the first trimester, when the fetus was viewed as nonviable, but allowing states some regulatory powers during the second and still more during the third, except that even third-trimester abortions could not be banned if the life and health of the mother were at stake. This distinction between viable and nonviable fetuses is reflected in South Carolina's child endangerment laws.

The U.S. Court of Appeals for the 4th Circuit held, 2-1, that the warrantless "searches" of the pregnant women were justified by a "special governmental need" beyond that of normal law enforcement—here the need to deal with the epidemic of "crack babies" born to addicted mothers, who often suffer serious physical and neurological problems.

The difficulty presented to those concerned with the civil liberties of pregnant women is agonizing. The controversies that have wracked the nation since *Roe v. Wade* have pitted the rights of pregnant women against those of unborn, usually nonviable, fetuses. Regardless of whether the fetus is or is not considered to be a "life," its "rights" have been held subservient to those of the mother. Damage done by the mother to a fetus destined to be aborted—whether that harm be accomplished by the mother's ingestion of drugs or her ultimate decision to abort—was not of legal moment, for it was the mother who would survive the fetus. However, if the mother's intention is to bear the child, her harm to the fetus becomes harm to the child who is soon to be born.

Vexing dilemma

Of course, courts often prohibit intrusions by the state even if another citizen's welfare may be adversely affected. However, the prospect of a mother's inflicting serious harm on her baby just as it is about to begin life's journey is particularly vexing.

Giving the mother a choice of ceasing drug use or facing prosecution makes the question even closer. (The dissent pointed out that because several of the women were arrested immediately after giving birth, the arrest and prosecution "could only have had a punitive rather than a preventive purpose." Yet one doubts that an easier civil liberties question would be presented if the mother were kept under arrest, and hence drug-free, from her first positive drug result until the delivery.)

It may be that even Solomon could not satisfactorily resolve this case. Nonetheless, the Supreme Court has undertaken to do so in reviewing *Ferguson v. City of Charleston, S. Carolina*, 186 F.3d 469 (1999). NLJ

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