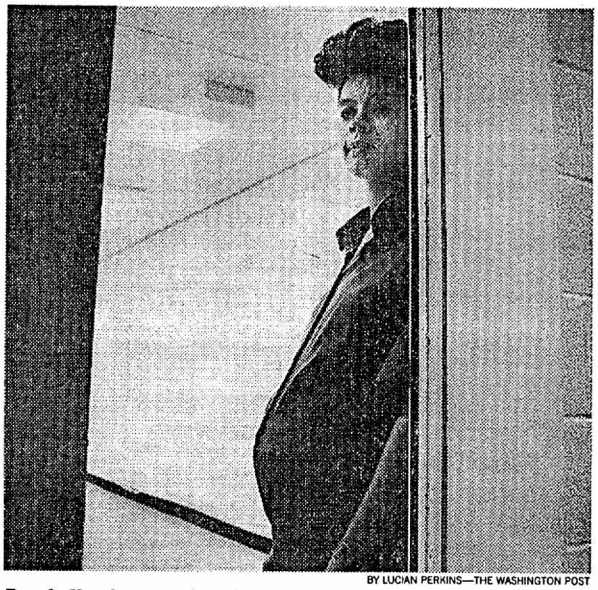
Washington Post



BY LUCIAN PERKINS—THE WASHINGTON POST

Brenda Vaughan says, "I've had nightmares I had this baby in . . . jail."

D.C. Judge Jails Woman As Protection for Fetus

Convicted Thief Allegedly Uses Cocaine

By Victoria Churchville
Washington Post Staff Writer

A woman convicted of second-degree theft is serving out the term of her pregnancy in jail because a D.C. Superior Court judge said he thought her fetus needed protection from her alleged drug use.

"I'm going to keep her locked up until the baby is born because she's tested positive for cocaine when she came before me," Associate Judge Peter H. Wolf said at the June 24 sentencing of Brenda A. Vaughan, according to a transcript obtained by The Washington Post. "She's apparently an addictive personality and I'll be darned if I'm going to have a baby born that way."

Wolf sentenced Vaughan to 180 days in the D.C. Jail, subject to a motion to reduce the time after the baby's birth, which is expected Sept. 15. "I can't trust you, Ms. Vaughan, and that's a hell of a thing to say," Wolf told the 30-year-old former employment agency worker.

Vaughan's sentence was harsh for a first offender, according to several court officials, prosecutors and judges who spoke on the condition that they not be identified.

The U.S. attorney's office had agreed to probation instead of jail time, according to a transcript of an earlier sentencing hearing.

Vaughan was arrested Feb. 5 on felony "uttering" charges after she forged $721.98 in checks against an account of the employment agency, which had paid for a private drug rehabilitation program last year to help her overcome her cocaine addiction.

See PREGNANCY, A8, Col. 1

D.C. Woman Is Jailed To Protect Her Fetus

PREGNANCY, From A1

She pleaded guilty to a lesser charge of second-degree theft.

Some legal experts interviewed by The Post praised Wolf's decision as Solomon-like and compassionate, while other legal scholars and women's rights groups said the judge acted unfairly and exceeded his authority.

In a jail interview this week, Vaughan complained bitterly that Wolf had sentenced her baby to a bad beginning in life. "It's a dirty deal. Emotionally, that's the thing that bothers me the most and makes me mad at Judge Wolf. How in the hell can you do the best for this baby if you're in jail?" she said, tears spilling from her eyes.

"He feels like if he ever did anything good in his life, he saved Brenda Vaughan's baby," she continued. "Judge Wolf may have a point, but I say, 'Don't use me to make your point. Give me a chance like everybody else.' "

Jeffrey Lewis, Vaughan's attorney, filed a motion last week to reduce her sentence. "I really believe he did it for Ms. Vaughan's own good," Lewis said in an interview. "Because bad check writers are the worst recidivists, [because of the judge's] strong feeling against drug use and his concern with the most innocent victim of all—the unborn fetus of a drug user—they all combined to cause Judge Wolf to give Ms. Vaughan such a long sentence."

D.C. law gives judges leeway in sentencing decisions and allows up to one year in jail for the misdemeanor charge of second-degree theft, or stealing an amount under $250. Wolf, who is on vacation, declined through his law clerk to comment on the Vaughan case.

"This strikes me as the epitome of justice. It's sort of Solomonic," said Jeffrey Troutt, director of the Free Congress Center for Law and Democracy, a conservative think tank. "For her protection and the protection of the child she's carrying, it's a reasonable, humane and compassionate sentence . . . not meant to be as much punishing as protecting."

But representatives of more liberal groups strongly disagreed.

"He was wrong to sentence her to jail to protect her fetus. That's her business, not his," said Arthur Spitzer, legal director of the Washington area chapter of the American Civil Liberties Union. "The fact that she committed a crime doesn't give the state any more authority to regulate her life for the protection of her fetus."

Dorothy L. Jones, president of the D.C. chapter of the National Organization for Women, said, "It's just part of a terrible trend of putting fetal rights over women's rights. They're treated as vessels for the fetus, not as individuals. If it were a man in this case, he would have received a lesser sentence. It's not equal treatment for women—that's the crux."

Vaughan, who is not married, revealed her pregnancy to the court on May 24 at her initial sentencing. When she tested positive for cocaine on that date, Wolf ordered her to D.C. Jail for 30 days, pending a decision on whether to admit her to a special intensive probation program that features routine drug tests as a condition for release.

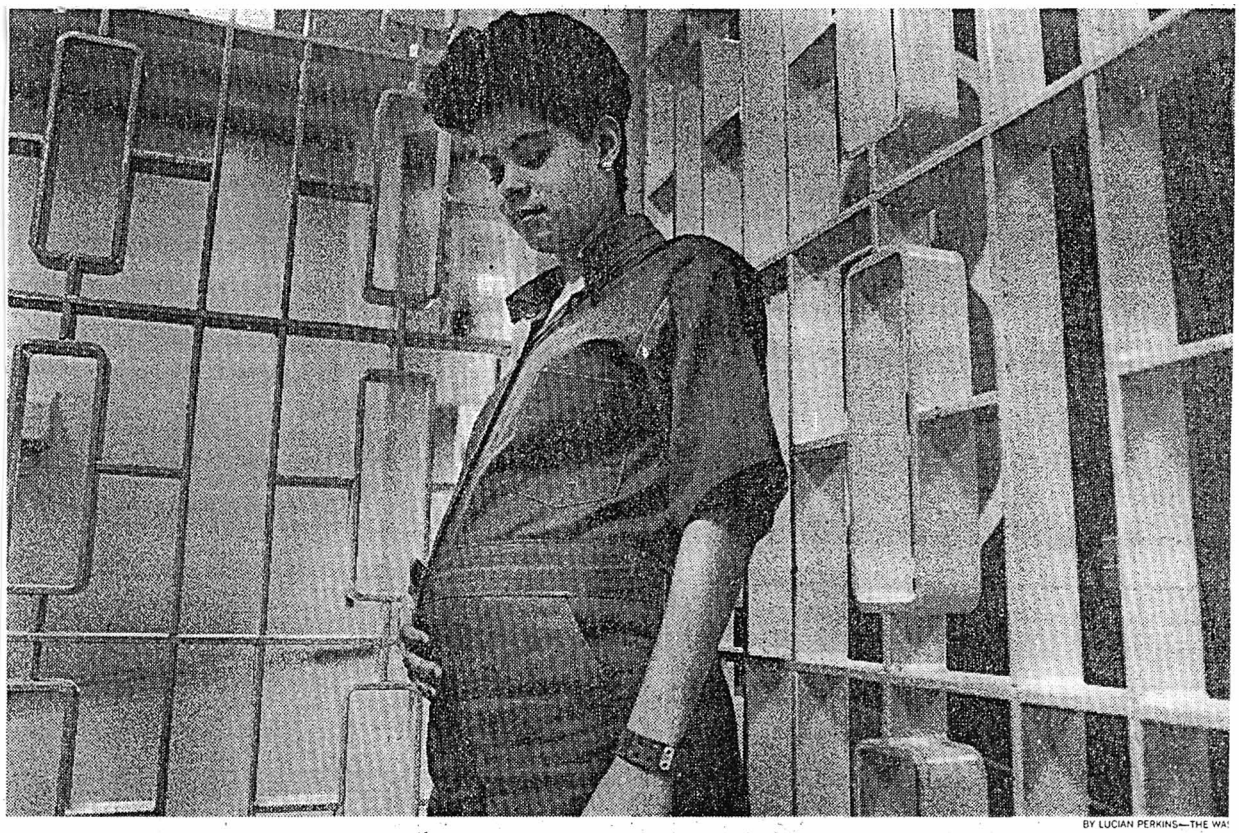
Wolf said from the bench at the May hearing, "Ms. Vaughan is a walking tribute to the meanness of that drug [cocaine] because her employer put her through an inpatient program. She got out, stole from her employer, got fired, and here she is back and here she is hooked again."

Wolf added, "One of the things that sadly we have to come to with alcoholics and addicts of drugs . . . is you've got to hit bottom before you are going to start up, and I'm helping you hit bottom."

Vaughan, of Temple Hills, was judged ineligible for the intensified probation program because she is not a District resident. In court on June 24, Wolf sentenced Vaughan to six more months in the D.C. Jail.

In court and in the interview last week, Vaughan maintained that she had not used cocaine since January, but acknowledged smoking marijuana on the morning of her first sentencing.

D.C. corrections officials estimated there are about 40 pregnant women in a female population of about 425 at the D.C. Jail at any given time. One morning last week there, several pregnant women



BY LUCIAN PERKINS—THE WA

Brenda A. Vaughan was described by judge as testing positive for cocaine. "She's apparently an addictive personality," said Judge Peter H. Wolf at sent

wearing blue jail-issue jumpsuits walked the corridors and answered phones in a probation office.

Pregnant inmates receive double portions of food but no special diets or exercise, according to D.C. Jail officials. They receive medical checkups once a month, or more often if needed, and counseling from D.C. General Hospital midwives. They spend the final two weeks of their pregnancy at the jail infirmary and are sent to D.C. General, which is adjacent to the jail, for delivery when labor begins.

Vaughan complained that she is unable to get the extra milk, vegetables and fruit that she craves. She said she sleeps on the top bunk of her two-woman cell, even though she knows she could fall, because she is frightened of the mice that she said scampered over her when she slept in the bottom bunk.

"I would like to be able to go out to have Lamaze classes. I'd like to have natural childbirth," said Vaughan, a petite, large-eyed woman. "I've had nightmares that I had this baby in the D.C. Jail—that I didn't even make it across the street to D.C. General."

Volume 117 - Number 43 - Page 441 Tuesday, March 7, 1989

THE DAILY WASHINGTON
Law Reporter

Established 1874

U.S. Court of Appeals for the D.C. Circuit

PATENTS

LONG-ARM JURISDICTION

Long-arm patent statute (35 U.S.C. §293) does not extend personal jurisdiction to actions based only on breach of contract, fraud,or breach of fiduciary duty.

NATIONAL PATENT DEVELOPMENT CORPORATION v. T.J. SMITH & NEPHEW, LIMITED, U.S.App.D.C. No. 88-7062, January 13, 1989. *Affirmed* per Silberman, J., (concurring opinion by Ruth B. Ginsburg in which Gibson, J. (8th Cir.) concurs). *C. Frederick Leydig* with *Jeffrey S. Ward* and *John P. Bundock* for appellant. *Albert L. Jacobs, Jr.* with *Mark H. Sparrow* and *Stephen M. Harancz* for appellee. Trial Court—Harris, J.

SILBERMAN, J.: Appellant National Patent Development Corporation ("National"), an American company, sued T.J. Smith & Nephew, Limited, a British company, in the district court seeking, *inter alia,* a declaratory judgment that National has a 50% ownership interest in certain patents controlled by Smith & Nephew. National claims that through a series of actions including breach of contract, fraud, and breach of fiduciary duty, Smith & Nephew asserted ownership of an invention that belongs in part to National. Because Smith & Nephew is a foreign company with no agent for service of process in the United States, National alleged that personal jurisdiction over Smith & Nephew was established under 35 U.S.C. §293 (1982), which gives the district court jurisdiction over a foreign patentee in order "to take any action respecting the patent or rights thereunder." Smith & Nephew moved to dismiss the complaint on several grounds, including lack of personal jurisdiction, contending that section 293 does not extend personal jurisdiction to actions based only on breach of contract, fraud, or breach of fiduciary duty. The district court granted the motion on that ground, and because we believe the district court's decision is consistent with this court's precedent interpreting section 293, we now affirm.

I.

The relationship between National and Smith & Nephew dates back to 1967 when National entered into a series of written agreements with SANACO, a large British corporation, which is the parent corporation of Smith & Nephew. These contracts created a joint venture between National, a small company that held patents relating to hydrophilic polymers, and SANACO, which was in the business of developing surgical and medical dressings. The parties agreed that most discoveries or inventions made by SANACO and Smith & Nephew would be the property of Hydron, the joint-venture company in which each party had a one-half interest. Smith & Nephew was required to keep Hydron (and hence National) informed concerning all work performed under the research program and to disclose fully any discoveries or inventions.

The instant dispute centers on another written agreement between National and SANACO, executed in 1970, by which the parties modified their earlier agreements. The later 1970 contract provided that notwithstanding the earlier agreements, certain adhesive wound dressing applications by Smith & Nephew would be the exclusive property of Smith & Nephew, not of Hydron. National now claims that its entry into the 1970 agreement

(Cont'd. on p. 445 - Jurisdiction)

D.C. Superior Court
New Auditor-Master

Anita Isicson

Chief Judge Fred B. Ugast has announced that Ms. Anita Isicson has been selected as an Auditor-Master for the Superior Court of the District of Columbia. She will begin her official duties on March 13, 1989.

Ms. Isicson, who is a principal partner in the law firm of Isicson, Steinmetz & Weinberg, was born in Alexandria, Virginia and resides in the metropolitan area. She is a *cum laude* graduate of the Wharton School of Finance and Commerce, University of Pennsylvania and the Georgetown University Law Center. She spent four years as an associate with the law firm of Bonner, Thompson, Kaplan & O'Connell before beginning her general private practice partnership in 1978. Her firm's specializations are in probate administration, estate planning, tax, family, real estate and business law. She has had extensive experience in probate administration in the District of Columbia, Virginia, Maryland, and Florida.

Chief Judge Ugast said, "We are pleased that as well qualified a candidate as Ms. Isicson is joining the Court. With the pending implementation of the District of Columbia Guardianship Protective Proceedings Act, Ms. Isicson's capable assistance will be greatly needed to help the Probate Division handle the expected increases in its caseload."

D.C. Superior Court

CRIMINAL LAW & PROCEDURE

PREGNANT DEFENDANT

Incarceration of pregnant misdemeanor defendant who is cocaine addict explained.

UNITED STATES v. VAUGHN, Sup.Ct., D.C., Crim. No. F-2172-88B, August 23, 1988. *Opinion* per Wolf, J. *Jeffrey M. Lewis* for Defendant.

WOLF, J.: The court has today heard argument in this case about the D.C. Department of Corrections' calculation of defendant's mandatory release date because of its questionable interpretation of the Prison Overcrowding Emergency Powers Act of 1987 codified at D.C. Code §24-901 *et seq.* (Cum.Supp. 1988). The net effect of its calculations was that defendant would be released on August 27, 1988 rather than September 14.

The court feels it appropriate to state why it *sua sponte* raised this question, seemingly to have quibbled over a mere 18 days' incarceration for one defendant among hundreds on this judge's misdemeanor calendar. Moreover, some details on the court's thinking about its sentence in this case is appropriate because it has obviously received some notoriety and, indeed, national publicity.

The court explicitly said on June 24 that it was sentencing defendant to a long enough term in jail (180 days with credit for time already served before sentencing) to be sure she would not be released until her pregnancy was concluded as expected on September 14. The court did so because of its concern for the unborn child in light of defendant's demonstrated lying about, and inability to control, her cocaine addiction. The effect of the order entered today, therefore, is to delay defendant's release until her precise due date. The court would have preferred to be certain defendant's child was born before she could again gain access to cocaine, and it was the court's intent to be sure that would happen by giving her a long enough sentence to conclude well past her due date. The court then planned to reduce her sentence when the baby was born. But the court did not adequately anticipate proper emergency prison overcrowding declarations by the Mayor when added to defendant's statutory "good time" credits. Thus the 18 days in question became crucial.

On April 5, 1988 Ms. Vaughn pled guilty to second degree theft, an offense punishable by up to $1,000 fine and/or one year in jail. The prosecutor agreed not to ask that the defend-

(Cont'd. on p. 446 - Defendant)

TABLE OF CASES

F.2d at 780. And section 293 supplied the basis for personal jurisdiction over Gist-Brocades; because Riker's claim went to the issue of whether Gist-Brocades could enforce its patent against infringers. *Id.* at 777. This, we said, clearly affected the "rights" under the patent.

In *Riker*, we took care to explain why *Neidhart* was not controlling precedent. *Neidhart*, we said, involved actions that were "essentially contract disputes, only incidentally involving patents." *Id.* at 778. In contrast, although the genesis of the dispute in *Riker* was a license agreement, the case "embrace[d] the patent laws directly," because it centered on the enforceability of the patent under traditional patent doctrine. *Id.*

III.

National and Smith & Nephew each interprets our precedent to resolve the case in its favor. National asserts that with our decision in *Riker*, we have "come full circle . . . to Judge Leventhal's position in his vigorous dissent in *Neidhart* that the plain language of section 293 affords personal jurisdiction in a much broader class of cases than those seeking declaratory judgment of invalidity or non-infringement." In National's view, section 293 provides for personal jurisdiction over Smith & Nephew because "this case involves the fundamental question of whether [National's] ownership rights under the patents as a 50% shareholder in Hydron have been fraudulently misappropriated by Smith & Nephew." Smith & Nephew, on the other hand, views the instant case as no different from the contract disputes in *Neidhart*. It is irrelevant, appellee contends, "whether the contracts involve patent licenses, patent assignments, patent security interests or, as here, patent ownership." In none of those circumstances, it says, does the claim involve "the patent or rights thereunder" within the meaning of section 293.

If this case came to us without circuit precedent, we would find Judge Leventhal's analysis appealing, if not compelling. We note, however, that even under his construction of the statute—relying as it does on the plain language—we would face problems in defining the outer boundary of jurisdiction. How tangential or remote to the core dispute could the patent be and still authorize use of the long-arm statute? Be that as it may, we are not free to write on a judicial *tabula rasa;* we must do our best to interpret and reconcile our own precedent.

We think Smith & Nephew (and the district court) clearly offers the better interpretation of the governing cases. National's position requires us, essentially, to conclude that *Riker* overruled *Neidhart,* and that would be to ascribe to the *Riker* panel an assertion of authority that only an *en banc* court may exercise. In *Neidhart,* we explicitly endorsed *North Branch's* rationale suggesting that section 293 is limited to actions brought against foreign patentees involving validity or infringement of patents—in other words, actions that turn on the resolution of a question of federal patent law. *Neidhart,* 510 F.2d at 764. *Riker,* in turn, justified the use of the long-arm statute because, although the case was brought under the antitrust laws, the core issue was whether the tie-in agreement constituted patent misuse and thus impaired enforceability of the patent under traditional equitable *patent* concepts. We therefore read *Neidhart* and *Riker* together as holding that section 293 is available in a case brought in federal district court, whatever the basis of subject matter jurisdiction, if the complaint shows that the court will be obliged to resolve an issue of patent law. Although we have difficulty visualizing such a case that would not involve the validity or infringement of a patent, we do not think it necessary to foreclose the possibility that such a case exists.

* * * *

It is readily apparent that the case before us does not turn on any issue of patent law no matter how broadly defined, and therefore the long-arm statute does not provide a basis for personal jurisdiction over Smith & Nephew. The judgment of the district court is

Affirmed.

GINSBURG, RUTH B., J., joined by GIBSON, J., *concurring:* I concur in the court's disposition of this case because *Neidhart v. Neidhart S.A.,* 510 F.2d 760 (D.C. Cir. 1975), is the controlling precedent and remains the law of this circuit until overruled by the court en banc. I write separately, however, to voice my agreement with Judge Leventhal's interpretation of 35 U.S.C. §293 (1982), set forth in his dissent in *Neidhart. See* 510 F.2d at 765-68 (Leventhal, J., dissenting).

The district court possessed subject matter jurisdiction over this case under 28 U.S.C. §1332(a) (1982) (diversity of citizenship): plaintiff-appellant National Patent Development Corporation (National) is a Delaware corporation with its principal place of business in New York, defendant-appellee T.J. Smith & Nephew, Limited (Smith & Nephew) is an English corporation, and the amount in controversy exceeds $10,000, exclusive of interest and costs.

Furthermore, to the extent that National's claims relate to patents Smith & Nephew registered here, *see infra,* due process would not have inhibited the district court's assertion of personal jurisdiction over defendant-appellee. By registering a patent in the United States Patent Office, a party residing abroad purposefully avails itself of the benefits and protections patent registration in this country affords. *See World-Wide Volkswagen Corp. v. Woodson,* 444 U.S. 286, 297-98 (1980); *cf. Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd.,* 647 F.2d 200, 203-04 & nn. 4-6 (D.C. Cir. 1981). It is therefore fair and reasonable to require such a party to respond here in proceedings, whether arising under federal or state law, concerning the U.S.-registered patent.

The critical question for this court, then, is whether the long-arm statute invoked in this case, section 293, extends to a suit involving patent ownership. Were this court writing on a clean slate, I believe the answer would have to be yes. The words Congress used broadly authorize the district court to exercise adjudicatory authority over a patentee not residing in the United States in cases "respecting the patent *or rights thereunder.*" 35 U.S.C. §293 (emphasis added). This unqualified language is most naturally and plausibly read to encompass a suit over patent ownership.

Despite the recognized natural meaning of the legislature's formulation, *see Neidhart,* 510 F.2d at 764 n.9; *North Branch Prod., Inc. v. Fisher,* 179 F.Supp. 843, 845 (D.D.C. 1960), the court in *Neidhart* read the provision stingily, stating that " '[n]atural meaning' simply will not suffice where, as here, other considerations necessitate more sophisticated interpretation." 510 F.2d at 764 n.9. I am unconvinced, however, of the reality of any substantial countervailing considerations. I would therefore follow "the familiar canon of statutory construction that the starting point for interpreting a statute is the language of the statute itself"; "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.,* 447 U.S. 102, 108 (1980); *accord Ford Motor Credit Co. v. Cenance,* 452 U.S. 155, 158 n.3 (1981); *Diamond v. Diehr,* 450 U.S. 175, 182 (1981); *Perrin v. United States,* 444 U.S. 37, 42 (1979).

Our current confined reading of section 293 had its genesis in *North Branch.* The district court there appparently believed that the plaintiff had invoked the section to do double duty, *i.e.,* to satisfy, simultaneously, the requirements of subject matter and personal jurisdiction. The *North Branch* court's analysis, 179 F.2d at 845, confused the two issues, instead of treating them discretely, as Judge Leventhal pointed out in his *Neidhart* dissent, 510 F.2d at 765-66. A similar confusion appears to have influenced the *Neidhart* majority. Reacting to the Justice Department's suggestion that section 293 conferred both subject matter and personal jurisdiction on the district court over patent-related cases, the *Neidhart* majority stressed its resistance to federal court intrusion upon the domain of state courts via assertion of jurisdiction over what was, in essence, a contract dispute. 510 F.2d at 764.

When one separates subject matter jurisdiction from personal jurisdiction, however, the courts' fears appear unjustified. Subject matter jurisdiction is in no case supplied by section 293; it must be based, ordinarily, either on diversity of the parties' citizenship, *see Neidhart,* 510 F.2d at 765 (Leventhal, J., dissenting), or on a federal question, *see Riker Laboratories, Inc. v. Gist-Brocades N.V.,* 636 F.2d 772, 779-80 (D.C. Cir. 1980). Interpreting section 293 in accord with its plain meaning, then, would not allow the District Court for the District of Columbia to roam the country pilfering state court fare, because the federal court would be limited by the normal subject matter competence requirements.

In sum, this case properly belongs in federal court. Only misconceived precedent bars the door that Congress appears to have opened. There was good cause for the door-opening: to assure United States citizens the opportunity to air in a United States court complaints against a foreign registrant regarding a United States patent and the rights flowing therefrom. Notwithstanding my reluctance to rehear freshly decided panel opinions, *see, e.g., Air Line Pilots Ass'n, Int'l v. Eastern Airlines, Inc.,* No. 88-7201, slip. op. at 1. (D.C. Cir. Jan. 10, 1989 [117 WLR 433] (Ruth B. Ginsburg, J. concurring in denial of rehearing en banc), I am convinced that the full circuit, having had ample time for reflection and running no risk of undermining the courts collegiality, should reverse the course set by *Neidhart.*

DEFENDANT

(Cont'd. from p. 441)

ant be incarcerated pending sentencing but reserved the right to speak against her at the time of sentencing. Though Ms. Vaughn was a first offender, her case was originally a felony charge (she had forged and uttered four checks of her employer totalling $721.98; the prosecutor allowed her to plead guilty to the one misdemeanor charge). The defendant explained that she had had a cocaine habit, had reported it to her employer, and her employer had paid some $8,000 for her to enter an inpatient drug treatment program for 30 days. When she got out of the treatment program and went back to work, her drug dealer began to hound her for money she still owed him and she had, according to the defendant, stupidly forged the checks. For all these reasons the court ordered the preparation of a presentence report by the court's Social Services Division, a

step it might have skipped for a more ordinary drug first offender. The court allowed her to remain on release status pending sentencing, which was set for May 24, 1988.

When defendant's presentence report was later prepared it revealed that she had twice failed to report to the Alcohol and Drug Abuse Administration for drug testing—on April 6 and 18. She had been using marijuana since the age of 13 (defendant is now age 29), and began using cocaine "through an association with a friend who was apparently a well-connected drug dealer and not a 'street pusher.' " As a result of these reports, at sentencing on May 24 the court ordered Ms. Vaughn tested for drugs that day. The results from the Pretrial Services Agency (whose testing is 98 percent accurate with a 2 percent error rate inclined toward false negative results, *United States v. Roy,* 113 Wash.L.Rep. 2317, 2322 (Nov. 15, 1985)) showed she tested positive for cocaine use within the last two to four days. When she was later that morning again brought before the court she revealed for the first time that she was six months pregnant. Ms. Vaughn vigorously denied cocaine use. The court did not believe her, especially when it is the court's consistent experience that defendants who do not appear for drug testing as required by the Pretrial Services Agency or the court's Social Services Division frequently do not do so because they know their urine testing will yield "dirty" results.

Moreover, the court was horrified that Ms. Vaughn was using cocaine when she was pregnant. As this judge does with most women drug abusers when they appear before the court, he had given her at the time of her guilty plea a Xerox reprint of a January 17, 1988 *Washington Post* article on the dangers to fetuses when their mothers-to-be abuse drugs. Ms. Vaughn said she had read it. It revealed that cocaine abuse in pregnancy has been linked with fetal strokes which can cause paralysis and brain damage; genital, urinary tract, and kidney malformations; premature births through premature separation of the placenta; underweight babies; sudden infant death syndrome; and extremely cranky, hyperactive, tremorous babies. The court stepped Ms. Vaughn back to jail while it awaited a 30-day evaluation of her suitability for the court's Intensive Probation Supervision Program. On June 24 she was found ineligible for that program because she was not a District of Columbia resident. Thereafter the court sentenced her as described above.

It has been reported that Ms. Vaughn has said, "Judge Wolf may have a point [about the safety of her baby], but I say, 'Don't use me to make your point. Give me a chance like everybody else.' " It has been argued by others that this judge was wrong to sentence her to jail to protect her fetus—"That's her business, not his"; that fetal rights have been put over women's rights; that Ms. Vaughn has been treated as a vessel for the fetus, not as an individual; that it's not equal treatment for women—if it were a man in this case, he would have received a lesser sentence; that the court has exceeded its authority and acted unfairly; that it is a "terrifying" decision that will soon lead to jailing mothers who smoke or drink alcohol while pregnant; and that the court has reacted to the antidrug hysteria of the moment.

After this case was publicized, many of this judge's colleagues reported to the undersigned having similarly sentenced or otherwise incarcerated pregnant drug abusers. Several reported that they had said on the record that they were doing so. Accordingly, while Ms. Vaughn's case may be the first to have achieved publicity, she is not the first to have been given similar treatment. This judge's response below to the above-described criticism may or may not reflect the views of colleagues.

The four acknowledged purposes of the criminal law, and sentencing thereunder, are punishment (or retribution), deterrence (of the defendant who is being sentenced and of members of the public at large perhaps contemplating, or later to contemplate, similar conduct), protection of the public from dangerous or aberrant people, and rehabilitation of the offender. The rights of the defendant and of the public must obviously be weighed. There frequently is no easy calculus. The court has not ignored Ms. Vaughn's rights as a woman in this case; it has weighed her rights as a defendant in a reckoning of all the factors just described and concluded that protection of the public counted more heavily. In this judge's mind that "public" included an unborn child and the taxpaying public who would undoubtedly have to pay for, and perhaps support in a very long-term way, a child who could have severe and expensive problems at birth and/or developmental and permanent damage if its mother repeated her cocaine abuse before its birth. Preventing such an outcome was "her business," she abdicated it, and it became this public official's business.

When a convicted robber is sentenced a judge must consider the possibility the defendant may rob again—the judge never knows if or when or who. In Ms. Vaughn's case, however, there was no "if" or "when" or "who." She had continued to abuse cocaine, did it while she was pregnant, stood a substantial chance of harming a society's most precious resource—a helpless child-to-be, and had also contributed directly or indirectly to the marketing of drugs in the District of Columbia by her illegal acquisition of cocaine from friend or street pusher. The least the court could do was protect that fetus from further harm and/or enable it to have a more risk-free start in this life from birth—especially in this jurisdiction which has one of the highest infant mortality rates in the nation. (While Ms. Vaughn reportedly lives with her mother in Maryland, the court has no hesitancy in helping the taxpaying citizens, or citizens-to-be, of that state just as it assumes Maryland judges would be equally concerned for District of Columbia citizens.) Ms. Vaughn's status as a criminal defendant authorized the court to consider all these factors in imposing a sentence whose maximum of one year's incarceration she clearly acknowledged at the time of her guilty plea.

It is true that most judges of this court would probably impose a sentence of probation for most defendants with a first-time misdemeanor conviction. But that is not an invariable rule. Every case is different. Indeed many defendants are later revoked for failure to abide by the terms and conditions of their probation and suffer delayed incarceration notwithstanding their first-offender status. Some defendants' backgrounds make them obviously unsuitable for successful probation supervision by an overworked probation staff. That appeared true for Ms. Vaughn who had already not reported for drug testing while under the supervision of the Probation Department during the preparation of her presentence report. The court's assessment of Ms. Vaughn in this regard was later confirmed by an unsolicited letter received two days after her case was publicized in the *Washington Post* on July 23, 1988. Her employer previous to the one she had stolen from in this case wrote as follows:

> Brenda is a very intelligent young woman, with lots of potential—however misdirected. Ms. Vaughn has had lots of chances to straighten out her life before she got to this point. During her employment here 1986-87, she lied, stole from other employees, and finally, forged my name to a corporate check. I made her pay it back and then fired her. I agreed not to press charges if she got help for her cocaine habit.
>
> * * * This is not Brenda's first offense. She has been brushing the law for a few years now.
>
> I commend you for * * * seeing through Brenda's big tears and manipulative ways. She can really pour it on; she's so sweet and innocent looking. Somewhere in Brenda, there's a decent person. * * * [Those] criticizing your sentence don't know Brenda Vaughn.

Ms. Vaughn has had her "chance like everybody else"—and more. It is ironic for her to complain she is unable to get extra milk, vegetables and fruit she craves while pregnant in jail when her real craving is a devastating drug.

It is true that defendant has not been treated the same as if she were a man in this case. But then a man who is a convicted rapist is treated differently from a woman. She has also not been treated the same as a nonpregnant woman. But Ms. Vaughn became pregnant and chose to bear the baby who, like most criminal defendants the court sees so frequently, will start with one other severe strike against it—no father is around. Arguably Ms. Vaughn should have demonstrated even greater responsibility toward her child.

The court wishes there were some other answer besides jail for Ms. Vaughn until the baby is born. That is why it delayed her sentencing on May 24 to determine her eligibility for the court's Intensive Probation Supervision Program. But that or any such program has its limitations in this drug-afflicted society. Addiction cannot be "cured," even with expensive outside help, until the person herself acknowledges her addiction and determines to stop. Ms. Vaughn was still denying her drug problem to the court. The only recourse, unfortunately, is to help an addict fully realize the consequences of his or her actions. One of those consequences may be jail. That is what the court meant when it said to Ms. Vaughn, "You've got to hit bottom before you are going to start up, and I'm helping you hit bottom."

Finally, this court is not empowered to search for and lock up any pregnant woman found abusing her fetus. It has only exercised its responsibility to sentence a defendant who committed her crimes because of her addiction to cocaine, an illegal substance. Reality, not "antidrug hysteria," has governed this court's imposition of sentence. Alcohol and smoking, which can also harm a fetus, are not yet illegal substances. It *is* illegal to sell or provide alcohol or cigarettes to minors. D.C. Code §§25-121, 22-1120 (1981). Perhaps someday those substances will be similarly regulated for pregnant women. Even so, this judge would comparably weigh in the balance the rights of a convicted severely alcoholic pregnant woman and the rights of the public should such a case be presented. The law clearly permits *all* relevant factors to be taken into account in imposing sentence. This judge has done no more; nothing less should be expected.

LEGAL NOTICES

FIRST INSERTION

LOPEZ, Oswaldo Jesus

Deanna R. Duby, *Attorney*
Dolkart & Zavos