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HAS CONNECTICUT THROWN OUT THE BABY WITH THE BATH WATER?¹ TERMINATION OF PARENTAL RIGHTS AND *IN RE VALERIE D.*

I. Introduction

Jane, a crack addict, smoked throughout eight months of her pregnancy, but stopped in the last month for fear of having her baby test positive for drugs and thus be taken away. She received treatment during her pregnancy at a hospital drug detoxification unit, and at a shelter for mothers and children. According to her neighbors, she resumed her crack habit soon after she gave birth to Daniel, a healthy baby boy.

One day Jane left her baby with Felipe, her drug-abusing, live-in companion. Jane returned home six days later after what police say was an extended bout of smoking crack, which was paid for through prostitution. She found her son lying dead in a pool of his own blood. The city's medical examiner determined his death was caused by acute starvation and dehydration.²

Gigi was also a drug addict. She used cocaine at least three times a week and every weekend. Despite continued drug abuse during her pregnancy, Gigi's social workers allowed her to take her newborn home with her under an intensive supervision program.³ According to Gigi, "[I]f they had just removed my son, I wouldn't have had anything to do but keep drugging because I wouldn't have had no baby. Being they give you the chance to keep your child makes you go to the drug program."⁴

Hardy was a crack addict who, like these other women, abused

1. Frankfurter, Felix, *International Salt Co. v. U.S.*, 332 U.S. 392, 405 (1947).

2. Anemona Hartocollis & Clara Hemphill, *Why Did This Child Die?*, *NEWSDAY*, March 20, 1991, at 4.

3. According to the Human Resources Administration, New York City is embarking on a new program which will allow babies who have been exposed to drugs to go home with the mother instead of being automatically removed. Telephone interview with Mr. Weber of the Media Relations Office of the Human Resources Administration. The Dinkins Administration set a \$12.5 million city tax levy to fund this program which was scheduled to begin in December of 1991. *Id.* The city is training case workers to be "preservation workers," and intensive crisis centers are being set up in 20 neighborhoods throughout the city. *Id.* Women who have a drug problem receive intensive counseling and assistance for as long as 16 months. Joseph B. Treaster, *Plan Lets Addict Mothers Take Their Newborns Home*, *N.Y. TIMES*, Sept. 19, 1991, at A1. The program coordinator emphasizes that the program realizes a basic respect for the family as the primary entity in which children grow. *Life at the Top of New York's Welfare Bureaucracy*, *N.Y. TIMES*, Dec. 8, 1991, § 4, at 18.

4. Treaster, *supra* note 3.

drugs during her pregnancy. The city took Hardy's children from her while she attempted to rehabilitate herself. She moved into a new neighborhood and made a new circle of friends. Hardy began to see a drug counselor, and stopped using drugs. After ten months of foster care, social services returned Hardy's children to her, and she began planning on a career as a drug therapist.⁵

* * *

These stories reflect not only the harsh realities faced by pregnant addicts and drug-exposed babies, but also the myriad of problems confronting governmental and private agencies guided by the best interests of the child. The governmental responses have been as diverse as the problems themselves. At least fifty criminal cases have been brought against women who have abused drugs during pregnancy in nineteen states and the District of Columbia.⁶ In many states, the social service agency will remove the baby from the drug-abusing mother at birth for a temporary period of time.⁷ Others have attempted a system of in-home intervention to ensure that the mother stops using drugs and properly cares for the child.⁸ Lastly, at least one state has chosen the harshest alternative, termination of the parental rights.⁹

This Note focuses on the last alternative: termination of parental rights. In this context, it necessarily discusses what is in the best in-

5. Jan Hoffman, *Pregnant, Addicted, and Guilty?*, N.Y. TIMES, Aug. 19, 1990, at 34.

6. Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and The Right of Privacy*, 104 HARV. L. REV. 1419, 1421 n.5 (1991). One example is *Johnson v. State*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991) (upholding criminal conviction where defendant gave birth to drug-exposed infant). *But see State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991). After a review of the legislative history of the relevant Florida statute, this court concluded that the legislature considered and rejected imposing criminal sanctions upon a mother for transmitting drugs to her unborn child. *Id.* at 1142 (citing *Johnson v. State*, 578 So. 2d 419, 423-24 (Fla. Dist. Ct. App. 1991) (Sharp, J., dissenting)). The court noted that the thrust of the statute is toward keeping the baby with its mother and family. *Id.* at 1142-43. This Note does not address the issue of criminal prosecution of pregnant mothers. *See generally* Kary L. Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278 (1990); Roberts, *supra*.

7. *Vanessa W. v. Texas Dep't of Human Serv.*, 810 S.W.2d 744 (Tex. Ct. App. 1991) (baby born with drug withdrawal symptoms immediately placed in foster care); *In re Stephen W.*, 221 Cal. App. 3d 629, 271 Cal. Rptr. 319 (1990) (baby born under the influence of opiates placed in temporary foster care); *In re Ruiz*, 27 Ohio Misc. 2d 31 (1986) (baby born with cocaine and opiates in his blood immediately taken into custody of the Department of Human Services); *In re Baby X*, 97 Mich. App. 111, 293 N.W.2d 736 (1980) (baby born exhibiting symptoms of drug withdrawal taken into temporary custody).

8. Treaster, *supra* note 3.

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

terest of the drug-impaired child. Termination of parental rights has been characterized as a unique kind of deprivation which has the effect of ending a fundamental liberty interest.¹⁰ In *In re Valerie D.*,¹¹ Connecticut has established a new precedent in the area of termination of parental rights by holding that parental rights may be terminated at birth solely on the basis of prenatal conduct. This Note discusses *Valerie D.* in the context of the governmental obligation to promote family integrity and the penumbra of rights residing in the parents, the child and the familial relationship. Part II of the Note sets forth Connecticut law on termination of parental rights exemplified by the lower and appellate court opinions of *Valerie D.* Part III briefly explores both the history of the family in our constitutional tradition and other constitutional implications which could arise in a termination of parental rights case. Part IV analyzes *Valerie D.* and its implications in termination of parental rights cases in light of the constitutional interests involved. The Note concludes that, in deciding whether to terminate these parental rights, the least restrictive alternative should be used.

II. *In re Valerie D.*

A. Connecticut Law on Termination of Parental Rights

In *Valerie D.* the trial court was confronted with an issue of first impression: whether the circumstances presented by the petitioner were sufficiently compelling to require immediate and permanent termination of parental rights according to Connecticut law. In Connecticut, termination of parental rights is defined as "the complete severance by court order of the legal relationship, with all its rights and responsibilities, between the child and his parent . . ."¹² Courts have construed "complete" to mean permanent severance of the legal relationship, subject to the appellate process.¹³

10. *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).

11. 25 Conn. App. at 592-93, 595 A.2d at 925.

12. CONN. GEN. STAT. § 45a-707(g) (1990).

13. Termination of parental rights has been defined as the "irretrievable destruction" of family life. *In re Jessica M.*, 217 Conn. 459, 465, 586 A.2d 597, 600 (1991) (citing *Santosky v. Kramer*, 455 U.S. 745, 753 (1982)). By terminating parental rights, children can be removed from a temporary home and placed in a permanent family environment. *Anonymous v. Norton*, 168 Conn. 421, 430-31, 362 A.2d 532, 537 (1975). *In re Joshua Z.*, 26 Conn. App. 58, 63, 597 A.2d 842, 844 (1991) ("[t]ermination of parental rights, because of its finality, requires clear and convincing evidence . . ."); *In re Wayne A. II*, 25 Conn. App. 536, 541, 595 A.2d 373, 375 (1991) ("[parent] understood that the termination of parental rights is part of the adoption process and that the state would be seeking to permanently place his son").

Commentators define the effect of termination of parental rights as depriving the par-

Connecticut's social and human services and resources statute requires that before terminating parental rights, the court must engage in a three step fact-finding process. First, the court must find by clear and convincing evidence that the termination is in the best interest of the child.¹⁴ The court must then find an enumerated ground for termination.¹⁵ With a nonconsenting parent, the enumerated ground for termination must have existed for at least one year prior to bringing the termination action.¹⁶ This requirement may be waived if, from the totality of the circumstances, the court finds waiver to be in the child's best interest.¹⁷ Thirdly, the court must consider and make

ent of the right ever to regain custody and the right to exercise visitation privileges. Marsha Garrison, *Why Terminate Parental Rights?*, 35 STAN. L. REV. 423, 425 (1983); Judith Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887, 930 (1975).

14. CONN. GEN. STAT. § 17a-112(b) (Supp. 1991). According to the Supreme Court of Connecticut, the requirement of finding termination to be in the child's best interest is additional to finding an enumerated ground for termination. *In re Jessica M.*, 217 Conn. 459, 466, 586 A.2d 597, 600 (1991).

15. The superior court upon hearing and notice . . . may grant such petition if it finds, upon clear and convincing evidence, that the termination is in the best interest of the child and that, . . . with respect to any nonconsenting parent, over an extended period of time, which, except as provided in subsection (c) of this section, shall not be less than one year: (1) The child has been abandoned by the parent in the sense that the parent has failed to maintain a reasonable degree of interest, concern or responsibility as to the welfare of the child; or (2) the parents of a child who has been found . . . to have been neglected or uncared for in a prior proceeding have failed to achieve such degree of personal rehabilitation as would encourage the belief that within a reasonable time, . . . they could assume a responsible position in the life of the child; or (3) the child has been denied, by reason of an act or acts of parental commission or omission, the care, guidance or control necessary for his physical, educational, moral or emotional well-being. Nonaccidental or inadequately explained serious physical injury to a child shall constitute prima facie evidence of acts of parental commission or omission sufficient for the termination of parental rights; or (4) there is no ongoing parent child relationship, which means the relationship that ordinarily develops as a result of a parent having met on a day to day basis the physical, emotional, moral and educational needs of the child and to allow further time for the establishment or reestablishment of the parent child relationship would be detrimental to the best interests of the child.

CONN. GEN. STAT. §§ 17a-112(b), 45a-717(f) (Supp. 1991).

16. CONN. GEN. STAT. § 17a-112(b) (Supp. 1991).

17. CONN. GEN. STAT. § 17a-112(c) (Supp. 1991). Recent cases in Connecticut which have dealt with waiver of the one year period give little guidance as to what circumstances merit such a waiver. The decision is made on a case-by-case basis depending on the totality of the circumstances. *In re Sonja A.*, 1991 Conn. Super. LEXIS 1733 (July 30, 1991) (waiver of one year requirement where mother was found to have abandoned her children for six months and such waiver was in the children's best interest); *In re Jason M.*, 1991 Conn. Super. LEXIS 1604 at *33-*34 (July 15, 1991) (waiver unnecessary to promote the child's best interest where mother's ability to care for the child was assessed during a limited period of time and where court found that time for rehabilitation of the mother according to a treatment plan would be beneficial to the child); *In re Christina F.*,

findings regarding six factors,¹⁸ including the timeliness, nature and extent of services offered or provided to the parent and child by an agency to reunify the family;¹⁹ the feelings of the child with respect to his parents;²⁰ the age of the child;²¹ and the efforts the parent has made to adjust his circumstances to make it in the child's interest to return to his home in the foreseeable future.²²

B. Lower Court Opinion

The factual circumstances confronted by the court in *Valerie D.* were harsh and stark. Valerie's mother, Jean, began using liquor and drugs at age eleven. Jean's first baby, Amanda,²³ was born healthy and drug-free. However, by the time Jean was pregnant with Valerie, she had become addicted to cocaine.²⁴ One month before Valerie's birth Jean was arrested and her first baby, Amanda, was taken into temporary custody by the Department of Children and Youth Services ("DCYS") which filed a neglect petition against the parents.²⁵

6 Conn. App. 360, 505 A.2d 734 (1986) (one year requirement waived where intellectually limited mother was unable to protect child from intellectually limited father's sexual molestation).

18. [I]n determining whether to terminate parental rights under this section, the court shall consider and make written findings regarding: (1) The timeliness, nature, and extent of services offered or provided to the parent and the child to facilitate the reunion of the child with the parent; (2) the terms of any applicable court order . . . and the extent to which all parties have fulfilled their obligations under such order; (3) the feelings and emotional ties of the child with respect to his parents . . . ; (4) the age of the child; (5) the efforts the parent has made to adjust his circumstances, conduct, or conditions to make it in the best interest of the child to return him to his home in the foreseeable future, including but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions and (B) the maintenance of regular contact or communication with the guardian . . . ; and (6) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child

CONN. GEN. STAT. §§ 17a-112(d), 45a-717(h) (Supp. 1991).

19. CONN. GEN. STAT. § 17a-112(d)(1) (Supp. 1991).

20. CONN. GEN. STAT. § 17a-112(d)(3) (Supp. 1991).

21. CONN. GEN. STAT. § 17a-112(d)(4) (Supp. 1991).

22. CONN. GEN. STAT. § 17a-112(5) (Supp. 1991).

23. Amanda has the same father as Valerie, John M.. *In re Valerie M.*, 1990 Conn. Super. LEXIS 529, at *9 (July 24, 1990).

24. *Id.* at *10.

25. *Id.* Neglect proceedings are initiated by a complaint of neglect or abuse to a court, the police, or a child welfare agency from a hospital, relative, neighbor, teacher, or social worker. A social welfare agency usually investigates the complaint and it may either file a charge of neglect in a juvenile court, work out a voluntary treatment program, or place the children in foster care. When a court is petitioned, the child is often removed from home and placed in an institution or foster home pending adjudication of the neglect

Jean had cared for Amanda without incident for more than a year.²⁶ Both Jean and the baby's father were advised to enter treatment for an admitted cocaine addiction, but the court found that they had failed to do so.²⁷

Despite warnings of doctors and social workers of the dangers of drugs, Jean injected cocaine in the last stages of her pregnancy.²⁸ Valerie was six days old and still hospitalized when DCYS filed cotermi-
nous petitions for neglect and termination of parental rights.²⁹ Jean had normal parental contact with her child until her own discharge a few days after giving birth.³⁰ Valerie was placed in foster care ten days after birth.³¹ Jean was advised by a hospital social worker that she and the father should obtain drug treatment so that Valerie could be returned to them.³² Four months after giving birth to Valerie, Jean attended an outpatient drug treatment program for five days and tested positive for cocaine on the last day.³³ Valerie's father, John, completed twenty-one days of a twenty-five day inpatient drug treatment program but received no aftercare.³⁴ From August 1989 to February 1990, the mother visited her baby eleven times and phoned eight

charge. In some instances, this temporary placement can last for five years. Upon a finding of neglect, the court can either remove the child or leave him at home subject to social work supervision. Approximately 75% of the children removed are put in foster homes. Unless parental rights are terminated, the parents still retain some rights regarding the child's care. Michael S. Wald, *State Intervention on Behalf of "Neglected" Children: Standards for Removal of Children from Their Homes, Monitoring the Status of Children in Foster Care, and Termination of Parental Rights*, 28 STAN. L. REV. 623, 629-31 (1976).

26. *In re Valerie M.*, 1990 Conn. Super. at *11.

27. *Id.* at *36. According to the appellant's brief, however, Jean could not seek treatment because she was heavily pregnant with Valerie and faced difficulty in obtaining drug treatment as a pregnant woman. Brief for Appellant at 8, *In re Valerie D.*, 25 Conn. App. 586, 595 A.2d 922 (1991) (No. 9140) [hereinafter "Brief"]. Commentators are increasingly taking note of the lack of adequate treatment centers available for pregnant women. In 1989, the ACLU's Women's Rights Project filed the first in a series of lawsuits on behalf of pregnant crack addicts against private drug treatment programs in New York City. These programs do not admit the women because they are pregnant. Moss, *supra* note 6, at 297.

New York recently amended its mental hygiene law to provide specifically that substance abuse programs funded by federal, state, local and private resources must have "as part of their program mission the delivery of services to women including pregnant women . . ." N.Y. MENTAL HYG. LAW § 19.07(b)(3) (McKinney Supp. 1992).

28. *Valerie M.*, 1990 Conn. Super. at *12. Jean testified that she was not fully aware of the harm cocaine could do to her baby. Brief, *supra* note 27, at 4.

29. *Valerie M.*, 1990 Conn. Super. at *13.

30. *Id.* at *14.

31. Brief for Appellee at 8, *In re Valerie D.*, 25 Conn. App. 586 (1991) (No. 9140).

32. *Valerie M.*, 1990 Conn. Super. at *14.

33. *Id.*

34. *Id.* at *16.

times.³⁵ John visited once in August and once in October.³⁶

Both parents lacked any steady source of income and were struggling to overcome their drug addiction. A psychologist testified as an expert that the parents were immature, impulsive, insecure and had failed to bond or connect with Valerie. He also stated that there had been no motivation on the part of either parent to get treatment until the state removed their children.³⁷

Petitioner DCYS sought termination on the basis of three separate statutory grounds: (i) that Valerie had sustained nonaccidental serious physical injury; (ii) that she was abandoned, and; (iii) that there was no ongoing parent-child relationship. The trial court found, by clear and convincing evidence, nonaccidental serious physical injury in that the mother's injection of cocaine was found to cause serious, life-threatening, physical injury at the instant of Valerie's birth.³⁸ This prenatal conduct supplied the basis for an order terminating parental rights. The court waived the one year waiting period which is statutorily required before petitioning to terminate parental rights. It concluded that the ground of serious physical injury should not be subject to the one year statutory requirement because this requirement was an inadvertent, technical amendment.³⁹ The court further noted that even if the ground were subject to this requirement, it could be waived if necessary to promote the best interest of the child.⁴⁰

Although the trial court dismissed the abandonment claim for failure of proof,⁴¹ the court did find additional support for termination based on the lack of a parent-child relationship. This latter finding was based in part on the expert testimony of a psychiatrist that there was no bonding between parent and child during the two days that he saw them together.⁴² The court decided that to allow further time for establishment of a relationship would be detrimental to the child's best interests.⁴³

Having determined the best interests of Valerie and having found two enumerated grounds for termination, the court next considered and made findings regarding the six factors.⁴⁴ Thus, although prenatal

35. Brief for Appellee, *supra* note 31, at 6.

36. *Valerie M.*, 1990 Conn. Super. at *16.

37. *Id.* at *18.

38. *Id.* at *26-*27.

39. *Id.* at *37. *See infra* note 118.

40. CONN. GEN. STAT. § 17a-112(c) (Supp. 1991).

41. *Valerie M.*, 1990 Conn. Super. at *29.

42. *Id.*

43. *Id.*

44. *See supra* note 18.

conduct supplied the basis for the termination of parental rights, the court was required to examine postnatal conduct in making its decision. The court found that the suggestions made by doctors and social workers that the parents enter drug treatment were, under the circumstances, sufficient "services offered . . . to the parent" to facilitate reunion of parents and child.⁴⁵ The court also found that services had been provided to the parents through the granted visitation rights. The natural parents received the foster parents' address and telephone number and were invited to make their own arrangements for visitation.⁴⁶ The court considered Valerie's emotional ties to her natural parents to be undeveloped because she saw them so infrequently in her first seven months.⁴⁷

As Valerie was a seven month old cocaine baby, the court decided that she would need an extraordinary degree of secure and attentive parenting, and thus that permanent placement was imminently needed.⁴⁸ Neither parent was found to have sufficiently adjusted his or her circumstances to make it in Valerie's best interest to return home.⁴⁹ Lastly, although the foster home was ten miles from the parents' home, the court held that the foster placement did not act to prevent them from maintaining a meaningful relationship with Valerie.

After considering these factors, the court decided termination of parental rights was in Valerie's best interest. The court construed the facts to be serious enough to merit waiver of the one year statutory waiting period.⁵⁰

B. The Appellate Opinion

On appeal, the mother⁵¹ challenged the termination decision arguing that her conduct while pregnant could not support a neglect petition or a petition to terminate parental rights. In affirming, the appellate court held that a petition for neglect or termination could be based solely on a mother's prenatal conduct,⁵² namely, causing the baby to be born with cocaine in her system.⁵³ In discussing the issue

45. *Valerie M.*, 1990 Conn. Super. at *34.

46. *Id.*

47. *Id.* at *35.

48. *Id.* at *34-*35.

49. *Id.* at *35.

50. *Id.* at *27.

51. The father is not a party to this appeal. *In re Valerie D.*, 25 Conn. App. 586, 587 n.1, 595 A.2d 922, 923 n.1 (1991).

52. *Id.* at 592, 595 A.2d at 925.

53. Originally, the opinion focused solely on the prenatal conduct. The court

of termination based on prenatal conduct, the court drew an analogy to tort law.⁵⁴ It compared the state's interest in protecting newborn children with cases allowing a child to recover for injuries sustained *in utero* or those allowing a representative of the child to bring a wrongful death action.⁵⁵ Because a child may sue third parties based on harm done to him as a fetus, the court concluded that the state, protecting the best interests of the child, may petition to terminate parental rights based on a mother's prenatal conduct.⁵⁶

In *Roe v. Wade*,⁵⁷ the Court held that a state has a legitimate interest in the fetus at viability. The *Valerie D.* court relied on this holding to support its conclusion that the state may intervene even when the harmful acts were committed on the fetus.⁵⁸ The *Valerie D.* court found that the state had a compelling interest in protecting Valerie from the consequences of being born with a dangerous drug in her system.⁵⁹

In addition to finding support in the United States Supreme Court, the Connecticut appellate court looked to cases in other jurisdictions which dealt with prenatal drug abuse. These cases involved petitions for neglect,⁶⁰ the adjudication of a child as a dependent child of the court,⁶¹ and an abused child proceeding.⁶² Based on the tort analogy, the support of *Roe* and the analogous neglect cases, the court held that a petition for neglect or termination of parental rights can be supported solely by evidence of a mother's prenatal conduct. By setting this precedent in the context of drug-abusing pregnant women, *Valerie D.* raises the question of how best to resolve the competing rights and interests of the child, mother and the state.

amended its opinion, basing its decision on the second ground of no ongoing parent-child relationship as well. The court included more facts about the mother's postnatal conduct and concluded that there was overwhelming evidence that to allow further time for the establishment of a relationship would be detrimental to Valerie. *Id.* at 595, 595 A.2d at 926.

54. *Id.* at 590, 595 A.2d at 924.

55. *Id.* at 591-92, 595 A.2d at 924-25.

56. *Id.* at 592, 595 A.2d at 925.

57. 410 U.S. 113, 163 (1973) (holding that a Texas statute making abortion illegal unconstitutionally infringed upon a woman's right to privacy).

58. *Valerie D.*, 25 Conn. App. at 592, 595 A.2d at 925.

59. *Id.*

60. *In re Stefanel Tysha C.*, 157 A.D.2d 322, 324, 556 N.Y.S.2d 280, 281 (1990); *In re Baby X*, 97 Mich. App. 111, 113, 293 N.W.2d 736, 738 (1980).

61. *In re Troy D.*, 215 Cal. App. 3d 889, 895 n.1, 263 Cal. Rptr. 869, 870 n.1 (1989). A child becomes a dependent child, or a child in need of protection of the juvenile court, when he has suffered serious physical harm inflicted nonaccidentally by his parents. *Id.*

62. *In re Ruiz*, 27 Ohio Misc. 2d 31 (1986).

III. Constitutional Implications

In terminating parental rights, a court must consider a number of essential interests protected by the United States Constitution. This consideration is especially significant since termination of parental rights involves "a most severe and sensitive judicial action."⁶³ In terminating parental rights, the law is able to destroy human relationships, but has no power to compel them to develop.⁶⁴ In *Santosky v. Kramer*, the United States Supreme Court noted that with termination, "[t]he child loses the right of support and maintenance, for which he may thereafter be dependent on society; the right to inherit; and all other rights inherent in the legal parent-child relationship, not just for a limited period . . . , but forever."⁶⁵ Within the general ambit of family integrity,⁶⁶ the Court has accorded a high degree of constitutional respect to a natural parent's interest in retaining the custody and companionship of the child.⁶⁷ A child shares this vital interest in maintaining a relationship with his natural family.⁶⁸

A. Constitutional Protection of the Family

Any analysis of the issues raised by termination of parental rights must include reference to the body of jurisprudence dealing with family rights. The Supreme Court has recognized many rights and liberty interests which flow from the family. In *Stanley v. Illinois*,⁶⁹ the Supreme Court emphasized that "the integrity of the family unit has found protection in the Due Process Clause of the Fourteenth Amendment,⁷⁰ the Equal Protection Clause,⁷¹ . . . and the Ninth Amendment."⁷² The state has an interest in strengthening the family as a valuable social institution,⁷³ a police power interest in regulating

63. *Anonymous v. Norton*, 168 Conn. 421, 362 A.2d 532 (1975).

64. JOSEPH GOLDSTEIN ET AL., *BEYOND THE BEST INTEREST OF THE CHILD* 50, 53 (1973).

65. 455 U.S. 745, 760 n.11 (1982) (quoting *In re K.S.*, 33 Colo. App. 72, 76 (1973)).

66. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

67. *Smith v. Org. of Foster Families*, 431 U.S. 816, 842-45 (1976); *Lassiter v. Dep't of Soc. Service of Durham County*, 452 U.S. 18, 38 (1981) (Blackmun, J., dissenting).

68. *Santosky*, 455 U.S. at 760.

69. 405 U.S. 645, 651 (1972).

70. *Meyer v. Nebraska*, 262 U.S. 390 (1923). The Court held that parents have an essential right, based on their liberty interest, to engage an instructor to teach their children German. The right to have a family is protected by the Fourteenth Amendment liberty interest. *Id.*

71. *Skinner v. Oklahoma*, 316 U.S. 535 (1942) (finding a statute authorizing involuntary sterilization of certain criminals to be unconstitutional).

72. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

73. According to the Court, the family has found protection "precisely because the institution of the family is deeply rooted in this Nation's history and tradition." *Moore v.*

the public morals, and a *parens patriae* interest in promoting the child's best interest.⁷⁴ A conflict arises when the child's best interest competes with the aim of maintaining family unity. As seen in *Valerie D.*, parents also compete with this *parens patriae* interest in that they have a constitutionally protected right to direct the upbringing and education of their children.⁷⁵

Analogous to the instant issue are the cases dealing with the separation of children from their families. In *Alsager v. Dist. Ct. of Polk County, Iowa*,⁷⁶ a state parental termination statute was found to be unconstitutionally vague. After reviewing a long line of United States Supreme Court cases dealing with the family, the trial court came to the "inescapable conclusion" that parents possess "a fundamental liberty and privacy interest in maintaining the integrity of their family unit." States must have a compelling interest before terminating parental rights.⁷⁷

In *Santosky v. Kramer*, the Court held that New York's fair preponderance of the evidence standard in parental termination proceedings violated the Due Process Clause.⁷⁸ New York now requires proof by clear and convincing evidence.⁷⁹ The essence of parental termination was succinctly stated in the Court's opinion:

City of E. Cleveland, 431 U.S. 494, 503 (1977) (invalidating a zoning ordinance which limited the occupancy of a dwelling to members of a narrowly defined single "family"). In the 1888 case of *Maynard v. Hill*, 125 U.S. 190 (1888), the Court discussed the institution of the family in the context of marriage. Marriage was considered "an institution, in the maintenance of which in its purity the public is deeply interested, for it is the foundation of the family and of society, without which there would be neither civilization nor progress." *Id.* at 211. The state has an interest in protecting the institution of the family in part because when the family breaks down, often it is the state which ends up supporting the family members.

74. *Developments in the Law—The Constitution and the Family*, 93 HARV. L. REV. 1156, 1198-99 (1980).

It is argued that by protecting the child's interest, society is protecting future generations of children by increasing the number of adults-to-be who are likely to be adequate parents. GOLDSTEIN, *supra* note 64, at 111.

75. Two years after *Meyer v. Nebraska*, 262 U.S. 390 (1923), the Court found that a statute requiring children of a certain age to attend public school unreasonably interfered with the liberty interest of parents to direct the education of their children. *Pierce v. Society of Sisters*, 268 U.S. 510, 518, 534-35 (1925). The Court reiterated this principle in *Prince v. Massachusetts*, 321 U.S. 158 (1944). In this case, a child sold religious literature with her aunt in violation of a state law prohibiting minors from selling newspapers in the street. The statute was upheld under the *parens patriae* doctrine. The Court stressed, however, that the custody, care, and nurture of the child should reside first in the parents and that the state must respect the private realm of family life. *Id.* at 166.

76. 406 F. Supp. 10, 16-17 (S.D. Iowa 1975), *aff'd per curiam*, 545 F.2d 1137 (8th Cir. 1976).

77. *Id.*

78. 455 U.S. 745 (1982).

79. N.Y. SOC. SERV. LAW § 384-b(3)(g) (McKinney 1983).

[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the State. Even when blood relationships are strained, parents retain a vital interest in preventing the irretrievable destruction of their family life.⁸⁰

In *Stanley v. Illinois*,⁸¹ a statute which empowered state officials to circumvent neglect proceedings for unwed fathers was struck down as violating the Equal Protection Clause.⁸² It was found that the private interest at stake, that of a father in the child "he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection."⁸³ A similar issue arose in *Lehr v. Robertson*,⁸⁴ where the Court held that New York did not deny a putative father of equal protection or due process by failing to provide for advance notice of an adoption proceeding where he never established a substantial relationship with his child.⁸⁵ However, before ruling against this father, the Court eloquently noted:

[t]he intangible fibers that connect parent and child have infinite variety. They are woven throughout the fabric of our society, providing it with strength, beauty, and flexibility. It is self-evident that they are sufficiently vital to merit constitutional protection in appropriate cases.⁸⁶

A common thread in the decisions dealing with separation of children from their parents is a recognition of the state's responsibility to look out for the best interest of the child. In *Quillon v. Walcott*,⁸⁷ the trial court had found adoption and denial of legitimization to be in the child's best interest.⁸⁸ On review, the Supreme Court held that the

80. *Santosky*, 455 U.S. at 753.

81. 405 U.S. 645 (1972).

82. *Id.* at 658.

83. *Id.* at 651.

84. 463 U.S. 248 (1983).

85. *Id.* at 267.

86. *Id.* at 256. New York's Court of Appeals agreed with this principle that an unwed father may not merely block adoption of his child without manifesting some parental responsibility in *In re Raquel Marie X.*, 76 N.Y.2d 387, 399 (1990). However, it invalidated a section of the relevant adoption statute which required the father to live with the mother and child in order to receive the maximum protection of his relationship with the child. *Id.* at 407. The court reasoned that "[a]lthough the State plainly has a significant interest in fostering the well-being of the child by ensuring swift, permanent placement, the State's objective cannot be constitutionally accomplished at the sacrifice of the father's protected interest by imposing a test so incidentally related to the father-child relationship as this one" *Id.* at 406.

87. 434 U.S. 246 (1978).

88. *Id.* at 251.

unwed father's substantive rights were not violated where he never had nor sought custody of the child.⁸⁹

Thus, even where termination may be beneficial to the child, the state may not order termination unless the parents are found to be unfit by a court. Although there is a fundamental right to family integrity,⁹⁰ there comes a point when a relationship between a parent and child has so deteriorated that the parent's constitutional right to raise her children must yield to the welfare of the child and the obligation of the state to protect that interest.⁹¹ It is up to the court to decide what is in the child's best interest. While the best interest of the child is a factor in termination of parental rights proceedings, no all encompassing, best interest standard vitiates the requirement of compliance with the statutory criteria for termination.⁹²

B. Other Constitutional Implications

In addition to the constitutional protection of the family, there are other asserted constitutional rights at stake when a state seeks to terminate parental rights at birth based on prenatal conduct.⁹³ Although it may ultimately be determined that review of the constitutional is-

89. *Id.* at 255.

However, in a more recent case, the best interests of the child standard seems to have been disregarded. In *Michael H. v. Gerald D.*, 491 U.S. 110 (1989), the Court refused to recognize the natural father's parental relationship with his daughter. According to California law, Gerald, the marital father, was presumed to be the natural father as the mother was living with him when the child was born and he was not impotent or sterile. *Id.* at 117-18. The blood test which proved Michael to be the father was taken one year too late to rebut this presumption. *Id.* at 114.

The Court refused to recognize Michael's relationship in order to protect the marital family, notwithstanding the child's best interests in maintaining contact with her natural father. *Id.* at 130. The child claimed that she had a due process right to maintain her relationship with Michael. *Id.* at 131. In addition, a court appointed psychiatrist found that it would be in the child's best interest to maintain visitation rights with Michael. *Id.* at 115.

90. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972).

91. *In re D.R.M.*, 570 A.2d 796, 805 (D.C. App. 1990).

One commentator notes that any decision by a state court in a termination proceeding may affect not only the individual child, but also other children, as well as parents and relatives and that these interests should be given substantial weight, especially where the best interest of the child is unclear. Wald, *supra* note 25, at 639.

92. *In re Juvenile Appeal* (Anonymous), 177 Conn. 648, 661-62, 420 A.2d 875, 886 (1979). See text accompanying note 125. For the statutory criteria, see *supra* note 15.

93. For a discussion of the constitutional issues involved in prenatal drug abuse cases, see Walter B. Connolly, Jr. & Alison B. Marshall, *Drug Addiction, Pregnancy and Childbirth: Legal Issues for the Medical and Social Services Communities*, ABA SECTION OF FAMILY LAW 1990, at 1-5. For a complete review of the constitutional issues involved in drug testing of mothers and newborns, see Kary L. Moss, *Legal Issues: Drug Testing of Postpartum Women and Newborns as the Basis for Civil and Criminal Proceedings*, 23 CLEARINGHOUSE REV. 1406 (1990).

sues in *Valerie D.* was waived for failure to pursue them at the trial level, the issues remain for the future.⁹⁴

A decision to terminate parental rights based on prenatal conduct may implicate due process and equal protection rights.⁹⁵ In addition, any rule of law which creates rights in a fetus will arguably be subject to constitutional scrutiny by the courts in light of a mother's asserted right to privacy in reproductive and familial decision making.⁹⁶ Closely connected to the right to privacy in reproductive decision making is the right to bodily integrity which derives from both common law and the Fourth Amendment. This right is also implicated

94. It is not the purpose of this Note to argue for or against the validity or strength of these asserted constitutional protections, but it is important in analyzing the issues raised by *Valerie D.* to recognize their existence. This consideration is essential because when such a mixture of constitutional issues exists, courts should seek to decide the case in such a way that causes the least tension with the Constitution. "[W]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems . . ." Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, 485 U.S. 568, 575 (1988).

95. According to the Supremacy Clause, U.S. CONST. art. VI, cl. 2, the Connecticut State Constitution must provide at least the minimum protection required by the Federal Constitution. One commentator sees a change in Connecticut court interpretation of the state constitution from historically imposing similar constitutional limitations as the Federal Constitution, to sharing, but not being limited by, the content of the Federal Constitution. Martin B. Margulies, *A Lawyer's View of the Connecticut Constitution*, 15 CONN. L. REV. 107, 119 (1982).

96. Connolly & Marshall, *supra* note 93, at 1-6. It is unclear whether courts must still use the strict scrutiny test for the right to privacy as set out in *Roe v. Wade*, 410 U.S. 113, 155 (1973). The recent decisions of *Webster v. Reproductive Health Services*, 109 S. Ct. 3040, 3058 (1989) (plurality opinion) (finding restrictions in state statute on use of public employees and facilities for nontherapeutic abortions to be in accord with the Constitution), and *Hodgson v. Minnesota*, 110 S. Ct. 2926, 2931 (1990) (finding a statute requiring two parent notification before an abortion can be performed on a minor unconstitutional), replaced the strict scrutiny of *Roe* with the intermediate test, which looks to whether the action is reasonably related to a legitimate state interest. There was no judicial notice of this change.

There is debate over whether a woman who takes drugs while pregnant has a right to privacy in reproductive decision making. One commentator notes that "[a]rguments based on a woman's right to make decisions about her pregnancy and her fetus . . . appear weak in the context of maternal drug addiction." Roberts, *supra* note 6, at 1459. She asserts that society only demands that the mother cease conduct that it already deems illegal and reprehensible. *Id.* However, others focus on the general effect of laws which are designed to prevent fetal harm on a woman's autonomy. Connolly & Marshall, *supra* note 93, at 1-7, 8; Bonnie I. Robin-Vergeer, *The Problem of the Drug-Exposed Newborn: A Return to Principled Intervention*, 42 STAN. L. REV. 745, 786 (1990); Note, *Maternal Rights and Fetal Wrongs: The Case Against the Criminalization of "Fetal Abuse"*, 101 HARV. L. REV. 994 (1988); 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, 612-13 (1986). "[B]y granting rights to the fetus assertable against the pregnant woman, and thus depriving the woman of decision making autonomy, the state affirmatively acts to create an adversarial relationship between the woman and the fetus." Johnsen, at 613.

when the state is able to regulate a pregnant mother's conduct.⁹⁷

In *In re Fletcher*, a New York family court held that allegations that a child with a positive toxicology for cocaine was born to a mother who admitted using cocaine during her pregnancy were insufficient to form the basis for a finding of neglect.⁹⁸ In discussing the constitutional issues raised, the *Fletcher* court explained that "[a]n expectant mother, just like any other person, is protected by a constitutional right to privacy and bodily integrity which the State may not violate without showing a compelling state interest."⁹⁹

More recently, however, New York's appellate division in *In re Stefanel Tyeshia C.*,¹⁰⁰ rejected the constitutional arguments of *Fletcher* pointing out that the issue in these proceedings is not harm to the fetus but to the newborn children.¹⁰¹ The mother's right to privacy is no longer involved. In addition, the *Stefanel* court found that *Roe v. Wade* supported neglect decisions based on prenatal conduct in that the state has a legitimate interest—protecting a viable fetus.¹⁰²

Due process rights may also be implicated in parental termination cases. Due process requires notice before a person can be deprived of her right to be a parent, a right more precious than property rights.¹⁰³ In the context of criminal law, courts have held that penal statutes are invalid if they fail to give a person notice that his contemplated conduct is forbidden.¹⁰⁴ Decisions finding neglect or ordering termination based on prenatal conduct may also violate due process rights where

97. *Maternal Rights*, *supra* note 96, at 1002. Moss, *supra* note 93, at 1408 (a complete review of the constitutional issues raised by testing pregnant women for drug use and instituting neglect or criminal proceedings). Moss argues that the growing practice of testing pregnant women for drug use and instituting neglect proceedings or criminal prosecution based on those results has created a serious health and civil liberties crisis. *Id.* She asserts that a pregnant woman has a Fourth Amendment privacy right against being tested for drugs without her consent. *Id.* at 1408.

98. 141 Misc. 2d 333, 336, 533 N.Y.S.2d 241, 242-43 (1988).

99. *Id.* (citing *Roe v. Wade*, 410 U.S. 113, 155 (1973)). Clearly, a mother does not have a right to bodily integrity to engage in illegal conduct. However, in pointing out the ramifications of an assertion that the state can regulate a pregnant woman's body, *Fletcher* noted that "the State would be able to supersede a mother's custody right to her child if she smoked cigarettes during her pregnancy, or ate junk food, or did too much physical labor or did not exercise enough." *Id.*

100. 157 A.D.2d 322, 556 N.Y.S.2d 280 (1990) (upholding petitions alleging neglect on the basis of a mother's use of drugs during pregnancy as sufficient to state a cause of action).

101. *Id.* at 329, 556 N.Y.S.2d at 285.

102. *Id.* at 330, 556 N.Y.S.2d at 285.

103. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972) (citing *May v. Anderson*, 345 U.S. 528, 533 (1953)).

104. *U.S. v. Batchelder*, 442 U.S. 114, 123 (1979) ("[i]t is a fundamental tenet of due process that '[n]o one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes.'") (citing *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939));

they are based on statutes that were not intended to apply to prenatal acts.¹⁰⁵ The father here chose not to appeal. In another case, the father's rights could be violated where a petition to terminate parental rights is based on his conduct before the baby is born. A parent's due process rights may be involved where the parent is not afforded notice that the neglect and termination statutes could apply to her conduct while pregnant.¹⁰⁶

Marks v. U.S., 430 U.S. 188, 191 (1977) ("persons have a right to fair warning of that conduct which will give rise to criminal penalties . . .").

105. This argument has been made in the context of prosecuting women for prenatal drug abuse when their children are born with positive toxicologies. Moss, *supra* note 93, at 1411. It could be argued that the liberty interest involved in proceedings to terminate parental rights merits the same protection from due process violations as that involved in criminal proceedings.

It is questionable whether mothers are afforded notice that their prenatal conduct violates neglect and termination statutes. In *Stanley v. Illinois*, 405 U.S. 645, 656 (1972), the Court noted that "[i]ndeed, one might fairly say of the Bill of Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials . . ." Although it may be efficient to apply neglect and termination statutes to the prenatal conduct of mothers, because the statutes were not meant to apply to this conduct, the courts may be infringing on the mother's due process rights. Some legislatures have expanded the statutory definition of neglected children to include newborns who test positive for drugs at birth. See FLA. STAT. ANN. § 415.503(9)(A)(2) (West Supp. 1992); IND. CODE ANN. § 31-6-4-3.1(I)(b) (Burns Supp. 1991); MASS. GEN. L. ch. 119, § 51A (Supp. 1991).

Notably, three recent state court opinions have dismissed charges or overturned decisions to criminally prosecute mothers who took drugs while pregnant reasoning that the relevant child abuse statutes were not intended by the legislatures to apply to harm to a fetus. This trend may soon be followed in cases dealing with neglect and abuse statutes. *Welch v. Commonwealth of Kentucky*, Court of Appeals, Frankfort, 90-CA-1189-MR (1992) (overturning a child abuse conviction of a woman who injected herself with narcotics while eight months pregnant as the Kentucky child abuse law did not refer to a fetus).

People v. Morabito, 1992 Misc. LEXIS 22 (Jan. 29, 1992) (dismissing a child abuse charge against a mother accused of harming her unborn child by smoking crack while pregnant). The court concluded that to hold otherwise would deny the defendant of her Constitutional right to due process. *Id.* at *13.

State v. Gethers, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991). The appellate court affirmed a dismissal of criminal charges against a mother who introduced cocaine into her system during the gestation period. The court concluded that the statute was not meant to apply to a pregnant mother's acts towards her fetus. *Id.* at 1142.

106. Brief, *supra* note 27, at 21.

Due process rights are also involved when a court presumes parental unfitness. *Stanley v. Illinois*, 405 U.S. 645, 651 (1972). In *Stanley*, the Court held that a failure to inquire into the father's ability to care adequately for a child violated his due process rights. Unlike the situation in *Stanley*, a hearing is provided to the parents before a finding of neglect or an order of termination. However, it is questionable whether courts are requiring proof of future risk of child neglect for a finding of neglect in prenatal drug abuse cases. For instance, a California state court in *In re Troy D.*, 215 Cal. App. 3d 889, 897, 263 Cal. Rptr. 869, 872 (1989) found that prenatal drug abuse was probative of future

In addition to the implication of due process rights, cases basing neglect and termination on prenatal conduct also raise equal protection concerns.¹⁰⁷ Courts have disregarded the connection between drug use of the father and child neglect, as well as the effects of male drug use on the fetus where only the mother is tested for drugs when the baby is born.¹⁰⁸ Conceivably, a baby who tests positive for drugs could be removed from the mother at birth where the father and not the mother had used drugs.¹⁰⁹ Limiting the application of neglect and termination statutes to the mother's drug use as predictive of future abuse could be found unconstitutional because of the gender-based classification. A classification based on gender is subject to an intermediate level of scrutiny by the courts.¹¹⁰

IV. Analysis of *Valerie D.*

Termination results when conflicting interests of the state, child and parent are resolved in favor of the best interest of the child due to parental unfitness. When there is no conflict between the rights of the parent and the best interest of the child, there should be no termination. There is no question that there is a severe problem when babies are born drug-impaired because of their mother's prenatal drug abuse. It has been estimated that eleven percent of the children born in U.S. hospitals are born with dangerous drugs in their systems and are consequently at risk.¹¹¹ Some cocaine exposed babies suffer physical and neurological malformations, others have disabling strokes in the womb, and most of these babies are underweight at birth.¹¹² Every

child neglect without citing to any evidence of such a correlation. The mother lost custody based on allegations of prenatal drug abuse. Courts may be presuming parental unfitness based on evidence of prenatal drug use. Moss, *supra* note 6, at 290.

107. The Fifth Amendment has been held to prohibit governmental action resulting in different treatment of people similarly situated. *Skinner v. Oklahoma*, 316 U.S. 575 (1942) (holding sterilization of some types of criminals and not others violative of the Equal Protection Clause). In *Valerie D.*, the mother asserted that while an estimated 5,000 babies were born to substance-abusing mothers in one year in Connecticut, she was one of the first to have coterminous petitions filed for her baby. Brief, *supra* note 27, at 21.

108. Moss, *supra* note 93, at 1410 n.25. New evidence shows that fathers who use cocaine may transmit the drug to the fetus. *Cocaine Using Fathers Linked to Birth Defects*, N.Y. TIMES, Oct. 15, 1991, at C6.

109. "Social service agencies have recently begun to use child abuse laws that were never intended to apply to a mother's prenatal behavior to take custody of infants born with positive toxicologies." Moss, *supra* note 6, at 289.

110. *Reed v. Reed*, 404 U.S. 71 (1971); *Craig v. Boren*, 429 U.S. 190, 199-204 (1976). See generally LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* (1978).

111. *In re Troy D.*, 215 Cal. App. 3d 889, 898, 263 Cal. Rptr. 869, 872 (1989).

112. Francis T. Murphy, *Prejudice Attacks Victims of Prenatal Drug Abuse*, N.Y.L.J., Jan. 29, 1992, at 37, 40.

child has the legal right to begin life unimpaired by physical or mental defects resulting from the negligence of another.¹¹³ A court "cannot and should not await broken bone or shattered psyche before extending its protective cloak around a child."¹¹⁴ As the Supreme Court stated in *Santosky*, after the state has established parental unfitness at the initial proceeding, the court may assume that the interests of the parents and the child do diverge.¹¹⁵

On the other hand, parental rights are destroyed by a termination decision. Adult constitutional issues of privacy, family integrity, due process, and equal protection are directly at stake. Many states have attempted to resolve these competing interests by giving the parent time and providing services to help change the lifestyle for the baby, before taking the severe course of terminating parental rights.¹¹⁶

A. Best Interest of the Child

1. Waiver Conflicts With Valerie's Best Interest

In terminating parental rights at this point in Valerie's life, it was necessary for the court to waive the statutory requirement that at least one year expire before bringing a petition for termination. Arguably, in this case, waiver was contrary to Valerie's interest in preserving an existing family.

The lower court determined that the statutory period was meant only to apply to abandonment and its application to the other grounds

113. *In re Stefanel Tysha C.*, 157 A.D.2d 322, 329, 556 N.Y.S.2d 280, 284 (1990) (citing *Endresz v. Friedberg*, 24 N.Y.2d 478, 483, 301 N.Y.S.2d 65, 68 (1969)).

114. *Id.* at 328, 556 N.Y.S.2d at 284 (quoting *In re Anthony*, 81 Misc. 2d 342, 345, 366 N.Y.S.2d 333, 336 (1975)).

115. *Santosky v. Kramer*, 455 U.S. 745, 760 (1982).

116. CONN. GEN. STAT. § 45a-717(h)(1) (Supp. 1991) (although Connecticut has this public policy, the court made an exception to it in this case); N.Y. SOC. SERV. LAW § 384-b(1)(a)(ii)(iii) (McKinney 1983); CAL. WELF. & INST. CODE § 300 (West operative Jan. 3, 1989); D.C. CODE ANN. § 16-2354(b) (as amended 1981), *In re A.W.*, 569 A.2d 168, 170 (D.C. App. 1990); FLA STAT. ANN. §§ 39.451, 415.502 (West 1988); 23 PA. CONS. STAT. ANN. § 2511 (1991). The fact that these legislatures have this public policy to keep families intact indicates that the competing interests of children, state and parents are best served by this waiting period. Only 13 states provide for immediate termination. See *infra* note 139.

In a recent Florida case, *State v. Gethers*, 585 So. 2d 1140 (Fla. Dist. Ct. App. 1991), the court dismissed criminal charges against a drug-abusing mother. It stressed that criminal prosecution of pregnant women would undermine Florida's express policy of keeping the family intact, whereas alternative measures could protect the child and stabilize the family. *Id.* at 1142-43.

Recent proposals before the Senate and the House seek to strengthen families, avoid placement in foster homes, and promote the development of comprehensive substance abuse programs for pregnant women by providing states with federal funds. S. 4, 102nd Cong., 1st Sess. §§ 101, 201 (1991); H.R. 2571, 102nd Cong., 1st Sess. §§ 104, 201 (1991).

was inadvertent.¹¹⁷ However, the court's review of the legislative history appears to be too facile.¹¹⁸ The addition of the one year period does not mean, as the *Valerie D.* court suggests, that the child must be abused or neglected for one year before anything can be done. If necessary for the best interest of the child, the state may remove the child from the custody of the parent, upon a finding of neglect or abuse within that one year period. However, a petition to terminate parental rights may not be made until at least a year expires, unless immediate petition is in the child's best interest.¹¹⁹

The waiver of the statutory period may not have been to Valerie's benefit. Connecticut Supreme Court cases, as well as sociological studies indicate that continued contact even with a noncustodial parent may be better for the child in the long run than termination of parental rights.

Sociological studies support the proposition that termination should be ordered only if a less severe alternative does not exist. "[B]ecause continuing contact between parent and child generally correlates with higher levels of well-being for the child than does lack of contact, the parent-child relationship should be severed only as a last resort."¹²⁰ Valerie is presently in foster care and studies indicate that the chances of her entering permanent placement are slim¹²¹ given her age and drug-impairedness. Thus instead of cutting Valerie

117. *In re Valerie M.*, 1990 Conn. Super. LEXIS 529, at *27 (July 24, 1990).

118. In discussing the second ground for termination, nonaccidental, serious physical injury, the court stated, "[t]he apparent requirement that this ground shall have existed for 12 months before termination may be granted seems to have been inserted in the statute inadvertently." *Valerie M.*, 1990 Conn. Super. at *27. The court reviewed the legislative history of termination of parental rights and the one year requirement. In an amendment, the one year requirement was moved to a position where it became equally applicable to all nonconsensual grounds. *Id.* at *38-40. Because there was no discussion of the impact of applying the one year requirement to each enumerated ground for termination, the court concluded that it was inadvertent. *Id.*

Interestingly, the court explained that a letter was written to the Judiciary Committee which suggested that the one year requirement should apply so as to give all parents the opportunity to rehabilitate before any court could terminate their rights. This suggestion was introduced to the House of Representatives and passed without debate; yet the court passed this off as a technical amendment. *Id.* at *40-41.

The appellate court did not review this question. The statute cited by the lower court was transferred to another section in 1991 without amendment. § 17a-112 transferred from § 17-43a in 1991.

119. See CONN. GEN. STAT. § 17a-112(b).

120. Garrison, *supra*, note 13, at 423, 477.

121. "Drift is indeed a pervasive problem among children in foster care. Once a child enters foster care, he has about a 50% chance of remaining there for at least two years; the longer he remains in care, the more likely he is to . . . change foster homes." *Id.* at 426. This author also notes that in 1980, 75% of the adoptable children in New York City had been so for more than one year. *Id.* at 472.

off from her natural parents forever, and perhaps depriving her of her one chance at a family, the court should at least wait a year to see if the parents are able to change their lifestyles for their baby. Choosing this less severe alternative ensures that the state will not deprive a child of his family unless this step is actually necessary.¹²²

The Connecticut Supreme Court has recently addressed the issue of the child's best interest in proceedings which separate the child from the family.¹²³ In *In re Jessica M.*, the court reversed a lower court decision which terminated parental rights because the natural mother was not the child's "psychological parent."¹²⁴ The court noted that even where termination is in the best interest of the child, it can not be ordered unless all other statutory requirements are met.¹²⁵ Thus the court first had to decide whether there was a relationship between the child and natural mother, even though it may have been in the child's best interest to stay with petitioner, the "psychological parents." In *Valerie D.*, the state already determined that termination was in Valerie's best interest at birth, before even giving her a chance to develop a relationship with her parents.¹²⁶

In the view of the *Jessica M.* court, this requirement of strict compliance is consistent with the child's best interest as the child has a "powerful" interest in remaining with his natural parent.¹²⁷ In requiring courts to find termination to be in the child's best interest, the legislature could reasonably have determined that in some circumstances, "it would be contrary to the child's best interest to sever his ties to a parent even though statutory cause to do so could be found."¹²⁸ The court also noted that recent studies show that even for children who are separated from their parents at an early age and whose subsequent contacts with the parents are sporadic, continued contact with the parent generally promotes the child's sense of well-being and emotional security.¹²⁹

In re Juvenile Appeal,¹³⁰ an earlier Connecticut case, also shed some light on the best interest of the child standard. It referred to recent

122. *Id.* at 477.

123. *In re Jessica M.*, 217 Conn. 459, 586 A.2d 597 (1991); *In re Juvenile Appeal*, 189 Conn. 276, 455 A.2d 1313 (1983) (holding that fair preponderance of the evidence standard must be used in temporary custody hearings).

124. *Jessica M.*, 217 Conn. at 464, 586 A.2d at 600.

125. *Id.* at 465, 586 A.2d at 600.

126. *Id.* at 474, 586 A.2d at 604.

127. *Id.* at 466, 586 A.2d at 600.

128. *Id.* at 466 n.5, 586 A.2d at 601 n.5.

129. *Id.* (quoting Marsha Garrison, *Why Terminate Parental Rights?* 35 STAN. L. REV. 423, 461 (1983)).

130. 189 Conn. 276, 455 A.2d 1313 (1983).

studies that indicate that the child's interest is served usually by keeping the child in the home with his or her parents.¹³¹ "Even where the parent-child relationship is marginal, it is usually in the best interest of the child to remain at home and still benefit from a family environment."¹³² Thus, in addition to parents having a strong interest in keeping their families together, children benefit from family unity as well. However, children also have a basic, sometimes conflicting interest in their own health and safety.¹³³ In this situation, a state has two alternatives apart from and less intrusive than termination of parental rights: to take the baby away temporarily and help rehabilitate the parents to make it in the baby's interest to go home;¹³⁴ or to allow the baby to stay with the parents and begin an intensive counseling program.¹³⁵

2. Connecticut Public Policy

The decision in *Valerie D.* to waive the one year period may be contrary to the public policy of Connecticut. When a child is committed to the custody of the state, the state has a duty to provide supportive services to the parents to enhance the possibility of eventual reunification of the family.¹³⁶ The state has a responsibility to protect children whose health and welfare may be adversely affected through injury and neglect, and to strengthen the family and make the home safe for children by enhancing parental capacity for good child care.¹³⁷ The Supreme Court of Connecticut has stressed that it is both a fundamental right and the policy of the state to maintain the integrity of the family.¹³⁸ Similarly, available evidence indicates that termination following an initial finding of neglect is rare in most states.¹³⁹ Most courts seem to prefer to give the parents an opportu-

131. *Id.* at 285, 455 A.2d at 1318.

132. *Id.* at 286, 455 A.2d at 1319.

133. *Id.* at 287, 455 A.2d at 1319.

134. *See supra* note 7.

135. *See supra* note 3.

136. CONN. GEN. STAT. § 17a-101 (Supp. 1991); *In re Jessica M.*, 217 Conn. 459, 470, 586 A.2d 597, 603 (1991) (acknowledging that this policy evinces a concern for protection of family integrity).

137. CONN. GEN. STAT. § 17a-101 (Supp. 1991).

138. *In re Juvenile Appeal*, 189 Conn. 276, 295, 455 A.2d 1313, 1318 (1983).

139. Thirteen states do provide a means for immediate termination. ALASKA STAT. § 47.10.080(c)(3), (d) (Supp. 1991); COLO. REV. STAT. ANN. § 19-3-111(2)(a) (West 1986); CONN. GEN. STAT. §§ 17a-112(c), 45a-717(g) (Supp. 1991); D.C. CODE ANN. § 16-2354(b) (1981); KAN. STAT. ANN. § 38-1583(a) (1986); *In re C.*, 63 Misc. 2d 1019, 314 N.Y.S.2d 255 (N.Y. Fam. Ct. 1970); OHIO REV. CODE ANN. § 2151.353 (Baldwin 1991); OKLA. STAT. ANN. tit. 10 § 1130(A)(5)(a) (Supp. 1990); R.I. GEN. LAWS § 14-1-

nity to rehabilitate.¹⁴⁰

The *Valerie D.* court found that the only services that could be offered under the circumstances of this case were referral to drug treatment centers and the facilitation of visitation.¹⁴¹ The court found that this was satisfactorily accomplished. By suggesting drug treatment centers to the parents, DCYS was found to have sufficiently "offered or provided" services to them to facilitate reunification.¹⁴² However, it is very difficult for a poor woman to get into a drug treatment center. Like many drug treatment centers, at Crossroads, a Connecticut drug treatment center, there is a waiting list of fifty-seven people for eight beds.¹⁴³ It does not seem that the services that were offered would be sufficient to satisfy the affirmative duty to strengthen the family.¹⁴⁴

B. No Ongoing Parent-Child Relationship

The factual context in which *Valerie D.* came before the court raises questions about the finding that termination could be based on the lack of a viable parent-child relationship. The court held that the psychiatrist's testimony that no meaningful relationship existed was clear and convincing evidence of this ground.¹⁴⁵ However, the parents never got a chance to develop a familial relationship with the child because Valerie was taken into foster care ten days after birth.¹⁴⁶ The state has the authority and the duty to remove the child temporarily, even at birth if the circumstances require. However, the state should not be able to bootstrap its position by removing the child from its parents at birth and then asserting the lack of a parent-child relationship as grounds for termination.

34 (1981); S.D. CODIFIED LAWS ANN. § 26-8a-27 (1984); TEX. FAM. CODE ANN. § 15.02 (West 1991); VT. STAT. ANN. tit. 33 § 656 (1981); W. VA. CODE § 49-6-5 (1986).

140. Wald, *supra* note 25, at 634.

141. *In re Valerie M.*, 1990 Conn. Super. LEXIS 529, at *33 (July 24, 1990). According to the mother, she had no car or phone and yet she still managed to visit the foster home, which was ten miles from her home. Brief, *supra* note 27, at 2.

142. *Valerie M.*, 1990 Conn. Super. at *34. The mother claims that she had difficulty receiving drug treatment because of the long waiting lists. Brief, *supra* note 27, at 7. The mother was unable to remain at the outpatient center because she did not have the requisite insurance. *Id.* at 7.

143. Thomas Scheffey, *Appellate Court Modifies Valerie D.*, CONN. L. TRIB., Nov. 11, 1991, at 2.

144. *In re Jessica M.*, 217 Conn. 459, 470, 586 A.2d 597, 603 (1991).

145. *Valerie M.*, 1990 Conn. Super. at *29-*30.

146. The lower court notes that the psychiatrist observed the parents and child three months after Valerie was born. He saw them on two days, but the court does not state how long the observation was each day. The mother claims this belief was based on a one hour observation of the parents with the baby when the baby was only three months old. Brief, *supra* note 27, at 17.

Lack of an ongoing parent-child relationship is simply not relevant to the unique situation of a noncustodial parent who is prevented from ever meeting the physical, emotional, or moral needs of the child on a day-to-day basis. In *In re Megan M.*,¹⁴⁷ a mother's parental rights were terminated where there was a lack of an ongoing parent-child relationship. The court found that the mother had made laudable efforts to adjust her circumstances for the child and overcame her drug and alcohol addictions. However, because the child had negative feelings towards the mother and rejected the idea that this woman was her mother, the parental rights were terminated.¹⁴⁸

In an opinion which contrasts this arguably harsh decision, the Supreme Court of Connecticut reversed a termination decision that was based on the lack of an ongoing parent-child relationship in *In re Jessica M.*¹⁴⁹ The *Jessica M.* court found the standard to be inherently ambiguous when applied to noncustodial parents who must maintain their relationships with their children through visitation.¹⁵⁰ Although the mother had not provided day-to-day care for the child, the daughter had a strong attachment to the mother. In addition, the mother, a drug addict, had made great efforts to change her lifestyle for the baby.¹⁵¹ In *Valerie D.*, where the baby was taken away at birth, it was very difficult for any type of emotional attachment to have developed. Terminating the parents' rights on this ground deprives the parents of the opportunity to know their daughter in a familial setting.

The *Valerie M.* court recognized that the lack of relationship was the necessary consequence of being separated from the child since birth.¹⁵² Thus a further finding was required that to allow the relationship to develop would be contrary to the child's best interest. Under the relevant Connecticut statute, there must have been a lack of ongoing relationship for at least one year before there can be a

147. 24 Conn. App. 338, 588 A.2d 239 (1991).

148. *Id.* at 341-42, 588 A.2d at 241.

149. *In re Jessica M.*, 217 Conn. 459, 586 A.2d 597 (1991).

150. *Id.* at 468, 586 A.2d at 601. Incarcerated mothers face similar problems. While they are in jail, their children are usually put in foster care and it is very difficult for them to maintain the required contact with their children so that their parental rights will not be terminated. See generally Philip M. Genty, *Protecting the Parental Rights of Incarcerated Mothers Whose Children are in Foster Care: Proposed Changes to New York's Termination of Parental Rights Law*, 17 *FORDHAM URB. L.J.* 1, 2 (1989). One early California case recognized this difficulty and ruled that an incarcerated mother's actions were sufficient to prevent termination of parental rights based on abandonment where the mother wrote to her children twice a month. *In re T.M.R.*, 41 Cal. App. 3d 694, 698, 116 Cal. Rptr. 292, 295 (1974).

151. *Jessica M.*, 217 Conn. at 463, 586 A.2d at 599.

152. *Valerie M.*, 1990 Conn. Super. at *30.

petition to terminate parental rights on this ground.¹⁵³ Additionally, the court must find that to allow further time for the establishment of the parent-child relationship would be detrimental to the child's best interest.¹⁵⁴ However, in this case, the court not only decided that to allow further time for the relationship to develop would have been detrimental to Valerie, it waived the one year requirement as well.¹⁵⁵ Arguably, it is within Valerie's best interest to allow time for both the establishment of a relationship and for the rehabilitation of her parents as this may be her only chance for a permanent family. Again, the Connecticut appellate court took the unnecessarily drastic route in terminating the parental rights of the mother.

C. The Underpinnings of the Court's Rationale

In seeking support from case law in other jurisdictions,¹⁵⁶ the court in *Valerie D.* incorrectly equated the analysis of termination of parental rights based on prenatal conduct with that of neglect.¹⁵⁷ The court cited *In re Stefanel Tyesha C.*, for the proposition that, as a matter of law, petitions for neglect can be based on allegations of the mother's prenatal drug use, the child's positive toxicology for cocaine at birth,¹⁵⁸ and the mother's failure to be enrolled in a drug rehabilitation program at the time the petitions were filed.¹⁵⁹ In fact, the *Stefanel* court stressed that "[a] finding of neglect should not be made lightly, nor should it rest on past deficiencies alone."¹⁶⁰ Most importantly, in New York, a finding of neglect does not necessarily mean

153. CONN. GEN. STAT. § 17a-112(b) (Supp. 1991).

154. CONN. GEN. STAT. § 17a-112(b)(4) (Supp. 1991).

155. See discussion *supra* note 17.

156. *In re Stefanel Tyesha C.*, 157 A.D.2d 322, 556 N.Y.S.2d 280 (1990); *In re Troy D.*, 215 Cal. App. 3d 889, 263 Cal. Rptr. 869 (1989); *In re Baby X*, 97 Mich. App. 111, 293 N.W.2d 736 (1980); *In re Ruiz*, 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (1986).

157. All the cases which the court relies upon deal with neglect or dependency proceedings, not termination of parental rights. See *supra* note 25.

158. When maternal substance use is suspected, the hospital will screen neonatal urine for the presence of illicit drugs. If drugs are present, the result is a "positive toxicology screen." Dr. Wendy Chavkin, *Born Hooked: Confronting the Impact of Perinatal Substance Abuse: Hearing Before the Select Committee on Children, Youth and Families*, 101st Cong., 1st Sess. 114, 116 (1989) (transcript on file at the Fordham Urban Law Journal). Positive toxicology alone does not measure frequency of drug use, but only indicates that a drug was introduced in the last 24 to 72 hours. Thus it is questionable whether this should be enough for a presumption of neglect. Moss, *supra* note 93, at 1410. This is especially so due to the high incidence of false positives among the drug tests. *Id.* at 1413.

159. *Stefanel*, 157 A.D.2d at 325, 556 N.Y.S.2d at 282.

160. *Id.* at 327, 556 N.Y.S.2d at 283 (citing *In re Daniel C.*, 47 A.D.2d 169, 164, 365 N.Y.S.2d 535, 539 (1978)).

that the child is removed from parental care and supervision.¹⁶¹ A dispositional hearing must be held, and in most cases continued parental contact is encouraged.¹⁶²

Valerie D. also relied on *In re Baby X*, a Michigan case where the court held that a baby suffering from drug withdrawal symptoms as a consequence of prenatal drug addiction could properly be considered a neglected child within the court's jurisdiction.¹⁶³ Again, the court was careful to note that it made no determination as to whether prenatal drug use by the mother alone would be enough to deprive a parent of custody permanently.¹⁶⁴ Thus, *Valerie D.*'s reliance on these cases is suspect in that none have held that prenatal drug use may support an order to terminate parental rights. Instead of choosing a less severe alternative in recognition of the realities for Valerie and what truly is in her best interest, the court chose to extend pre-existing law on prenatal drug abuse, thus effectively destroying parental incentive for reform and Valerie's chance at a natural family.

The *Valerie D.* court also sought support for its holding by analogizing issues involving prenatal conduct to tort and criminal law. Because neglect proceedings and proceedings to terminate parental rights are neither tort nor criminal actions, it was necessary for the court to decide which of the two paths to follow in creating a new rule of law to apply in these cases.¹⁶⁵ The court then cited cases where children have sued third parties *in utero* and where representatives of children have brought wrongful death actions on behalf of a child who dies from injury *in utero*.¹⁶⁶

The court concluded that the policy underlying the Connecticut neglect and termination statutes, to protect children whose health and welfare are at risk, is similar to the rationale behind the prenatal torts cases.¹⁶⁷ However, the court's reasoning is problematic in that the purpose of tort law is to compensate the injured party,¹⁶⁸ whereas termination of parental rights does not serve this function. The purpose of termination of parental rights is, in theory, not to punish the par-

161. *Id.*

162. N.Y. FAM. CT. ACT § 1055, Douglas J. Besharov, 1986 *Supplementary Practice Commentary* (McKinney Supp. 1991).

163. 97 Mich. App. 111, 293 N.W.2d 736 (1980).

164. *Id.* at 116, 293 N.W.2d at 739.

165. *Valerie D.*, 25 Conn. App. at 591, 595 A.2d at 924. For a discussion on causes of action for wrongful birth and wrongful life, see generally Kathryn J. Jankowski, *Wrongful Birth and Wrongful Life Actions Arising From Negligent Genetic Counseling: The Need For Legislation Supporting Reproductive Choice*, 17 FORDHAM URB. L.J. 27 (1989).

166. *Valerie D.*, 25 Conn. App. at 590, 595 A.2d at 924.

167. *Id.* at 591-92, 595 A.2d at 924-25.

168. RESTATEMENT (SECOND) OF TORTS § 901 (1982).

ents, but to protect the child's present and future interests.¹⁶⁹ The court's focus on technical legal arguments when a newborn's injury is the result of her pregnant mother's drug use was misdirected. Instead, the court should have attempted to balance the complex rights and interests of the child, the parents and the state.

V. Conclusion

Valerie D. represents one of the many attempts¹⁷⁰ to solve the growing problem of drug-exposed babies. However, this result-oriented extension of previous law to allow for termination of parental rights is not the answer because it does not achieve a proper balance of the competing interests of the child, parent and state. In *Valerie D.*, the mother's conduct was egregious, outrageous and shocking. Unfortunately, the court permitted these egregious facts to overshadow the reality of Valerie's best interests. The court chose to waive the one year period required before a petition for termination of parental rights may be initiated, and removed Valerie from her natural family permanently.

The *Valerie D.* court articulated that the state has a "compelling interest" in protecting Valerie who was born with a dangerous drug in her system due to her mother's drug abuse while pregnant.¹⁷¹ Yet, the court in reality condemned her by its precipitous action of termination of parental rights. It did not protect her rights, it effectively destroyed them. The Supreme Court has held that where fundamental rights are involved, the means used to achieve a compelling state interest must be narrowly tailored in order to impinge on these rights as little as possible.¹⁷² The *Valerie D.* court, however, unnecessarily used the most severe method to achieve the goal of acting in the child's best interest by waiving the one year statutory period. The confluence of disparate rights determined when a baby is removed from her family at birth based solely on prenatal conduct, requires the court to consider the least, and not the most restrictive alternative available.¹⁷³

169. Wald, *supra* note 25, at 634-38.

170. See *supra* text accompanying notes 6-9.

171. *Valerie D.*, 25 Conn. App. at 592, 595 A.2d at 925.

172. *Roe v. Wade*, 410 U.S. 113, 155 (1973).

173. *Shelton v. Tucker* 364 U.S. 479, 488 (1960) (invalidating a statute requiring teachers to list organizations to which they belong or contribute to on due process grounds). "[T]hrough the governmental purpose be legitimate and substantial; . . . the breadth of legislative abridgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Id.*

This approach takes into account not only the state and parental interests involved, but, most importantly, Valerie's best interest.

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