

EDITORIAL

Addicted mothers to be criminalized in Tennessee

Gideon Koren MD FRCPC FACMT FAACT, Janine Hutson MSc PhD (candidate)
Motherisk Program, Department of Pediatrics, The Hospital for Sick Children, Toronto, Canada

ABSTRACT

In April 2014 Tennessee acted to criminalize pregnant women who use illegal drugs and have an offspring “considered harmed”. We discuss seven major reasons why this law is wrong and dangerous. Criminalizing vulnerable, addicted mothers scare them away from treatment. The new law will practically target the poor, vulnerable, uninsured non-white pregnant woman. It is hoped that, similar to previous cases, the American justice system will once again reverse the decision and allow the true American values to prevail.

In a new law signed by Tennessee Governor Bill Haslam on April 29, 2014, pregnant women who use illegal narcotic drugs and have an offspring addicted or “considered harmed” as a result will be arrested and charged with criminal assault starting July 1, 2014. Women may also be charged with homicide if her baby dies as a result of her illegal use of a narcotic drug. Women who seek treatment after arrest may escape jail time.¹

The law was approved despite advice to the Governor by physicians, addiction experts and reproductive health specialists. Sharp condemnation by medical associations throughout the nation, by the American Civil Liberties Union and by the White House Office of National Drug Control Policy, did not change Haslam’s decision.² It has been reported that this law comes as a response to the increasing numbers of infants born dependent on drugs and who suffer from neonatal abstinence syndrome (NAS) after delivery. Over the last decade, Tennessee has seen a 10-fold rise in the number of infants born with NAS.³ Tennessee is the first jurisdiction in North America, Europe, Australia or anywhere else to criminalize pregnant addicted women.

Here are seven major reasons why Tennessee’s decision is dangerous, setting a precedence of how medical conditions in pregnancy may be viewed by the court system and imposes on the pregnant woman’s constitutional rights.

- 1) Addiction is one of the most complex chronic conditions in the medical book. Addicted women are not using drugs and alcohol because they do not care about their babies. Rather, their very medical disease of addiction does not allow them to stop the use. If we are to blame and criminalize women with medical conditions for the outcome of their pregnancy, why addiction is chosen and not also the following:
 - Uncontrolled diabetes, hypertension, and epilepsy. Here too, the baby is damaged, and prosecutors can always show that the mother failed to optimally treat her condition.
 - Sexually transmitted diseases that adversely affect the baby, such as HIV, syphilis, herpes, to mention a few.
 - Smoking in pregnancy. Smoking affects babies adversely and 15% of American women do not quit smoking in pregnancy.
- 2) As argued repeatedly and proven in numerous studies, criminalizing vulnerable, addicted mothers scare them and drive them away from treatment. Hence, the end result will be an increased risk to the mother, fetus and newborn. This new law opposes last year’s Safe Harbor Act, which protected the custody rights of mothers and gave them priority

- placement into the state's limited number of treatment programs.
- 3) The new Tennessee law will exempt these women from prison if they are engaged in treatment program; however, the State of Tennessee has only 19 programs geared at pregnant women. Of these, only two treatment facilities provide on-site prenatal care allowing the older children of the affected women to attend. Importantly, Tennessee is one of the states that opted out of Medicaid expansion, increasing the numbers of pregnant women at high risk. The new law did not consider this reality and hence makes these women criminals by default.
 - 4) Many women use illegal drugs prior to knowing that they are pregnant. The first trimester is the most vulnerable period to the fetus and thus the most damage may be caused before recognizing the pregnancy.
 - 5) The new law will prosecute mothers if damage to the fetus or baby is deemed to be caused by her drug abuse. The vast majority of women addicted to drugs also smoke cigarettes, are poor and deprived of adequate nutrition and prenatal care. This multi factorial causation makes it impossible to assign fetal/ neonatal damage to the opioid itself. The new legislation reflects pervasive medical ignorance, as none of the adverse effects exhibited in these pregnancies is specific. For example: stillbirth is caused by cigarette smoking- will a stillbirth in a woman addicted to heroin be attributed to the heroine, despite being likely caused by her smoking?
 - 6) The legislation states that many of these babies are damaged by drug withdrawal. However, in the vast majority of cases neonatal abstinence syndrome is treated effectively and does not cause long-term damage to the baby. Moreover, opioids as a group have not been associated with increased teratogenic risk.
 - 7) The new law will practically target the poor, vulnerable, uninsured non-white pregnant woman. "Mothers struggling with drug

addiction in rural communities throughout Tennessee and poor mothers and their families will be the ones who suffer the effects of this dangerous legislation the most" said Sister Reach founder and CEO Cherrisse Scott.

For clinicians, scientists, public health advocates and others who try to help drug dependent mothers worldwide, this legislation, coming from an internationally leading country, is a true nightmare.

Allowing the state to define the crime of child abuse according to the health or condition of the newborn would potentially result in criminal liability of mothers for engaging in a myriad of both legal and illegal activities during pregnancy. Many American courts have concluded this in the past as it would undoubtedly give rise to constitutional challenges to criminal statutes that do not adequately delineate the conduct deemed criminal.⁴ Criminal prosecution of pregnant women for illegal drug use during pregnancy may appease the public's frustration over drug addiction and the increasing numbers of infants born with NAS in Tennessee, however, there is no evidence to support that this policy is socially effective or economically sound.

It is hoped that, similar to previous cases⁵, the American justice system will once again reverse the decision and allow the true American values to prevail.

Corresponding Author: vkoren@sickkids.ca

REFERENCES

1. Gonzalez T, The Tennessean, April 30, 2014.
2. McDonough K. Salon, April 30, 2014.
3. Tennessee Department of Health. Neonatal Abstinence Syndrome. November 2012. Available: <http://health.state.tn.us/MCH/NAS/index.shtml>. Accessed May 13, 2014.

4. Panossian AA, Panossian V, Doumanian NP. Criminalization of perinatal HIV transmission. *J Leg Med* 1998 Jun;19(2):223-55.
5. Farr KA. Fetal abuse and the criminalization of behavior during pregnancy. *Crime Delinq* 1995 Apr;41(2):235-45.