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To Prosecute or Not To Prosecute: The Dilemma Posed by Pregnancy and Substance Abuse

Eileen D. Collins

In the United States, three percent of pregnant women use illegal substances and about fifty-four percent use legal but harmful substances, such as alcohol and tobacco.¹ In an effort to reduce these numbers and protect unborn children, many prosecutors across the nation are choosing to file criminal charges against these women, ranging from misdemeanor counts of endangering the welfare of a child all the way to homicide.² These prosecutions have been the focus of intense criticism from many, including addiction specialists, advocates for pregnant women, and abortion-rights advocates.³ Prosecutors, focusing on the severe, often permanent and sometimes deadly consequences of substance abuse, have defended the prosecutions as necessary in order to protect innocent infants.

Compared to their healthy counterparts, infants born suffering the effects of maternal substance abuse tend to be born premature, have significantly lower birth weights, longer and more complicated hospital stays, and are more likely to be abused or neglected if they remain in the custody of parents with substance

abuse problems.⁴ In addition, these children are placing overwhelming demands on the social welfare system because it is increasingly difficult to find foster parents willing to accept children exposed to maternal substance abuse.⁵ As they grow, these children continue to suffer the effects of maternal substance abuse. Sally Manning, a Chicago Public School teacher with a Masters Degree in Special Education, sees young children suffering the effects of maternal substance abuse every day.⁶ "With these students," she says, "there is an increase in hyperactivity, a decrease in attention span, a lack of impulse control, and extreme difficulty in grasping basic educational concepts."⁷

South Carolina, Texas, New York, Arizona, Hawaii, Utah, and California are among the states that have started filing criminal charges against women abusing drugs and alcohol during their pregnancy. South Carolina, one of the first states to bring such charges, has had over seventy cases heard in its courts since 1989.⁸ Riverside County, California, which has been called the methamphetamine capital of the country, has made this type of prosecution a top

priority. Prosecutors, citing numerous egregious examples of maternal substance abuse and its consequences, believe they are left with no other option but to prosecute. In Hawaii, Tayesha Aiwohi was charged with manslaughter after she ingested so much methamphetamine during her pregnancy that her son died only two days after his birth.⁹ In New York, Stacey Gilligan was charged with child endangerment after consuming so much alcohol during her pregnancy that her baby was born with a blood alcohol level more than twice the legal limit for an adult.¹⁰ Both cases are still working their way through the courts.

Critics of these prosecutions counter that not only are these cases not helping to curb drug and alcohol abuse among pregnant women, but that these prosecutions are actually making the problem worse. The National Advocates for Pregnant Women worries that these highly-publicized prosecutions will deter pregnant women from seeking addiction treatment or even prenatal care for fear of going to jail or having their other children taken away.¹¹ However, this is difficult to prove, as

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most pregnant women with substance abuse problems do not seek prenatal care for a variety of reasons, only one of which is fear of prosecution.¹²

More fundamentally, addiction specialists have denounced these prosecutions as ineffective, arguing that prosecution does not address the woman's addiction. The American Society of Addiction Medicine ("ASAM") is one of about fifty public health organizations opposed to these prosecutions and concerned that they will deter both treatment and prenatal care. Rather than prosecute, ASAM instead suggests prevention and education programs, addiction treatment, early intervention, and additional

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research.¹³

Abortion advocates, contending that life does not begin until birth, oppose the prosecutions as unconsti-

tutional. Using this logic, defense attorneys have argued that charges against pregnant women are not valid because substance-abusing pregnant women do not give illegal substances to a child, but rather to a fetus that remains constitutionally unprotected.

¹⁴ Prosecutors counter that when a child draws his first breath, he is protected under the law and if at birth he is intoxicated or under the effects of illegal narcotics, then his mother can be charged and held criminally responsible.

Although Illinois has not been active in prosecuting these types of cases, current state laws not only criminalize the use of illegal substances by pregnant women but also the act of supplying pregnant women with such substances.¹⁵ In addition, Illinois has a rebuttable presumption that a parent is unfit if at birth the child tests positive for any amount of a controlled substance.¹⁶ Typically in Illinois when a pregnant woman suspected of abusing drugs or alcohol comes to a hospital, a call is made not to the police but to a social worker who can then either recommend drug treatment or even force the woman to undergo treatment.¹⁷

With substance abuse approaching epidemic levels in some parts of our country, we are likely to see more and more of these cases. As the current cases continue to work their way through the courts, it remains to be seen whether prosecution is the best solution to the problem of substance abuse by pregnant women.

1. Kirsten Scharnberg, *Prosecutors Targeting Pregnant Drug Users*, Chi. Trib. Nov. 23, 2003 at 1
2. *Id.*
3. *Id.*
4. Janet L. Shikles, Director for Health Financing and Policy Issues, Report to the Chairman of Committee on Finance in U.S. Senate, *Drug-Exposed Infants, A Generation at Risk*, Jun. 1990, at 14-17, 23.
5. *Id.* at 17-18.
6. Interview with Sally Manning, Teacher, West Park Academy of Fine Arts and Technology, Chicago, IL (Jan. 25, 2004)
7. *Id.*
8. Kirsten Scharnberg, *Prosecutors Targeting Pregnant Drug Users*, Chi. Trib. Nov. 23, 2003 at 16
9. *Id.*
10. *Id.*
11. National Advocates for Pregnant Women, <http://www.advocatesforpregnantwomen.org>
12. Janet L. Shikles, Director for Health Financing and Policy Issues, Report to the Chairman of Committee on Finance in U.S. Senate, *Drug-Exposed Infants, A Generation at Risk*, Jun. 1990, at 21.
13. American Society of Addiction Medicine ("ASAM"), *Public Policy of ASAM: Chemically Dependent Women and Pregnancy* (2001) at <http://www.asam.org/ppol>
14. Kirsten Scharnberg, *Prosecutors Targeting Pregnant Drug Users*, Chi. Trib. Nov. 23, 2003 at 1
15. Corrine A. Carey, *Proposed and Recently Adopted Legislation Criminalizing Maternal Drug Use and Affecting Child Custody*, 1998, at <http://www.familywatch.org/library/legis.htm>; 720 ILCS 570/407.2 (2003), 720 ILCS 570/401 (2003)
16. *Id.*; 750 ILCS 50/1(D)(k) (2003)
17. Interview with Stephanie Tackett, Emergency Room Nurse, Christ Hospital and Medical Center, Oak Lawn, IL. (Jan. 25, 2004)