

## Nashville Scene



# By signing the controversial SB 1391, Gov. Bill Haslam makes Tennessee a battleground over the rights of pregnant women and prosecutorial bounds

## Birth of Vexation

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**W**ith the official stroke of Gov. Bill Haslam's pen last week, Tennessee went where no other state has gone before.

Despite opposition from obstetric medicine and drug addiction specialists (as well as women's rights groups) at the state and national level, the governor signed SB 1391, a bill allowing women to be criminally charged and possibly sent to prison for drug use during pregnancy if their baby is harmed. It made Tennessee the first state to do so, a fact that did not go unnoticed by national news outlets — including the New York Times editorial board, which urged Haslam to veto the bill.

He did not.

Once it goes into effect, the law will let prosecutors charge women with misdemeanor assault if they give birth to drug-dependent babies. That charge, supporters say, is the "velvet hammer" that will convince addicted mothers to get help: They can avoid jail time by entering and completing a drug treatment program. Critics counter that the last thing desperate mothers-to-be need is a blow from a hammer, however it's wrapped.

Everything about the bill has been unusual. It has brought unlikely alliances, and provoked unexpected divisions. Even as it worked its way to the governor, there were signs that this bill was a distinct sort of legislative creature.

First, somewhat rare for a bill in the supermajority era, it was bipartisan from the start — sponsored by Sen. Reginald Tate (D-Memphis) and Rep. Terri Lynn Weaver (R-Lancaster). It ended that way as well, passing with bipartisan majorities in both chambers. Every Senate Democrat voted for the bill, with the only seven opposing votes coming from Republicans. In the House, opposition came from 20 Democrats and 10 Republicans, with high-ranking GOP Leader Gerald McCormick among them.

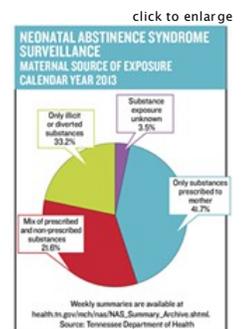
The proposal caused rancor on arrival. Opponents said its supposed intent (getting addicted pregnant women into treatment and protecting their babies from harm) is at odds with its actual consequences (criminalizing those women, quite possibly resulting in harm to them and their babies). The divide showed in the different ways the bill was received by legislators who largely share ideological beliefs.

On the House floor, before the final vote, Weaver trumpeted the bill as a pro-life measure, arguing that "any society which puts value on life would agree that these defenseless children deserve some protection and these babies need a voice." She frequently punctuated her statements with a nod to the mothers, who could "also be helped."

Meanwhile, two of her Republican colleagues in the Senate opposed the bill for similar reasons. Sen. Mike Bell tells the Scene he opposed the bill from "a pro-life perspective," saying he didn't want to do anything "that would encourage a woman to have an abortion or end a pregnancy to avoid prosecution." Sen. Steve Dickerson, a practicing physician when he's not on the Hill, also voted nay, saying he feared the threat of prosecution would discourage women from seeking crucial prenatal care.

The governor's administration raised opposition to a more aggressive early version of the bill. But after negotiations that largely reduced charges on guilty mothers and built in a two-year trial period, the state's departments of health and mental health agreed to stand down. They opted to leave the matter to the will of the legislature, as did key players in the medical community.

"Is it a perfect bill? No. It is not where we would want to go, but it was better than what was going to pass," says Julie Griffin, lobbyist for the Tennessee Medical Association. "There was a very strong passion by the sponsors of this bill, and they wanted it to pass, and the DAs were all in."



Others weren't. The state's association of substance abuse centers never took a position, according to Nathan Ridley, a lobbyist for the Tennessee Association of Alcohol, Drug and Other Addiction Services. The reason, Ridley says, was a split within their own ranks between Memphis-area facilities, which rallied for the proposal, and others in the rest of the state who were more skeptical.

One organization with a definite interest in anything that includes possible jail time is Nashville-based Corrections Corporation of America, the country's largest for-profit prison company. CCA does not make itself scarce in Tennessee politics. In 2013 alone, the corporation contributed nearly \$60,000 to state politicians, including \$10,700 to Gov. Bill Haslam, \$1,000 to Weaver and \$1,500 to Tate. It also employs eight lobbyists registered to work at the legislature.

But the governor's office tells the Scene that Haslam didn't speak to CCA before his decision on the bill. What's more, CCA says it did no lobbying on the legislation.

"Neither CCA nor its representatives took a position, lobbied for or engaged with legislators on SB 1391 to any extent," says CCA spokesman Jonathan Burns. "It is CCA's longstanding policy not to draft, lobby for or in any way promote policies that determine the basis or duration for an individual's incarceration or detention. This is also true of lobbyists representing the company. Every firm we engage with is contractually bound to adhering to this strict policy and understands that any violation will be dealt with swiftly."

In the end, Haslam said his conversations with district attorneys and drug court judges were a significant factor in his decision to sign the bill into law. In his statement announcing his decision, he said "the intent of this bill is to give law enforcement and district attorneys a tool to address illicit drug use among pregnant women through treatment programs."

In the hands of a zealous prosecutor, however, a tool can be a weapon. In the runup to Haslam's decision, the Times reported on the two-steps-forward-one-step-back series of events that produced the bill. It began with Tennessee's fetal protection law. It was meant to help protect pregnant women against assault, by increasing penalties for their attackers.

But a couple years back, the Times reported, prosecutors started using the law to go after women whose babies tested positive for illegal drugs. That tactic was viewed with distaste by women's rights groups and other organizations, and later legislation prevented the law from being used this way. The legislature seemed to support that stance in 2013 when it passed the Safe Harbor Act, which encouraged pregnant substance abusers to seek treatment by removing the threat of losing custody if they did so.

Now that SB 1391 is law, however, some of the same advocates who praised the Safe Harbor Act feel the state has walked back that progress. The new law says prosecutors can charge women with simple assault if their babies are born addicted to, or harmed by, illegal drug use. The Class A misdemeanor charge could mean as much as nearly a year in jail and a fine of up to \$2,500.

Critics say the law could give aggressive prosecutors an opening to seek aggravated assault charges — the punishment the District Attorneys General Conference lobbied for. If assault is when someone intentionally, knowingly or recklessly causes bodily injury to another (or causes them to reasonably fear it), aggravated assault almost always involves a weapon. The distinction is important. Aggravated assault carries a much stiffer sentence — up to 15 years.

Lawyers have differing interpretations of whether the bill gives prosecutors an opening to seek the harsher penalty. When passing the bill, legislators said the intent was to stick to the lesser assault charge, stressing to judges how they want the law used.

But the measure has raised still more questions about how it will be enforced. One is whether women will have enough access to drug treatment programs, should they seek help fighting their addiction and escaping the drug charge.

The answer for many women is no, critics say. Among the state's 95 counties, the state funds 33 substance abuse agencies equipped to treat pregnant women, particularly those of low income, according to the Department of Mental Health and Substance Abuse Services. Opponents of the law refute those numbers, saying fewer than 20 centers are suited to care for pregnant women. Many have wait lists.

In addition, critics argue, few treatment centers offer specialized care for pregnant women, and even fewer allow older children to stay with moms during treatment, which could split up families. Between state-funded programs and private ones, opponents of the new law say only two centers allow children to stay with their mothers during treatment. Addicted mothers seeking care would have little choice but to be separated from their children.

One of Sen. Mike Bell's five East Tennessee counties lacks a drug treatment center. He says he told district attorneys he worries what will happen when women there fail to enroll in a treatment program — and the DAs replied that they can use their discretion. That makes him uneasy.

"I know the DAs were pushing this bill very hard," Bell says. "I have a problem with giving DAs too much discretion, because it's abused at times, and it can be abused either way in this situation."

For their part, district attorneys must contend with the fallout from Tennessee's raging drug epidemic. The state is No. 2 in the country for the number of discovered and busted meth labs. For overdose mortality rates, it ranks No. 8.

Compounding the problem, prescription drug abuse outpaces more traditional illegal drug use. The state admitted 14,000

people to substance abuse treatment programs last budget year. Nearly a third were addicted to prescription painkillers like hydrocodone, morphine and oxycodone, according to officials. The number of prescription drug enrollees rivals those of alcoholics.

To further complicate the situation, state figures show that in more than 40 percent of the cases of infants showing drug withdrawal symptoms in 2013, the babies were exposed only to drugs prescribed to the mother.

Women struggling with a variety of drug addictions while pregnant would fall under the scope of the new law as of July 1. Once the law kicks in, the American Civil Liberties Union's Tennessee chapter will begin looking to build a legal case against it.

Any legal challenge could be short-lived, though. Another peculiarity in this criminal statute is it will exist for only two years. It's a rare move — but one that convinced the Haslam administration, the state departments of health and mental health and the medical community to lower their opposition, despite advocates who wanted the law to last longer.

"I've never heard of a sunset provision on a criminal act. Can you imagine a woman is being prosecuted on this and their attorney goes in and says, 'Judge, the legislature thought so much of this crime that they have it go away in a couple years.' It doesn't make sense to do that," said Rep. Bill Dunn, a Knoxville Republican and noted conservative, on the House floor during debate.

"I'm not sure why we're putting it on if this is a wonderful thing and it's gonna work and everybody's on board with it, why you'd put a sunset provision on a criminal law," he said.

But the expiration date means discussion isn't going away. Long after national media scrutiny refocuses elsewhere, the General Assembly's elected officials — and the governor — will have to decide if this odd, divisive pioneer of a law deserves to live.

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