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HEALTH LAW

Ferguson v. City of Charleston and Criminalizing Drug Use During Pregnancy

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Imagine that you are a pregnant woman battling a serious narcotic addiction. When you seek care at a local hospital, you are handcuffed to your bed during delivery and incarcerated immediately after the birth of your child [1]. This scenario, in which staff members of the Medical University of South Carolina (MUSC) reported to legal authorities those maternity patients whose unconsented-to urine tests were positive for cocaine in 1989, was brought before the Supreme Court of the United States in 2001 [2]. Ten women had been arrested for child abuse, on the theory that drug use during pregnancy was abuse of the fetus [2].

Good Intentions

In response to an increase in cocaine use among patients receiving prenatal care, MUSC referred any maternity patient who tested positive to the county substance abuse commission for counseling and treatment. When this did not lower the incidence of cocaine use among pregnant patients, MUSC's general counsel contacted a lawyer to develop policy to prosecute women who tested positive for cocaine while pregnant [2].

They created POLICY M-7, "Management of Drug Abuse During Pregnancy," which set forth procedures by which the hospital staff would "identify/assist pregnant patients suspected of drug abuse" [2]. A patient was to be tested for cocaine with a urine drug screen if she met at least one of the following nine criteria: "(1) no prenatal care, (2) late prenatal care after 24 weeks gestation, (3) incomplete prenatal care, (4) abruptio placentae, (5) intrauterine fetal death (6) preterm labor of no obvious cause (7) intrauterine growth retardation of no obvious cause (8) previously known drug or alcohol abuse, (9) unexplained congenital anomalies" [2]. MUSC partnered with the Charleston police in creating the program. After the patients tested positive for cocaine use, they were referred to the police. A woman could be charged with simple possession if she tested positive for cocaine during the first 27 weeks of her pregnancy. If the positive result occurred at 28 weeks or later, she could also then be charged with possession and distribution to a person under 18. Finally, if she delivered the child while testing positive for cocaine, she could be charged with unlawful neglect of a child [2].

Bad Outcomes

Crystal Ferguson was one of 30 women arrested under the collaborative policy. When Ferguson's drug screen came back positive during her prenatal care visit, she agreed to attend substance abuse counseling. When she delivered her child, she

tested positive again [3] and was arrested 3 days after giving birth for failing to comply with the order to receive drug treatment [3].

Many who tested positive for cocaine abuse before birth were arrested and sent to jail, taken to the hospital for weekly checkups, and in some cases, chained to their hospital beds during birth [4]. The women affected by the collaborative policy did not consent to the tests, nor did the authorities obtain warrants.

Ferguson v. City of Charleston

The Center for Reproductive Rights, a nonprofit advocacy group that works to advance reproductive freedom, brought suit against MUSC and local law enforcement officials on behalf of ten women arrested under the policy [1]. The original lawsuit was filed on behalf of Ferguson and one other woman, but eventually grew to include ten patients who had been arrested under the policy [3].

The United States Court of Appeals for the Fourth Circuit found that the hospital's testing policy could be approved if a "special need" was found for the drug tests [2]. To determine if a "special need" exists, courts must weigh the degree of infringement of a right (in this case, the women's right to privacy from nonconsensual search) against the state interest other than law enforcement that the infringement is invoked to protect [2]. The federal appellate court found that the state's interest in preventing complications of pregnancy and the medical costs associated with them constituted a special need and that infringement on the women's right to privacy to protect that need was minimal. The Center for Reproductive Rights appealed the court's decision and brought the case before the U.S. Supreme Court [1].

Violation of the Fourth Amendment. *Ferguson v. City of Charleston* was the first Supreme Court case to deal with the maternal-fetal conflict in the context of warrantless searches. The Supreme Court reversed the federal appellate court's decision, finding that a special need did not exist; the state's interest in preventing complications in pregnancy and their associated costs did not justify the nonconsensual search. Because the women were arrested and prosecuted after they tested positive, the special needs requirement that the program be unrelated to law enforcement was not satisfied [2]. Moreover, the court found that the hospital's use of a drug test without the women's consent was unconstitutional if not authorized by a valid warrant [2]. Although citizens and state employees have a duty to provide the police with evidence of criminal conduct, in this case abusing illegal substances, "they have a special obligation to make sure that the patients are fully aware of their constitutional rights when such evidence serves the purpose of incriminating that patient" [2].

Racial Profiling. MUSC is a hospital in Charleston where the population was predominantly low income and African American [3]. MUSC's records indicated that, among its maternity patients, an equal percentage of white and African

American women consumed illegal drugs [3]. Yet 29 of the 30 women arrested under POLICY M-7 were African American [5].

Researchers found that 15.4 percent of white women and 14.1 percent of African American women used drugs during pregnancy, but African American women were 10 times more likely to be reported to the authorities [6]. According to the ACLU, because “poor women of color are far more likely to give birth in public institutions and have more contact with state agencies, their drug use is far more likely than that of middle-class white women to be detected and reported” [5]. Similarly, the ACLU argued that the MUSC’s policy had little to do with the drug use and more to do with poverty. The hospital tested women who received little to no prenatal care. “Poor women are more likely to delay seeking prenatal care until relatively late in pregnancy or to obtain no prenatal care at all” [5]. This inadequate care could lead to birth defects or poor fetal growth, which were conditions considered by the MUSC as grounds for testing these patients. Finally, the ACLU argued that the MUSC’s policy on targeting “crack cocaine, a drug more prevalent among inner-city communities of color, rather than other substances like methamphetamines, which is a drug more often used by white rural and suburban women, will unfairly result in the arrests of women of color in Charleston” [5].

The American Medical Association included in their *amicus* brief that use of many legal and illegal drugs during pregnancy can harm fetal development as much or more than cocaine [7]. The ACLU argued that MUSC’s policy was a form of racial profiling, by both “design and implementation, the policy led inevitably to the identification and punishment of drug use by pregnant, low-income women of color, leaving other pregnant users free of the threat of warrantless, suspicionless, nonconsensual drug testing” [5].

Ferguson’s Effect on the Future of Reproductive Rights

Cases that criminalize pregnant women for acts that might harm their fetuses continue to be controversial. A case pending in the supreme court of Indiana similarly calls into question a woman’s privacy and autonomy vis-a-vis her fetus [7]. Bei Bei Shuai was charged with murdering her infant because she ate rat poison when she was 8 months pregnant in an effort to commit suicide after a breakup. She was hospitalized after the attempt, and the doctors determined that the fetus looked healthy for the first few days. After a few weeks, Shuai gave birth, and 3 days later the baby died from bleeding in the brain. Shuai was charged under a state statute that declares a person who “knowingly or intentionally kills a fetus that has attained viability commits murder” [8]. Shuai’s lawyers argue that the statute was intended to apply only to someone who attacks a pregnant woman and kills her fetus [8].

The ACLU gives many policy reasons not to punish women for ingesting substances during their pregnancies [5]. Punishing women who use drugs during pregnancy deters them from seeking prenatal care and entering drug treatment programs [3]. Rules intended to protect fetuses and help women end up having the opposite effect [5].

Furthermore, efforts to protect a fetus by confining women, regardless of compelling medical treatment, violate the guarantee of liberty of the due process clause of the Constitution [3, 5]. Singling out women of color may also violate the equal protection clause of the Fourteenth Amendment. The ACLU calls the maternal drug criminalization “bad medicine and bad public policy” [5].

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