Prosecution of Illicit Drug Use During Pregnancy: *Crystal Ferguson v. City of Charleston*

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J Am Acad Psychiatry Law 29:469–73, 2001

In clinical practice, physicians continually make difficult decisions regarding conflicting interests in the delivery of patient care. Frequently, these decisions involve disclosures of patient information to others without the patient's consent. For example, virtually all states have passed statutes mandating the reporting of known or suspected child abuse to social service agencies, which are responsible for both investigating such claims and providing alternative safe environments for children at risk. In addition, the advent of the duty to protect third parties from threatened harm by patients (*Tarasoff*[1] and its progeny) has led to further erosion of confidentiality. The duty to protect sometimes requires physicians to share clinical information with law enforcement agencies.

In the late 1980s, the United States experienced an alleged epidemic of infants born addicted to cocaine. Efforts to protect the unborn from the harmful effects of cocaine and other illicit drugs became increasingly problematic for clinicians, because many drug-addicted mothers fail to seek or comply with substance abuse treatment. At one South Carolina hospital, clinicians' frustrations over patients' noncompliance with drug abuse treatment led to the reporting of positive urine drug test results of maternity patients to law enforcement. These women then faced arrest and potential criminal prosecution. This reporting of positive urine drug screening results by the hospital, without the patient's consent, became a central issue in a recent U.S. Supreme Court decision, *Ferguson v. City of Charleston.*[2]

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Question

Does a public hospital's reporting of urine drug test results to law enforcement, without the informed consent of the patient, violate the patient's Fourth Amendment constitutional protections against illegal search and seizure?

Facts

In 1988, hospital personnel at a public hospital operated by the Medical University of South Carolina (MUSC) in Charleston became increasingly concerned about the growing number of pregnant women and newborn infants addicted to cocaine. In 1989, the hospital began urine drug testing of pregnant women who were suspected of using cocaine. When results were positive, the women were referred to a local substance abuse treatment center. Despite these referrals, the rate of substance use among pregnant women remained unchanged. Because many of these women would not comply with recommended substance abuse treatment, hospital staff agreed to cooperate with law enforcement authorities in the prosecution of women whose newborn infants tested positive for drugs at birth. Hospital personnel, in conjunction with local prosecutors, police, and the South Carolina Department of Social Services, formed a task force to develop a policy for the drug testing and reporting of test results of two groups: pregnant women receiving prenatal care and preg-

nant women in active labor. Nine criteria were developed to identify patients at risk for drug abuse, including, but not limited to, patients with a lack of prenatal care, patients with intrauterine fetal death, and patients with a known history of alcohol or drug abuse.

If drug test results were positive in a woman in prenatal care, the woman was referred to a local agency for substance abuse treatment. Results were reported to police only if the results were positive a second time or if the woman missed a substance abuse treatment appointment. If the fetus was of 27 weeks' gestation or less, the patient was charged with simple possession. If greater than 27 weeks, the patient was charged with possession with intent to distribute narcotics to a person under 18 years of age. If results were positive in a woman in labor, police were notified immediately and the patient arrested and charged with unlawful neglect of a child.

Ten women arrested pursuant to this policy later petitioned in federal court, alleging that warrantless and nonconsensual drug tests conducted for criminal investigative purposes were unconstitutional searches. The respondents claimed the patients had consented to the tests and that, even without consent, the policy was reasonable, because it was ultimately done for non–law-enforcement special needs: to assure compliance with drug abuse treatment and protect the unborn child. The U.S. District Court rejected the special-needs argument and instructed the jury that they must find for the petitioners unless they found that the patients had consented to the drug testing. The jury found for the respondents. The petitioners appealed, arguing there was insufficient evidence for the jury to conclude they had given consent.

Ignoring the question as to whether there was evidence that consent had actually been given, the Fourth Circuit Court of Appeals issued a two-to-one decision that disclosure of urine drug screening results did not require the patient's consent, because such disclosure represented a special-needs exception to the Fourth Amendment that had been established by prior case law. Examples of prior special-needs exceptions include drug tests for railroad employees,[3] U.S. Customs Service employees,[4] and high school athletes.[5] The court concluded that the tests were a minimal intrusion of a patient's privacy and that such intrusion was outweighed by the competing interest of curtailing pregnancy complications and the medical costs associated with drug use. The case was then appealed to the U.S. Supreme Court.

Holding

In a six-to-three decision, the Court reversed the Fourth Circuit, finding that "a state hospital's performance of a diagnostic test to obtain evidence of a patient's criminal conduct for law enforcement purposes is an unreasonable search if the patient has not consented to the procedure."[2] The case was remanded for a determination of whether consent had taken place.

Rationale

The Court noted that MUSC, as a state hospital, is subject to the limitations of governmental action imposed by the Fourth Amendment. Absent probable cause or a search warrant, the government may generally not conduct a nonconsensual search. The Court agreed with the lower courts that the criteria used by the hospital to initiate drug testing did not provide probable cause to believe that patients were using cocaine. Although the Court acknowledged the special-needs exceptions to suspicionless searches, the Court contrasted the current case to the former special-needs cases in which suspicionless searches were constitutionally approved. In all the former cases, there were protections against the release of drug test results to third parties. Also in the former cases, a positive test result might lead to disqualification for a job benefit or promotion or to prohibition against participating in a school's extracurricular activities, but not to criminal prosecution. The Court acknowledged that patients in a medical setting have a reasonable expectation of privacy and would not expect that test results would be handed to law enforcement officials. In fact, the Court noted that the current policy involved Charleston prosecutors and police in the day-to-day administration of the program. The Court rejected the special-needs exception, because the policy used law enforcement to coerce patients into substance abuse treatment. Thus, in the Court's view, the immediate objective of the policy was to generate evidence for law enforcement purposes. It is important to note that the Court distinguished this policy from cases in which, during

the course of normal medical treatment, a physician learns that a pregnant patient is using drugs and, in accordance with state statutes, is required to report such information to a child protection agency. Referencing *Miranda*,[6] the Court requires that when officials at the hospital obtain drug tests for the specific purpose of incriminating those patients, they incur a special obligation to fully inform patients of their constitutional rights, as standards of knowing waiver of constitutional rights require.

Seventy-five groups signed six *amicus curiae* briefs in *Ferguson*. All the briefs were in opposition to the drug-testing policy. In making its decision, the Court referenced an *amicus curiae* brief filed by the American Medical Association (AMA) that argued that the hospital policy would ultimately harm the physician-patient relationship.[7] The AMA told the Court that if a patient knew that divulgence of drug use would lead to arrest, the patient would avoid prenatal care or fail to disclose drug use to her treating physician. Thus, the hospital policy may actually have effects contrary to its stated goal of protecting the fetus from the harmful effects of maternal drug use. The AMA also argued that the policy would "force physicians to compromise their commitment to patient confidentiality." If the physicians were forced to act as agents of law enforcement, it would potentially conflict with their ethical obligation to act as advocates and protectors for patients. Finally, the AMA stated that the policy reflected "a fundamental misunderstanding of the nature of drug abuse and addiction," arguing that addiction is a disease whose hallmark is an inability to cease use of a substance, despite the possibility of adverse legal consequences.

Commentary

This is the first case that the U.S. Supreme Court has heard regarding the prosecution of pregnant women for drug use during pregnancy. MUSC, a state-supported medical school, operated the hospital involved in this case. It should be noted that the constitutional issues contained in this case would not necessarily apply to cases involving similar reporting policies at private hospitals, unless the private hospital collaborated with law enforcement in the development and implementation of the policy. However, if a private hospital, absent patient consent or affirmative legal action, simply divulged drug test results to law enforcement, it could incur civil liability for disclosing confidential medical information. It should also be noted that South Carolina courts do not recognize any physician-patient privilege. Therefore, information about drug use during pregnancy, including the results of positive urine drug tests, may be admissible in criminal prosecutions.

It is important to note the limitations of the *Ferguson* decision as it applies to prosecution of women for drug use during pregnancy. The decision in this case rested on the interpretation of special-needs exceptions to suspicionless and warrantless searches, not on constitutional issues as they relate to the prosecution of these women, *per se*. Although the respondents argued that the ultimate goal was to coerce these women into substance abuse treatment, the Court rejected this argument under the Fourth Amendment because the immediate goal was to hand over information about positive drug screening results to law enforcement officials. In a concurring opinion, Justice Kennedy rejected this separation of the immediate goal from the ultimate goal of the policy, stating that all former decisions in special-needs cases focused on the ultimate goal of the drug testing policy. Instead, he opined that none of the prior special-needs cases involved law enforcement in the design and implementation of the policy and that prior Court approval of the waiver of traditional probable cause and warrant requirements were in cases in which the obtained evidence would not be used for law enforcement purposes. In this case, women whose drug test results were positive received a letter explaining the policy from the county solicitor (prosecutor), not the hospital. But, despite the unconstitutional obtaining of evidence in the *Ferguson* case, he upholds the right of the State to pursue the prosecution of these women: "There should be no doubt that South Carolina can impose punishment upon an expectant mother who has so little regard for her own unborn that she risks causing him or her lifelong damage and suffering."[2]

The prosecution of women who abuse drugs during pregnancy has been attempted in many states. According to the Center for Reproductive Law and Policy (CRLP, New York, NY), at least 200 women in more than 30 states have been arrested and charged with drug use and other actions that could potentially harm the fetus during pregnancy.[8] In most cases, charges have been dismissed before trial.

Also, there have been appeals court decisions in other states that have limited these types of prosecutions. In these appellate cases, courts have rejected charges or reversed penalties in all states except South Carolina. For example, the Supreme Courts of Florida,[9] Kentucky,[10] Nevada,[11] Ohio,[12] and Wyoming[13] have held that prosecutions of women for illicit drug use or other behaviors during pregnancy that could harm the fetus are without legal basis or are unconstitutional under current statutory law. Many states have yet to decide this issue.

South Carolina case law has differed remarkably on this issue. In a 1960 wrongful death case, the South Carolina Supreme Court held that "a fetus having reached that period of prenatal maturity where it is capable of independent life apart from its mother is a person."[14] The Court later extended the definition of "person" in a criminal statute to include a viable fetus.[15] In 1992, a South Carolina woman was charged with and pleaded guilty to criminal child neglect and received an eight-year sentence because her child tested positive for cocaine metabolites at birth. In deciding her subsequent request for post-conviction relief (PCR), the Court, in *Whitner v. South Carolina,* upheld her conviction, stating that a "child" under the state's criminal child endangerment statute included a viable fetus.[16] The Court further held that any behavior during pregnancy (not only drug use) that was potentially harmful to a viable fetus could be the basis for a charge of criminal child endangerment. The *Whitner* decision represents the only standing appellate court decision in the nation that upholds prosecution of women for behavior during pregnancy that poses a risk of harm to the fetus.

The *Whitner* decision has affected the practice of psychiatry in South Carolina. For example, the Department of Mental Health has advised clinicians that when they have reason to believe that a woman, while in her third trimester of pregnancy, has used, is using, or probably will use substances in an amount or frequency that the clinician believes has posed or would pose a genuine risk of physical or mental injury to the unborn child, they are required by the child-abuse-reporting law to report such drug use to the state's child protective services agency. Failure to make such a report could subject the clinician to prosecution.[17] Finally, South Carolina courts recently adopted a limited *Tarasoff* duty to protect.[18] Given that a viable fetus is considered a child, it is also possible that clinicians could incur civil liability to a viable fetus in circumstances in which a therapist failed to take some action to protect the child from foreseeable prenatal harm by a pregnant woman under the therapist's care.

The current legal decisions regarding the prosecution of drug use during pregnancy most commonly involve cases in which pregnant women were using cocaine. Ironically, these cases are coming at a time when more recent scientific evidence has failed to show catastrophic effects of prenatal cocaine exposure and has revealed that the effects of cocaine on the first six years of child development may not be much different than the effects of alcohol or tobacco.[19]

Nonetheless, the *Ferguson* decision does little to limit the prosecution of these women in South Carolina state courts. In May of 2001, South Carolina became the first state to convict a woman of homicide after she gave birth to a full-term, stillborn child whose autopsy revealed the presence of cocaine metabolites.[20] The defendant in this case, facing a potential life sentence, was sentenced to 12 years. If courts in other states allow these types of prosecutions, there is likely to be further appeals and further decisions by appellate courts concerning permissible prosecution boundaries. Most challenges will be based on the due process prohibitions that prevent prosecutors from interpreting or applying an existing criminal statute in an unforeseen or unintended manner. If the concurring and dissenting opinions in *Ferguson* are any indications, the U.S. Supreme Court may be willing to uphold a state's prosecution of women for prenatal conduct judged to be harmful to their unborn children.

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