

# Virtual Mentor

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## HEALTH LAW

### The Legality of Drug-Testing Procedures for Pregnant Women

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State legislators, law enforcement officials, and physicians have struggled to reach consensus on how to identify, treat, and possibly punish women who abuse illegal substances during pregnancy. Between 1992 and 1995, the number of states that prosecuted drug-addicted pregnant women increased nearly threefold. No state has yet crafted a law specifically criminalizing drug addiction in pregnant women, choosing instead to prosecute women under child endangerment and drug distribution laws [1]. The stakes for pregnant women who abuse drugs are often high; they may face jail time, loss of custody when the child is born, and denial of welfare benefits for the baby [2].

When this effort to crack down on pregnant women who are addicted to illegal drugs enlists physicians to test for these substances and collect evidence, many ethical and legal questions arise. Law centers that specialize in advocacy for women question both the constitutionality and the morality of forcing physicians to fulfill the role of law enforcement officers in the course of treating pregnant women. The Supreme Court has recognized that addiction is an illness, and that criminalizing it is a violation of the Eighth Amendment, which prohibits cruel and unusual punishment [1]. Those working on behalf of pregnant women claim, and the Supreme Court agrees, that hospital policies of drug testing for the purpose of prosecution rather than treatment actually harm fetal health by discouraging women who most need assistance from seeking prenatal care [3].

Studies have shown that pregnant women who abuse drugs are much more likely to give birth to healthy babies if they receive prenatal care, even if they do not stop using drugs during pregnancy [4]. Furthermore, the patient-doctor relationship is compromised, and quality of care may suffer when women cannot fully disclose problems of addiction to their physician for fear of prosecution [5]. Most major medical organizations, including the American Medical Association, the American College of Obstetrics and Gynecology, and the American Academy of Pediatrics oppose using drug tests and punitive measures to manage the problem of addiction during pregnancy. Instead, these groups advocate increased treatment options and improved prenatal care for at-risk women and fetuses [6].

In *Ferguson v. City of Charleston*, the Supreme Court offered guidance for implementing constitutionally sound and ethically appropriate drug testing policies. This 2001 case tested the constitutionality of a Charleston, South Carolina, hospital's

partnership with law enforcement officials to create a procedure to identify pregnant women suspected of drug abuse. The protocol specified operational guidelines from the police, including instructions for the hospital staff on how to maintain a proper chain of evidence. The policy listed criteria for identifying suspicious women, such as lack of prenatal care, late prenatal care, and previously known substance abuse. Hospital staff tested the women's urine for drugs, but they did not act under the power of a search warrant, nor did they receive informed consent from the patients before conducting the tests. The hospital staff then turned over results of the tests and the patients' discharge summaries, which contained confidential medical information, to the prosecutor's office and the police, who then promptly arrested the patients.

The search and arrest policy of the hospital did not lead to a reduction in drug use, offer changes in prenatal care, improve pregnancy outcomes, prescribe special care for newborns, or increase the number of women successfully completing drug treatment programs [6]. In short, it seems that the principal goal was to punish addicted women.

The petitioners in *Ferguson v. City of Charleston* challenged the constitutionality of the drug tests, claiming that performing the tests in the absence of a warrant or informed consent violated the patients' Fourth Amendment protection against unreasonable search and seizure. The Supreme Court agreed, citing several aspects of the policy in their reasoning. First, the program was developed by the hospital in conjunction with police, so that the health professionals who carried out the testing became extensions of law enforcement. The Court reasoned that, when physicians are acting at the behest of the state to collect evidence, they have a special obligation to inform their patients of their constitutional rights. The Court recognized that health care workers might have a duty to report evidence of criminal conduct inadvertently acquired during treatment without informing patients of their Fourth Amendment rights. In the *Ferguson* case, however, the employees were not acquiring evidence of drug use to further treatment goals, but rather for prosecution purposes only, which made them extensions of law enforcement and therefore responsible for informing patients of their rights. While patients might expect that results of testing done in association with their treatment could be turned over to law enforcement, they would not expect that doctors would perform the tests for the sole purpose of obtaining evidence for criminal sanctions.

Second, the Court saw the involvement of prosecutors and police in the actual daily drug testing as clear evidence of the point made above—the policy was not intended to improve treatment options for pregnant women but to gather evidence for law enforcement, bypassing constitutional protections to do so. Third, the Court recognized that this program's central feature was the use of law enforcement to coerce women into drug rehabilitation and not the creation of more treatment options for women and the unborn. The Court acknowledged that the invasion of patient privacy in this case was severe due to the deceit involved in the testing and the unauthorized dissemination of confidential medical information to a third party.

Police received patient records detailing medical treatment and history, not simply drug test results.

### **Legal Drug-Testing Policies**

Based on the Supreme Court's decision in *Ferguson* and recommendations from leading medical organizations, hospitals are now able to craft drug testing and treatment policies that are both constitutional and ethically sound. First, medical professionals should know that, if they perform testing for the specific purpose of gathering evidence of criminal conduct by patients, they have an obligation to inform the patients of their constitutional rights to protection from unreasonable search and seizure [1]. Hospitals that fail to inform patients of their rights may be open to civil liability for monetary damages. Second, testing policies that are developed with law enforcement agencies, employing their protocols, are more likely to be deemed unrelated to treatment and thus be perceived as being used only to further prosecution. To avoid such categorization, hospitals should develop testing procedures based on medical care and treatment options, independent of police or prosecutors. Third, as Lisa Harris and Lynn Paltrow note, "no state authorizes or expects physicians to use medical evidence of addiction for criminal prosecution" [1].

The Supreme Court recognizes that a physician's duty is to provide sound medical treatment to his patient, not to act as an extension of law enforcement. Physicians serve medical—not legal—roles in the treatment of pregnant women. Health care professionals who act on behalf of the state rather than for their patients breach the ethical duties of the patient-physician relationship. Such a breach erodes confidence and trust in the medical community, resulting in poor disclosure by patients, which, in turn, may dramatically reduce the efficacy of diagnosis and treatment. Physicians' duty of care lies first and foremost with the patient. Ultimately, to preserve constitutional rights and the ethical patient-doctor relationship, drug testing policies should encourage open communication between patient and physician, emphasize the availability of treatment options, and advocate for the health of woman and child.

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