Facts on the Prosecution of Pregnant Women for Drug Use

Some states are prosecuting women for their drug use during pregnancy. Charges have included child endangerment, drug distribution and homicide. The criminal statutes that are used to prosecute pregnant women were not intended to cover women’s acts during pregnancy. While drug use during pregnancy is a serious concern and an important matter of public health, it should not be handled as a criminal matter.

Prosecuting pregnant women for drug use violates their constitutional rights

- The Supreme Court has held that punishing addiction is the equivalent of punishing illness. Also, while acts such as possessing or distributing drugs are crimes, testing positive for drugs is not in and of itself a crime. So punishing pregnant women based on their addiction to drugs is cruel and unusual punishment under the Eighth Amendment of the Constitution.

- Pregnant women have been prosecuted based only on evidence of positive drug tests, which could not result in a prosecution for non-pregnant women or men. Because the law punishes pregnant women differently based on their status and gender, such prosecutions violate their right to equal protection of the laws under the Fourteenth Amendment of the Constitution.

- A pregnant woman who has used drugs and is threatened with prosecution could only avoid criminal charges by terminating her pregnancy. Prosecution therefore violates the right to be free from government intrusion in making reproductive choices, which is protected under the Fourteenth Amendment’s guarantee of liberty.

- Women have no reason to know that their drug use could result in criminal charges based on the fact that they are pregnant. Because the laws used to prosecute women do not make it clear that using drugs while pregnant could be included in their scope, women are not given notice that they may be committing a crime. Also, women are charged under criminal statutes that were not intended to cover their alleged acts. Prosecuting women and depriving them of their freedom when the law does not inform them that their acts are crimes violates their right to due process under the Fifth Amendment of the Constitution.

- Women do not use drugs in order to pass them along to or cause harm to their fetuses. Because women do not have any criminal intent, prosecutions for crimes such as drug distribution or child endangerment deprive women of their right to due process under the Fifth Amendment of the Constitution.

There is no actual evidence that prosecuting women for drug use during pregnancy improves infant or maternal health, or encourages pregnant women to stop using drugs. Placing pregnant women in jail as a way to keep them off of drugs is also dangerous, because pregnant women need to be under close specialized medical supervision during withdrawal.

Prosecution and the threat of imprisonment discourage pregnant women from seeking prenatal care, and actually contribute to worse pregnancy outcomes. Major medical associations oppose prosecution, including the American Medical Association, the American Public Health Association, the American Academy of Pediatrics and the American Nurses Association.

For additional information, please visit the following organizations:
National Advocates for Pregnant Women  ACLU  Drug Policy Alliance
www.advocatesforpregnantwomen.org  www.aclu.org  www.drugpolicy.org