

17. **Deborah A. Wiczorkowski Wanamaker, From Mother to Child A Criminal Pregnancy : Should Criminalization of the Prenatal Transfer of AIDS/HIV be the next step in the Battle Against this Deadly Epidemic? 97, Dickinson Law Review, 383-409, 1993.**

This comment will first discuss the impact of the AIDS/HIV epidemic and the possible remedies available to a prenatally infected child. Second, this Comment will explore the possibility that states could prosecute an HIV infected woman who transfers the disease to her unborn child in utero. Third, this Comment will examine the ultimate battle such prosecution would spark between the rights of the woman, the rights of the child, and the interest of the state in protecting its citizens from the spread of this epidemic. Finally, this comment will address social policy and enforcement problems and discuss an alternative solution.

The Rights of the Unborn Child

In support of the right to be born healthy, it has been suggested that a child deprived of that right and born infected with AIDS/HIV may find an appropriate remedy in the area of tort law. Proposing a cause of action for battery or infliction of emotional distress, one commentator reasoned that the doctrine of parent-child immunity could be defeated by establishing that the act was intentional because the mother knew with substantial certainty that her conduct would transfer the antibodies to her child. However, this theory fails to recognize that although the antibodies of the mother are always passively transferred to the child during pregnancy, not all children who are born to HIV-positive mothers will continue to carry the antibody eighteen months after birth. In fact, more than half of these children will not be HIV-positive within two years after birth. Consequently, while the mother may know with substantial certainty that she will pass the AIDS antibody to her unborn child during pregnancy, she does not necessarily know with substantial certainty that the child will remain independently HIV positive. Rather, the odds are in favor of the child growing up healthy.

Nonetheless, it is arguable that the exposure to the virus and the risk that the child will become infected constitutes the injury. But there remains an additional barrier to a successful cause of action for battery. Because of the long incubation period of the disease, it may be difficult to establish the requisite intent. The mother may not have knowledge of her HIV infection during her pregnancy or at the time of transmission. While a woman who knows she has AIDS/HIV may have a difficult time convincing a jury that she did not realize the contagious nature of the disease, a woman who did not even know she was infected with the virus would have no reason to know, with substantial certainty, that she was transferring the disease to her unborn child.

A better remedy, therefore, may be found in an action for negligence. If a woman engages in conduct known to transmit AIDS/HIV, then she arguably should know that she is at risk of being infected with the disease. Such a woman may arguably have a duty to ascertain whether she is infected before engaging in behavior which could result in pregnancy.

Legislative Attempts to Battle the Spread of this Epidemic

Many states have heeded the call for action by enacting criminal statutes prohibiting certain behaviors that transmit the AIDS virus, and providing criminal penalties for those who disobey the law. At least four states have drafted legislation that is ambiguous enough that it could be used to prosecute an infected woman who transfers the disease to her child during the prenatal transfer of blood and blood products.

Any law that criminalizes the transfer of a disease through the prenatal transfer of blood, thereby burdening the choice of whether to conceive a child, will undoubtedly be met with cries of constitutional violation.

If a state began prosecuting HIV infected women who transfer their infection to their children through the prenatal transfer of blood and blood products, the state would have to demonstrate that :1) its regulation is justified by a sufficiently compelling state interest; and 2) the regulation is narrow enough in scope so as not to extend beyond the boundaries of that legitimate interest.

Under strict scrutiny, a regulation criminalizing the transfer of AIDS/HIV through prenatal transmission would probably meet the first prong of the test.

The legitimate interest in this case is to prevent the spread of the AIDS epidemic by criminalizing the behaviors responsible for spreading the disease. Such a measure represents the least restrictive alternative available to the state. It is certainly better to place the responsibility on infected individuals to refrain from behavior that is responsible for transmitting the virus than to quarantine or isolate those individuals altogether.

A woman who knows or has reason to know that she is HIV positive may arguably be considered to have engaged in behavior that transgresses beyond permissible or acceptable standards when she passes the infection to her unborn child in utero. But this argument fails to consider the problem presented when the woman claims to have unsuccessfully tried to prevent conception, and therefore she did not intend to become pregnant or engage in prohibited behavior. Of course, the need to prove intent could be eliminated by the imposition of strict liability. However, an HIV infected woman who utilizes birth control might still be prosecuted for something over which she has no control because contraceptive measures do not always prevent pregnancy. Nonetheless, pregnancy results from the act of engaging in consensual sexual intercourse; conduct that is voluntary. Because the AIDS/HIV epidemic presents such a serious public threat, a state may be able to impose a duty on a woman to ascertain whether she has or could have AIDS before engaging in an act that may result in pregnancy, and rightly subject her to strict liability for her failure to do so. It is therefore conceivable that a criminal law that restricts a woman's right to procreate, in order to safeguard the health and safety of the unborn child as well as the public, could pass the strict scrutiny test and withstand a constitutional challenge.

A second constitutional argument against such legislation is that it burdens an individual's right to freely practice religion. A woman whose religious beliefs do not permit the use of contraceptive measures to prevent pregnancy or prohibit abortion of an unwanted or unplanned pregnancy would essentially be forced to choose between engaging in sexual relations at the risk of breaking the law, refraining from sexual activity, or abandoning her religious values.

Problems and Concerns

The most alarming potential consequence of such a law is the possibility that a woman who tests HIV positive during her pregnancy may be encouraged, through coercive counseling, to abort the pregnancy. In addition, many poor women who may not be able to afford an abortion will be left with no alternative to prosecution.

Moreover, we must not forget that when a child is born to an infected mother the odds are in favor of the child being healthy. Proponents of the rights and needs of HIV positive women have argued that the fact that so many women choose to take this 30% chance "reflects a much more complicated balancing of consideration than that applied by so-called experts who consider the issue as if HIV infection were the only factors in the equation."

It is realistic to theorize that a person who is already facing a death sentence will not be deterred by the threat of criminal prosecution from taking the 70% chance to beget a healthy child. Use of the criminal law may even be inequitable because it requires individuals to behave at the highest stages of moral development, and it has been suggested that many AIDS/HIV carriers may not have the ability or willingness to do so.

Despite the compelling and valid interest of the state in protecting the public from the spread of this deadly epidemic, and irrespective of the likelihood that such criminal prosecution could withstand a constitutional challenge, a woman should not be forced to choose between aborting a potentially healthy fetus or risking violation of a criminal law.