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November 19th – The Criminalization of Pregnancy

- "The dangerous state laws that are punishing pregnant people." *ThinkProgress.org.* September 28, 2016. https://thinkprogress.org/criminalization-pregnancy-us-43e4741bb514/#.81z4xnr7l

- Paltrow, Lynn, and Katherine Jack. "Pregnant Women, Junk Science, and Zealous Defense." www.nacdl.org. May, 2010. https://www.americanbar.org/content/dam/aba/administrative/child_law/ParentRep/PregnantWomenJunkScienceZealousDefense.pdf

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- Concurrence in *Anne O'Hara Bynum v. State of Arkansas*. Arkansas Court of Appeals. Opinion Delivered, March 14, 2018.

- Opinion and Order. *Loertscher v. Anderson, Schimel, and Taylor County*. United States District Court for the Western District of Wisconsin. Opinion Delivered April 28, 2017.

VIDEOS – From National Advocates for Pregnant Women

- "Challenge to Wisconsin's 'Unborn Child Protection Act'"
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  Access via YouTube: https://www.youtube.com/watch?v=xGo6hbg0iuk&app=desktop

- "Project Prevention: Mothers and Children Speak Out"
  Published on May 10th, 2012
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The dangerous state laws that are punishing pregnant people

In the past 10 years, arrests and forced interventions of pregnant women have skyrocketed.

THINKPROGRESS
SEP 28, 2016, 5:36 PM

A MARCH 2015 PHOTO OF PURVI PATEL BEING TAKEN INTO CUSTODY AFTER HER INITIAL FETICIDE CONVICTION. CREDIT: WORLD NEWS NETWORK, YOUTUBE

On August 31, 2016, Purvi Patel walked out of the Indiana Women's Prison, after fighting a conviction and 20-year sentence for attempting to have an abortion. By

the time she won her appeal, she had already spent over a year in prison.

rights also often involve the use of the criminal legal system.

In Patel's case, she suspected that she might be pregnant in 2013. She did not want to be pregnant, and thinking she was still early in her pregnancy, she took medication she obtained online that could safely and privately end her pregnancy. She was, however, much further along in her pregnancy than she had realized. At approximately 25 weeks of pregnancy, she delivered what she believed to be a stillborn fetus at home. Following the delivery, she disposed of the fetal remains, and sought assistance at a local hospital.

By the time she arrived at the hospital, she had already lost 20 percent of her total blood volume. After some questioning and an initial physical examination, hospital staff began to suspect that she had delivered and abandoned a newborn. While Patel was in surgery, one of the OBGYNs who examined her called the police and left the hospital to search for what he believed might be a live infant.

Patel awoke from surgery to find two police officers by her bedside. They interrogated her. Shortly thereafter, they charged her with the crime of neglect of a dependent. When further police investigation found evidence that Patel used medication in an effort to end her pregnancy, she was also charged with feticide. The prosecution argued that the feticide law, passed to deter harm to pregnant women, could also be used to punish a woman for having or attempting to have an abortion.

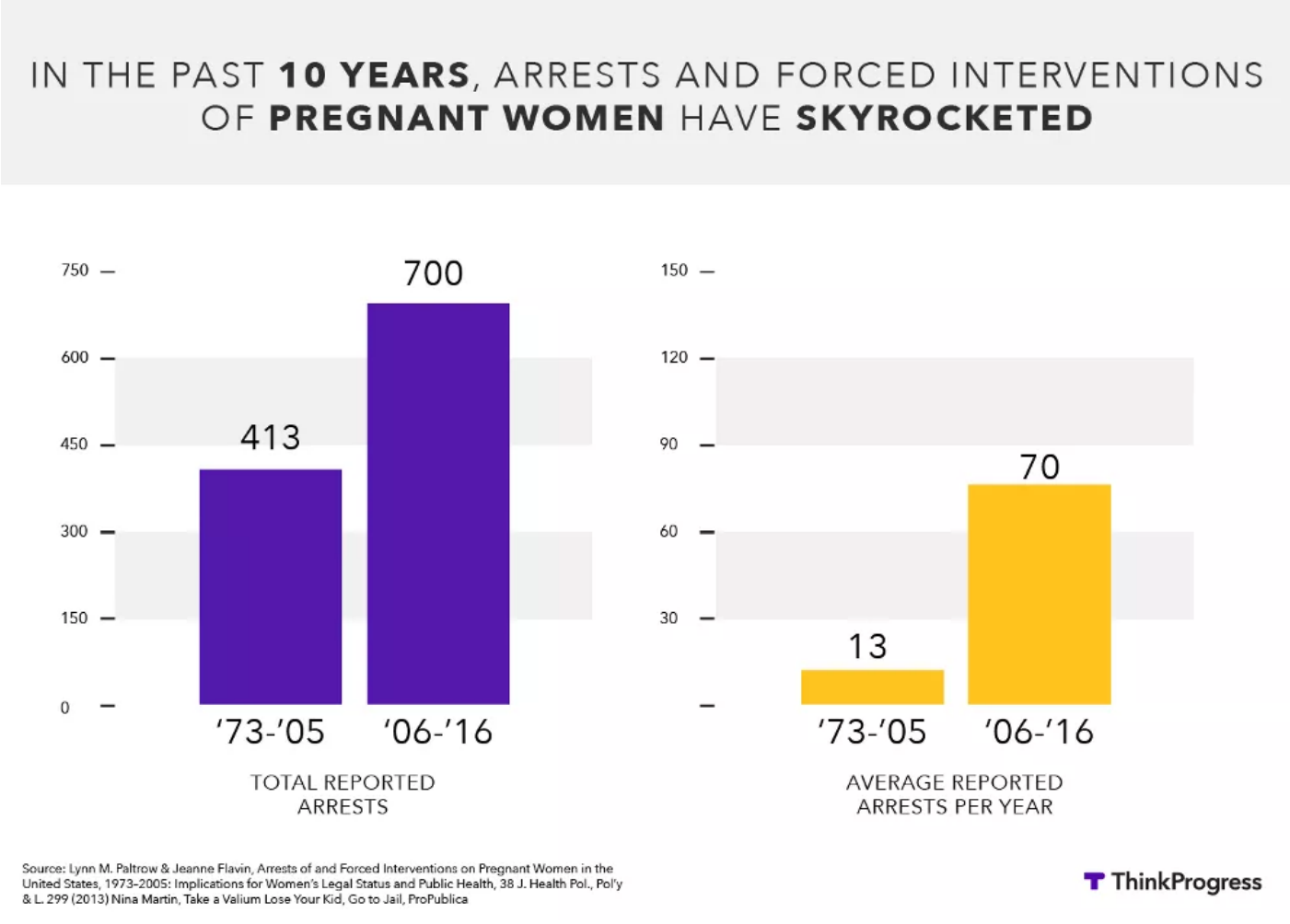
That a woman herself could face criminal penalties for having or attempting to have an abortion outraged many and challenged the claim by leading right to life

organizations that laws they support will not result in punishment of pregnant women themselves.

Patel is just one of a growing number of women in the United States whose pregnancies have led to arrest, prosecution, conviction, and incarceration. The 1973 *Roe v. Wade* Supreme Court decision is commonly thought to have decriminalized abortion, but many abortion laws today continue to allow criminal penalties. Although these penalties are generally directed to doctors, a handful of states—including Delaware, Idaho, Nevada, New York, Oklahoma, South Carolina, and Utah—have laws on the books that specifically permit punishment of women when they have an abortion in certain circumstances. More significantly, 38 states have feticide laws. And every state has scores of criminal laws that prosecutors may misuse or already have misused to punish pregnant women.

For example, in 2015, a Georgia woman who allegedly attempted to terminate her pregnancy at home was arrested on a charge of malice murder. She continues to

end a pregnancy. In Arkansas the same year, a woman who allegedly terminated her pregnancy outside of a hospital is appealing her conviction for "concealing a birth." And in Tennessee, a woman who allegedly used a coat hanger to try to end her pregnancy was initially arrested for attempted murder. She remains charged with the crime of "fetal assault"—a law passed under the guise of addressing issues involving pregnant opioid-using women.



CREDIT: DYLAN PETROHILOS/THINKPROGRESS

Since 1973, at least 1,000 women have been subjected to arrests or equivalent deprivations of liberty in which it is clear that but for pregnancy, their conduct

would not have been investigated or punished. Otherwise non-criminal acts such as attempting suicide, falling down a flight of stairs, drinking alcohol, failing to get

Women who have had stillbirths and miscarriages have been charged with homicide and feticide. Women who have gone to term and given birth but allegedly risked harm by drinking alcohol or using a controlled substance have been charged with crimes such as child abuse, delivery of drugs to a minor (through the umbilical cord), and chemical endangerment of a child. And like Patel, women have been charged with a variety of crimes for having or attempting to have an abortion.

Those targeted for arrest are overwhelmingly low income and a disproportionate number are women of color

Fortunately, the Indiana Court of Appeals reversed the feticide conviction for Patel, holding that the feticide law was not intended to punish women who have or attempt to have abortions. The Court also downgraded the neglect of a dependent conviction, holding that nothing about her pregnancy, including her decision to end that pregnancy, could be used as evidence of neglect of a child after it was

born. The Court based its decision in part on an earlier case, *State v. Heron*, in which it rejected the use of the state's child neglect statute to punish a woman

But hundreds of other pregnant women, whose cases did not generate the same public outcry and media attention, have been arrested or remain vulnerable to prosecution for otherwise lawful acts simply because they are pregnant. The fight for reproductive rights thus involves much more than removing obstacles to abortion services. It demands that we recognize and challenge how the criminal legal system is being used to deny pregnant women equal treatment under the law.

Lynn M. Paltrow, J.D., is the Founder and Executive Director of National Advocates for Pregnant Women ("NAPW").

Lisa K. Sangoi was formerly a law fellow and staff attorney with the National Advocates for Pregnant Women. She is now a Soros Justice Fellow at the NYU Law Family Defense Clinic.

Pregnant Women, Junk Science, and Zealous Defense

BY LYNN PALTROW AND KATHRINE JACK

There is no such thing as a "crack" or "meth baby"[1] and no state has a statute that makes it a crime for a drug-using pregnant woman to continue her pregnancy to term, to give birth, or to suffer a miscarriage or stillbirth. Nevertheless, some pregnant women and new mothers are still being arrested in the United States when they give birth or suffer a stillbirth and test positive for an illegal drug or alcohol. These prosecutions not only lack legal foundation, they also lack medical and scientific foundation. In other words, they are based on junk law and junk science.

In 1993, *The Champion* published an article entitled *Winning Strategies: Defending the Rights of Pregnant Addicts*.[2] It outlined the statutory and constitutional arguments that could be used to challenge the prosecution of pregnant women who continued to term in spite of a drug problem. These arguments remain valid today, and with the exception of the Supreme Court of South Carolina, have been used successfully to get charges dismissed and convictions overturned in scores of cases in dozens of states.[3] Additional arguments, including Fourth Amendment claims, have also been successful[4] and international human rights principles weigh strongly against such prosecutions.[5]

Nevertheless, there are many cases in which women have pleaded guilty to non-existent crimes and are serving significant sentences because they continued or tried to continue a pregnancy to term in spite of a drug problem. The vast majority of these cases are based on the claim that use of any amount of an illegal drug creates such unique risks or actually causes such significant harms, that judicially creating new pregnancy-related crimes is justified.

In 2008, an unlikely source made clear that failing to challenge the science behind these prosecutions could constitute ineffective assistance of counsel. A unanimous South Carolina Supreme Court overturned Ms. Regina McKnight's conviction for homicide by child abuse based on the claim that her use of cocaine during pregnancy caused her to suffer a stillbirth.[6] This ruling is particularly poignant since it comes from the only court in the country to have authorized such prosecutions in the first place.

In a powerful example of judicial activism, in 1977 the Supreme Court of South Carolina in a 3-2 decision rewrote the state's child abuse law, holding that it could be applied to a woman who gave birth to a healthy newborn that tested positive for cocaine.[7] The court held that under law unique to South Carolina, the word "child" included viable fetuses.[8] In 2003, in another 3-2 decision, the Supreme Court of South Carolina upheld the application of the state's homicide laws to pregnant women, ruling that a pregnant woman who unintentionally heightens the risk of a stillbirth can be found guilty of depraved heart homicide.[9] The Supreme Court of South Carolina is

the only one in the nation to reinterpret state child abuse and homicide laws to make them applicable to pregnant women in relationship to the fetuses they carry.

Nevertheless, as a result of ongoing post-conviction relief efforts, the very same court was finally persuaded that the conviction was based on "outdated" and inaccurate science. The court ruled that Regina McKnight had not received a fair trial and that her trial counsel was ineffective in her preparation of McKnight's defense through expert testimony and cross-examination. Specifically, the court found that the research the State relied on was "outdated" and that trial counsel failed to call experts who would have testified about "recent studies showing that cocaine is no more harmful to a fetus than nicotine use, poor nutrition, lack of prenatal care, or other conditions commonly associated with the urban poor."[10]

Media Hype and Enduring Myths Are Not the Same as Science

Prosecutors, public defenders, judges, and even some health care providers still believe that a pregnant woman who uses any amount of an illegal drug will inevitably harm or even kill her fetus. This is not surprising based on the extraordinary misinformation that appeared so frequently in the popular press.

For nearly two decades, the popular press was full of highly prejudicial and often inaccurate information about the effects of *in utero* cocaine exposure. In 1986, when crack cocaine began to attract substantial media attention, "six of the nation's largest and most prestigious news magazines and newspapers had run more than one thousand stories about crack cocaine. *Time* and *Newsweek* each ran five 'crack crisis' cover stories. … [T]hree major network television stations ran 74 stories about crack cocaine in six months. … Fifteen million Americans watched CBS' primetime documentary '48 Hours on Crack Street.'"[11] This hype, which built on pre-existing cultural and racial stereotypes about Black motherhood in particular, went largely unchallenged.[12]

But media hype is not the same as science. That is why in 2004, 30 leading doctors and researchers in the field of prenatal exposure to illegal drugs signed an open letter regarding the "crack baby" myth. Virtually every expert in the field joined this letter explaining:

> Throughout almost 20 years of research, none of us has identified a recognizable condition, syndrome or disorder that should be termed "crack baby." Some of our published research finds subtle effects of prenatal cocaine exposure in selected developmental domains, while other of our research publications do not. This is in contrast to Fetal Alcohol Syndrome, which has a narrow and specific set of criteria for diagnosis.
>
> The term "crack-addicted baby" is no less defensible. Addiction is a technical term that refers to compulsive behavior that continues in spite of adverse consequences. By definition, babies cannot be "addicted" to crack or anything else. In utero physiologic dependence on opiates (not addiction), known as Neonatal Narcotic Abstinence Syndrome, is readily diagnosed, but no such symptoms have been found to occur following prenatal cocaine exposure.[13]

Today courts and leading federal government agencies confirm that "the phenomena of 'crack babies' … is essentially a myth."[14] As the National Institute for Drug Abuse has reported, "Many recall that 'crack babies,' or babies born to mothers who used crack cocaine while pregnant, were at one time written off by many as a lost generation. … It was later found that this was a gross exaggeration."[15] As the U.S. Sentencing Commission concluded, "research indicates that the negative effects from prenatal exposure to cocaine, in fact, are significantly less severe than previously believed."[16] And finally, in 2009, the *New York Times* tried to set the record straight in a story entitled *The Epidemic That Wasn't*.[17] In this story leading researchers, including Dr. Deborah Frank who is also featured in an online video entitled *Prenatal Drug Exposure: Award-Winning Pediatrician Discusses What the Science Tells Us,*[18] explain that while researchers have found some effects of prenatal exposure to cocaine, those "effects are less severe than those of alcohol and are comparable to those of tobacco — two legal substances that are used much more often by pregnant women, despite health warnings."[19]

The newer hype about so-called "meth babies" is similarly unjustified. In 2005, a national expert panel reviewed published studies concerning the developmental effects of methamphetamine and related drugs and concluded that "the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans."[20] In that same year more than 90 leading medical doctors, scientists, psychological researchers, and treatment specialists released an open letter requesting that "policies addressing prenatal exposure to methamphetamines and media coverage of this issue be based on science, not presumption or prejudice" and warning that terms such as "meth babies" lack medical and scientific validity and should not be used.

> Although research on the medical and developmental effects of prenatal methamphetamine exposure is still in its early stages, our experience with almost 20 years of research on the chemically related drug, cocaine, has not identified a recognizable condition, syndrome or disorder that should be termed "crack baby" nor found the degree of harm reported in the media and then used to justify numerous punitive legislative proposals.
>
> The term "meth-addicted baby" is no less defensible. Addiction is a technical term that refers to compulsive behavior that continues in spite of adverse consequences. By definition, babies cannot be "addicted" to methamphetamines or anything else.[21]

In 2006, the American College of Obstetrics and Gynecology created a special information sheet about methamphetamine use in pregnancy, noting that "the effects of maternal methamphetamine use cannot be separated from other factors" and that there "is no syndrome or disorder that can specifically be identified for babies who were exposed *in utero* to methamphetamine."[22] Most recently, a peer-reviewed research article concerning stillbirths concluded that "despite widespread reports linking methamphetamine use during pregnancy with preterm birth and growth restriction, evidence confirming its association with an increased risk of stillbirth remains lacking."[23]

Prenatal exposure to opiates, most commonly heroin and oxycodone, is not associated with fetal malformations.[24] Moreover, there is no scientific evidence that growth and development are compromised by exposure to opiates themselves.[25] Some newborns exposed prenatally to opiates experience an abstinence (withdrawal) syndrome at birth. Withdrawal symptoms may also occur when adults with opioid addictions abstain from opiate use. In pregnant women, withdrawal symptoms are known to cause uterine contractions, miscarriage or early labor, but these symptoms can be prevented through methadone maintenance treatment, the medically approved treatment for opiate addiction that is particularly recommended during pregnancy. The U.S. Department of Health and Human Services advises:

> If you're pregnant and using drugs such as heroin or abusing opioid prescription pain killers, it's important that you get help for yourself and your unborn baby. Methadone maintenance treatment can help you stop using those drugs. It is safe for the baby, keeps you free of withdrawal, and gives you a chance to take care of yourself.[26]

For those newborns that do experience withdrawal, identification of such infants by trained caregivers is not difficult, and safe and effective treatment can be instituted in the nursery setting.[27]

While research demonstrates that some drugs such as alcohol can cause harm to fetuses, whether drug or alcohol use caused a particular harm or even unique risks of harm in any given pregnancy is a scientific question that requires careful examination. For example, although alcohol can unquestionably have teratogenic effects,[29] much remains unknown about the specific effects, if any, that any individual pregnant woman's pattern of alcohol use may have in any particular pregnancy. While many medical experts, particularly in the United States, recommend as a precautionary matter abstaining from alcohol altogether during pregnancy,[30] there is in fact no medical certainty regarding the level of alcohol consumption during a particular pregnancy that will result in negative fetal outcomes.[31] Even the exact mechanism that establishes a causative link between alcohol ingestion and manifestation of harmful fetal symptoms has yet to be definitively established.[32]

Moreover, the difficulty of isolating the influence of alcohol from that of other factors, such as poverty, poor nutrition, or smoking, on fetal outcomes or infant health renders inferences about causation based on *in utero* exposure to alcohol alone unreliable.[33] As researchers explain, "defining the factors that place certain women at risk of giving birth to an alcohol-affected child is a key research issue. Risk factors include maternal age, socioeconomic status, ethnicity, genetic factors, and maternal alcohol metabolism, among others." Researchers note that "further research is needed to evaluate the relative contributions of the various risk factors for FAS [fetal alcohol syndrome.]"[34]

The principal import of existing research is not that drug and alcohol use during pregnancy is "safe," but rather that no scientific or legal basis exists for concluding that exposure to these substances will inevitably cause harm or that the risks presented by use of these substances are any greater than those associated with many other conditions and activities common in the lives of all people, including pregnant women.

In spite of scientific fact, prosecutors continue to use medical misinformation to justify new arrests of pregnant women and to ask courts to radically rewrite state law to permit the prosecution of pregnant women.[35] It is time for criminal defense attorneys to zealously challenge the junk science at the heart of these prosecutions.

Using Daubert as a Guide To Zealous Advocacy For Pregnant Women

The landmark case of *Daubert v. Merrell Dow Pharmaceuticals*[36] established the federal standard for admission of scientific expert testimony. That case and its history also provide a surprisingly useful guide for attorneys who want to ensure that pregnant women get fair trials. That case reminds us that even when a pregnant woman takes a drug and her child is born with severe "deformities," it does not mean that there is, in fact, a connection between the drug and the harm the child suffered.[37]

In *Daubert*, two minors brought suit against Merrell Dow Pharmaceuticals, claiming that they suffered limb reduction birth defects "because their mothers had taken Bendectin, a drug prescribed for morning sickness to about 17.5 million pregnant women in the United States between 1957 and 1982."[38] Merrell Dow was vigorously defended, and after extensive discovery, the company moved for summary judgment, contending that Bendectin does not cause birth defects in humans and that the plaintiffs would be unable to come forward with any admissible evidence to establish that it did. Applying the *Frye* standard, the district court granted the motion for summary judgment, concluding that the scientific evidence was not admissible because the principle upon which it was based was not "'sufficiently established to have general acceptance in the field to which it belongs.'"[39] The minors appealed, and the U.S. Supreme Court granted certiorari.

The Court held that the *Frye* test was superseded by the adoption of the Federal Rules of Evidence, specifically Rule 702. The Court observed that nothing in the text of Rule 702 establishes "general acceptance" as an

Prenatal Exposure to Marijuana

Based on my 30 plus years of experience examining the newborn, infants, toddlers, children, adolescents and young adults born to women who used marihuana during pregnancy it is important to emphasize that to characterize an infant born to a woman who used marihuana during pregnancy as being 'physically abused' and/or 'neglected' is contrary to all scientific evidence (both mine and subsequent work by other researchers). The use of marijuana during pregnancy … has not been shown by any objective research to result in abuse or neglect.

There have been a few reports of mild negative effects in high-risk populations on the birth weight or birth length of newborns but, in those studies, these effects were no longer present after a few months. This is in contrast to many other substances that are commonly used during pregnancy, including alcohol and cigarettes, where the effects on growth are much more pronounced.[28]

Peter Fried, a leading researcher on the effects of prenatal exposure to marijuana.

absolute prerequisite to admissibility. The Court then identified things that trial judges could and should look for to help them determine whether the evidence proposed is scientifically valid and therefore reliable as required by Rule 702: (1) whether the theory or technique at issue can be tested;[40] (2) whether the scientific method at issue has been subjected to peer review and publication; (3) for a technique, the trial court should consider the proffered technique's known or potential rate of error; and (4) the degree to which the new theory has gained acceptance in the scientific community may be pertinent, but such acceptance is not required.[41] The court must also ascertain whether the expert's testimony will assist in understanding the evidence or determining the fact in issue.[42]

With the new standards set, the highest Court sent the case down to the appellate court to apply those standards. The pharmaceutical company argued that even under the new, seemingly more liberal standard, the proffered evidence of causation was not admissible.

> On remand, the Ninth Circuit explained:
>
> [S]omething doesn't become "scientific knowledge" just because it's uttered by a scientist; nor can an expert's self-serving assertion that his conclusions were "derived by the scientific method" be deemed conclusive, else the Supreme Court's opinion could have ended with footnote two. As we read the Supreme Court's teaching in *Daubert*, therefore, though we are largely untrained in science and certainly no match for any of the witnesses whose testimony we are reviewing, it is our responsibility to determine whether those experts' proposed testimony amounts to "scientific knowledge," constitutes "good science," and was "derived by the scientific method."[43]

This means that the "expert's bald assurance of validity is not enough. Rather, the party presenting the expert must show that the expert's findings are based on sound science, and this will require some objective, independent validation of the expert's methodology."[44]

On remand, the Ninth Circuit explored, in depth, the limits of scientific evidence concerning the causes of birth defects in general, and the specific evidence that the plaintiffs offered that their birth defects were caused by the drug Bendectin. The court noted on the issue of birth defects in general:

> For the most part, we don't know how birth defects come about. We do know they occur in 2-3 percent of births, whether or not the expectant mother has taken Bendectin. Limb defects are even rarer, occurring in fewer than one birth out of every 1000. But scientists simply do not know how teratogens (chemicals known to cause limb reduction defects) do their damage.[45]

In terms of causation, or the "biological chain of events that leads from an expectant mother's ingestion of a teratogenic substance to the stunted development of a baby's limbs," the court cautioned that "[n]o doubt, someday we will have this knowledge, … in the current state of scientific knowledge, however, we are ignorant."[46]

The court recognized that in some cases, such evidentiary problems could be overcome, and looked specifically at the proffered evidence linking Bendectin to the pregnancy outcomes in that case. Considering whether the testimony reflected "scientific knowledge," was "derived by the scientific methods" and "amounted to good science," the court concluded that the plaintiffs' evidence was not admissible as expert scientific testimony.[47]

Factors that led to this holding included: that only one of the plaintiff's experts had done original research; that none of the experts based his testimony on preexisting or independent research; and that the proffered analysis and conclusion had not been subjected to normal scientific scrutiny through peer review and publication.[48] The court specifically rejected the testimony of Dr. Palmer, who was the only expert willing to testify that Bendectin caused the limb defects in each of the children.

> In support of this conclusion, Dr. Palmer asserts only that Bendectin is a teratogen and that he has examined the plaintiffs' medical records, which apparently reveal the timing of their mothers' ingestion of the drug. Dr. Palmer offers no tested or testable theory to explain how, from this limited information, he was able to eliminate all other potential causes of birth defects, nor does he explain how he alone can state as a fact that Bendectin caused plaintiffs' injuries.[49]

The court concluded that "[t]he record in this case categorically refutes the notion that anyone can tell what caused the birth defects in any given case,"[50] and that Dr. Palmer's testimony was "rendered inadmissible by the total lack of scientific basis for his conclusions."[51]

As a result of the ruling, the children and families never even went to trial. The pharmaceutical company was safe from civil suit and financial liability. *Daubert* does not stand alone in applying stringent standards for the admission of expert testimony about causation in civil actions seeking to hold someone accountable for bad birth outcomes. Indeed, there are more than a dozen published decisions about Bendictin, with most delving into and turning on the admissibility of expert evidence about whether Bendictin caused a birth defect.[52] Civil actions alleging that a birth defect was caused by a drug or pesticide are vigorously, and often successfully, defended by challenging the admissibility of expert evidence.[53]

In another example, New York plaintiffs alleged that Malathion, a pesticide sprayed by a county agency, caused birth defects. The defendant challenged the expert evidence about causation, and the trial court conducted a hearing to determine whether it was generally accepted in the medical and scientific communities that Malathion caused birth defects.[54] Finding that no scientific organizations or peer-reviewed articles accepted a relationship between Malathion and birth defects and that the plaintiff's proposed expert relied on "fundamentally speculative" methodology, the court concluded that the expert's testimony was not admissible. Because the plaintiff presented no other evidence on the issue of causation, the lower court granted summary judgment for the defendant, and the appellate division affirmed.[55]

Consider Scientific Evidence, Not Junk Science

When those accused of causing harm to newborns are pregnant women rather than pharmaceutical companies and what is at stake is a

mother's liberty and not just money, the standards for expert evidence often do not even come into play. In many cases, the delivering doctor or the local medical examiner is allowed to testify as to causation of a stillbirth, birth defect, or the creation of risk of harm. Yet, the "average medical doctor is not a trained researcher"[56] and is not necessarily qualified to address as a matter of science whether a particular drug has caused a particular risk or outcome.

On the subject of pregnant women, however, pretty much everyone seems to be considered an expert. A good example of this comes from the *Starks* case in Oklahoma.[57] Julie Starks, a pregnant woman, was arrested in a trailer that was allegedly being used, or that had once been used, to manufacture methamphetamine. In addition to being arrested and charged with manufacturing methamphetamine, the State began proceedings in the family court to declare her "unborn" child dependent. The family court took emergency custody of Ms. Starks' fetus and also raised Ms. Starks' bail for the criminal charges in order to prevent her release from jail. Despite the lack of a positive drug test and a recent evaluation by a treatment provider concluding that Ms. Starks was not using drugs, the State alleged that Ms. Starks used drugs. The State's case, however, focused on the claim that while pregnant, she had been in a location that exposed her unborn child to dangerous "fumes that permeate in the air[.]"[58]

> In describing how Ms. Starks's fetus was endangered, the State argued:
>
> It does not take a rocket scientist, so to speak, to figure out that these kinds of chemicals would be harmful to not only the mother but the unborn child. The child breathes the same thing as the mother does. That child, because it's unborn cannot leave that residence. It's helpless. It can't do a thing. As investigator Stinnett says, it can't even cry.[59]

Indeed, as these exchanges from hearings in the case make clear, the State was allowed to use law enforcement officials to give opinions on medical and scientific facts:

> **State Q:** Sergeant Stinnett, do you need to have a medical degree in order to advise a pregnant woman not to step out in front of a car coming down the highway?
>
> **A:** I don't, no, sir.
>
> **Q:** Do you think you need a medical degree that would enable you to have an opinion that a pregnant woman should not have been in the environment that you were in [when you arrested her] on August 23rd of 1999?
>
> **A:** I don't believe I need a medical degree for that, no.[60]

And similarly:

> **State Q:** Okay. Let me ask you, Deputy [Dunlap], was there anything unusual that you noticed about Ms. Starks?
>
> **A:** She appeared to be pregnant.
>
> **Q:** And were you able to verify whether or not she was?
>
> **A:** She said she was pregnant.
>
> **Q:** Okay. And do you have an opinion as to whether or not she and her child's safety were placed in danger by being in that lab?
>
> **A:** I felt it was. …
>
> **Q:** Deputy, you have a little boy, do you not?
>
> **A:** That is correct.
>
> **Q:** And he is, if I remember correctly, not very old?
>
> **A:** He is about a half-year old.
>
> **Q:** Six months old. When your wife was seven months pregnant, would you have wanted her to be in a methamphetamine lab?
>
> **A:** No, sir, I would not.[61]

In other words, as the *Starks* case and these exchanges demonstrate, if a pharmaceutical company's pocket book is at stake, a high standard for the admission of expert testimony is applied. But if a pregnant woman's liberty is at stake, it is often true that no standard is applied at all. Sometimes, public defenders, who themselves may believe the medical misinformation, fail to challenge the scientific grounds for the case, fail to ask for *Daubert* hearings (or their state equivalent), fail to challenge the expertise of the State's witnesses, fail to vigorously cross-examine those witnesses who are allowed to testify, or fail to call their own experts. Courts should act as gatekeepers regardless of whether defense attorneys challenge the admissibility of scientific evidence, but too often do not. Moreover, even when counsel does object to the admission of junk science and unqualified witnesses, their motions are sometimes overruled. Similarly, when defense counsel request *Daubert* hearings and funding for experts, courts may deny those motions and refuse to authorize expenditures for experts for indigent defendants. And prosecutors arguably violate ethical principles by proceeding with cases that they know or should know are based on junk science and made-up law.[62] Defendants who are pregnant or parenting, however, deserve to have the junk science challenged.

Like the research available about Bendectin at the time of *Daubert*, the research about cocaine, methamphetamine, and other illegal drugs fails to establish, as a matter of science, a causal link between exposure to those drug and stillbirths, a wide range of alleged harms, or even unique risks substantially different from exposures to legal substances and a wide variety of life circumstances experienced by pregnant women. As the American College of Obstetricians and Gynecologists ethics statement on this issue provides:

> [P]regnant women should not be punished for adverse perinatal outcomes. The relationship between maternal behavior and perinatal outcome is not fully understood, and punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.[63]

Other advocates have argued that *Daubert* has not been adequately incorporated into criminal defense practice.[64] This omission, however, is especially

dangerous in cases involving pregnant women because pregnant women charged with crimes are not like other defendants. As the Illinois Court of Appeals noted when refusing to create a tort of prenatal maternal negligence:

> The relationship between a pregnant woman and her fetus is unlike the relationship between any other plaintiff and defendant. No other plaintiff depends exclusively on any other defendant for everything necessary for life itself. No other defendant must go through biological changes of the most profound type, possibly at the risk of her own life, in order to bring forth an adversary into the world. It is, after all, the whole life of the pregnant woman which impacts on the development of the fetus. As opposed to the third-party defendant, it is the mother's every waking and sleeping moment which, for better or worse, shapes the prenatal environment which forms the world for the developing fetus. That this is so is not a pregnant woman's fault: it is a fact of life.[65]

Because pregnancy and pregnancy loss occur inside a woman's body, the State can, in effect, make out virtually every element of a circumstantial case of guilt by simply producing evidence of a positive drug test, a stillbirth or some alleged harm, and the fact of cocaine use or any other unwise or unpopular behavior. This makes it especially important for trial counsel to attack the State's case for causation. In other words, in these kinds of prosecutions, ceding the issue of causation is not an option.

In a prescient passage, the *Stallman* court warned of the role prejudice and presumption, rather than probative scientific facts, could play in cases involving pregnant women.

> If a legally cognizable duty on the part of mothers were recognized, then a judicially defined standard of conduct would have to be met. It must be asked, by what judicially defined standard would a mother have her every act or omission while pregnant subjected to State scrutiny? By what objective standard could a jury be guided in determining whether a pregnant woman did all that was necessary in order not to breach a legal duty to not interfere with her fetus' separate and independent right to be born whole? In what way would prejudicial and stereotypical beliefs about the reproductive abilities of women be kept from interfering with a jury's determination of whether a particular woman was negligent at any point during her pregnancy?[66]

This is just one reason why, even if a causal link between a drug and harm could be established, these cases should never come to trial.[67] But if a motion to dismiss fails, and the case does proceed to trial, effective defense attorneys must challenge the qualifications of the State's experts and the scientific claims on which the prosecutions are based. Moreover, effective representation requires the introduction of scientific evidence to counteract the numerous prejudicial and stereotypical beliefs about pregnancy and addiction that are bound to influence the judge and jury.

On the basis of popular literature, warning labels, and general confidence in the advances of modern medicine, many people wrongly believe that women have a high degree of control over their pregnancy outcomes. For example, the best selling pregnancy advice book *What to Expect When You're Expecting*[68] warns women to avoid contact with anyone who is smoking, changing a cat litter box, consuming unpasteurized cheese or undercooked meat, gardening without gloves, inhaling when handling household cleaning products, and ingesting caffeine, thereby creating the illusion that women who conform to all proscriptions can guarantee a healthy pregnancy outcome.

The longstanding and constant medical reality, however, is that as many as 20-30 percent of all pregnancies will end in miscarriage or stillbirth. In fact, stillbirth is one of the most common adverse outcomes of pregnancy,[69] and it occurs despite the best intentions and numerous precautions taken by individual women. Similarly, as the president of the March of Dimes noted in a letter to the *Wall Street Journal*:

> No one would deny parents play a significant role in the health and well-being of their child, both before and after birth. But … every day in America women who did everything "right" during pregnancy — that is, they got good prenatal care, they were married to the father of the child, their neither smoked nor drank nor abused drugs — nevertheless give birth to babies with birth defects or low birth weight. … Scientific progress in understanding the causes of some birth defects inclines people to overestimate what is known, but the truth is that more than 60 percent of all birth defects are of unknown origin.[70]

Conclusion

The decision in the *McKnight* case, a growing body of helpful popular and scientific, peer-reviewed literature, as well as an increasing number of real experts who may be available to testify on a pro bono basis should all encourage defense counsel not to accept the junk science behind the prosecutions of pregnant women. Model briefs and motions, evidence-based research, and contact information for some of the leading experts are available from National Advocates for Pregnant Women.

Pregnant women charged with non-existent crimes may not have the financial resources available that pharmaceutical companies have. They, however, are no less entitled to a zealous defense.

The authors thank Tiloma Jayasinghe, JD, for her contributions to this article; David Goldberg of Donahue & Goldberg, LLP; Matthew Hersh and Julie M. Carpenter of the DKT Liberty Project; Jenner & Block, LLP; and colleagues at the Drug Policy Alliance and at national and affiliate offices of the ACLU for the sources and arguments they brought to the authors' attention.

Notes

1. *See* David C. Lewis et al., *Meth Science Not Stigma; Open Letter to the Media*, July 25, 2005, http://www.jointogether.org/news/yourturn/commentary/2005/meth-science-not-stigma-open.html; David C. Lewis et al., *Physicians, Scientists to Media: Stop Using the Term* 'Crack Baby,' Feb. 27, 2004, http://www.jointogether.org/news/yourturn/announcements/2004/physicians-scien-

tists-to-stop.html.

2. Lynn Paltrow, *Winning Strategies, Defending the Rights of Pregnant Addicts*, The Champion, Aug. 1993 at 19.

3. Some more recent examples of successful efforts to get charges dismissed or convictions overturned are: State v. Geiser, 763 N.W.2d 469 (N.D. 2009) (reversing conviction for endangerment of a child based upon suffering a stillbirth and testing positive for methamphetamine and holding that "pregnant woman cannot be charged for a crime allegedly committed against her unborn child" because the plain meaning of the word "child" does not include a fetus); State v. Wade, 232 S.W.3d 663 (Mo. Ct. App. 2007) (affirming the dismissal of child endangerment charge based on allegation that child tested positive for methamphetamine and marijuana at birth and stating that "[t]he plain language of the child endangerment statute does not proscribe conduct harmful to fetuses, and Section 1.205.4 clearly prohibits any cause of action against a mother for improper prenatal care"); State v. Martinez, 137 P.3d 1195 (N.M. Ct. App. 2006) (refusing to apply child abuse statutes to punish a woman for continuing her pregnancy to term in spite of a cocaine addiction); Kilmon v. State, 905 A.2d 306 (Md. 2006) (holding that the reckless endangerment statute does not apply to the context of pregnancy); Ward v. State, 188 S.W.3d 874 (Tex. App. 2006) (reversing the convictions of Tracy Ward and Rhonda Smith, who had both been convicted of delivery of a controlled substance to a "child" for their alleged *in utero* transfer of drug metabolites to their fetuses, holding that the plain language of the statute made clear that the state legislature did not intend the drug delivery statute to apply to the context of pregnancy); State v. Aiwohi, 123 P.3d 1210 (Haw. 2005) (holding that according to the plain language of the Hawai`i manslaughter statute, the definition of person did not include fetus); State v. Dunn, 916 P.2d 952 (Wash. Ct. App. 1996) (holding that the legislature did not intend to include fetuses within the scope of the term "child" which was defined "as a person under 18 years of age"); Reinesto v. Superior Court, 894 P.2d 733 (Ariz. Ct. App. 1995) (dismissing child abuse charges filed against a woman for heroin use during pregnancy and holding that that the ordinary meaning of "child" excludes fetuses, and to conclude otherwise would offend due process notions of fairness and render statute impermissibly vague); Collins v. State, 890 S.W.2d 893 (Tex. App. 1994) (charges brought for substance abuse during pregnancy dismissed because application of the statute to prenatal conduct violates federal due process guarantees); Ex Parte Lovill, 287 S.W.3d 65 (Tex. App. 2008), *rev'd on other grounds*, No. PD-0401-09 (Tex. Ct. Crim. App. Dec. 16, 2009) (finding that the decision to revoke a woman's probation because she was pregnant constituted impermissible sex discrimination, and remanding habeas claim to trial court for determination of whether the discrimination could survive Equal Protection review).

4. *See* Ferguson v. City of Charleston, 532 U.S. 67 (2001).

5. *See Amicus Curiae* Brief of Medical, Public Health, and Child Welfare Experts and Advocates in Support of Respondent Amber Lovill at 38, *Ex Parte Lovill*, No. PD-0401-09 (Tex. Ct. Crim. App. Aug. 5, 2009), *available at* http://advocatesforpregnantwomen.org/briefs/Lovill_TexasAmicusBrief.pdf.

6. McKnight v. State, 661 S.E.2d 354 (S.C. 2008).

7. Whitner v. State, 492 S.E.2d 777 (S.C. 1997); Lynn Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 Albany L. Rev. 999 (1999).

8. Whitner, 492 S.E.2d at 777.

9. State v. McKnight, 576 S.E.2d 168 (2003).

10. McKnight v. State, 661 S.E.2d 354, 358 n.2 (S.C. 2008).

11. Laura Gómez, Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure 14 (1997) (reporting that without knowing that cocaine was used by their mothers, clinicians could not distinguish so-called crack-addicted babies from babies born to comparable mothers who had never used cocaine or crack); *see also* John P. Morgan & Lynn Zimmer, *The Social Pharmacology of Smokeable Cocaine Not All It's Cracked Up to Be*, in Crack In America: Demon Drugs And Social Justice 131, 152 (Craig Reinarman & Harry G. Levine eds., 1997).

12. *See, e.g.,* Dorothy Roberts, *Unshackling Black Motherhood*, 95 Mich. L.R. 938 (1997).

13. David C. Lewis et al., Physicians, Scientists to Media: Stop Using the Term 'Crack Baby' (2004), *available at*

http://www.jointogether.org/news/yourturn/announcements/2004/physicians-scientists-to-stop.html.

14. United States v. Smith, 359 F. Supp. 2d 771, 780 n.6 (E.D. Wis. 2005).

15. Nat'l Institute on Drug Abuse, Research Report, Cocaine: Abuse and Addiction 6 (May 2009) (emphasis added), *available at* http://www.drugabuse.gov/PDF/RRCocaine.pdf.

16. U.S. Sentencing Commission, Report to Congress: Cocaine and Federal Sentencing Policy 68, 70 (May 2007), available at http://www.ussc.gov/r_congress/cocaine2007.pdf.

17. Susan Oakie, *The Epidemic That Wasn't,* N.Y. Times, Jan. 27, 2009, at D1, *available at* http://www.nytimes.com/2009/01/27/health/27coca.html. Other newspapers including those in Oklahoma and Kansas also eventually ran similar stories. *See also* Jeff Raymond, *Effects of Drugs Challenged*, NewsOk, Nov. 15, 2007, http://newsok.com ("Deepening research shows babies who are exposed to cocaine or methamphetamine in the womb fare similarly to other babies as they age."); Laura Bauer, *'Crack Babies' Aren't Severely Damaged, Researchers Find*, Kan. City Star, Feb. 14, 2008, at A, *available at* http://advocatesforpregnantwomen.org/KansasStar_Crackbabiesnotseverely.pdf (After monitoring these children into their teen years, researchers think cocaine exposure is less severe than alcohol and comparable to tobacco use during pregnancy.).

18. Prenatal Drug Exposure: Award-Winning Pediatrician Discusses What the Science Tells Us, *available at* http://www.vimeo.com/3916613.

19. Susan Oakie, *The Epidemic That Wasn't,* N.Y. Times, Jan. 27, 2009, at D1, *available at* http://www.nytimes.com/2009/01/27/health/27coca.html.

20. Ctr. For The Evaluation Of Risks To Human Reproduction, Report Of The NTP-DERHR Expert Panel On The Reproductive & Developmental Toxicity Of Amphetamine & Methamphetamine 163, 174 (2005).

21. *See* CESAR Weekly Fax from the Center for Substance Abuse Treatment, Vol. 14 Issue 33 (Aug. 2005); David C. Lewis et al., Meth Science Not Stigma: Open Letter to the Media, (July 25, 2005), *available at* http://www.jointogether.org/news/yourturn/commentary/2005/meth-science-not-stigma-open.html.

22. Am. College of Obstetrics & Gynecology, Information about Methamphetamine Use in Pregnancy, Mar. 3, 2006, *available at* http://www.rhrealitycheck.org/emailphotos/ACOGmethtalkingpoints.pdf.

23. Robert M. Silver et al., *Workup of Stillbirth: A Review of the Evidence*, 196 Am. J. Obstetrics Gynecology 433-444, 438 (2007).

24. Gary D. Hembrecht & Sivia Thiagarajah, *Management of Addiction Disorders in Pregnancy*, 2 J. Addiction Med. 1, 9 (2008).

25. *See, e.g.,* Laura P. Finnegan & Stephen R. Kandall, *Maternal and Neonatal Effects of Alcohol and Drugs*, in Substance Abuse: A Comprehensive Textbook 805 (J. Lowinson, ed. 4th ed. 1997); W.F. Rayburn & M.P. Bogenschutz, *Pharmacotherapy for Pregnant Women with Addictions*, 191 Am. J. Obstetrics & Gynecology 1885 (2004).

26. Substance Abuse & Mental Health Servs. Admin., U.S. Dep't Health & Human

Servs., Methadone Treatment for Pregnant Women, Pub. No. SMA 06-4124 (2006), *available at* http://csat.samhsa.gov/publications/PDFs/PregnantWomen.pdf. With regard to safety of methadone during pregnancy, the prestigious National Institute of Medicine reported that "[t]here is no reported evidence of any toxic effects of methadone in the woman, fetus or child, although such evidence has been sought." Institute of Medicine, Federal Regulation of Methadone Treatment 203 (1995), *available at* http://www.nap.edu/openbook.php?isbn=0309052408.

27. *See generally* Methadone Treatment for Pregnant Women, *supra* note 26.

28. Affidavit of Peter Fried, Ph.D. in Support of Defendants' Answer to Complaint for S.C. Code § 63-7-1650 at ¶ 4-5, S.C. Dep't Soc. Servs. v. Doe (S.C. Fam. Ct. July 13, 2009) (on file with National Advocates for Pregnant Women).

29. *See, e.g.*, Grace Chang, *Alcohol-Screening Instruments for Pregnant Women,* 25 Alcohol Research & Health 204 (2001). Alcohol, (ethanol) intake during pregnancy, however, has also been shown to have a beneficial effect on women and fetal health by preventing pre-term labor, which poses high risks of infant morbidity. Until the recent development of alternative pharmacological agents offering lower risks and greater benefits, alcohol was routinely used in some circumstances to prevent pre-term labor in order to promote optimal fetal development *in utero*. *See also* Marc J.N.C. Keirse, *The History of Tocolysis*, 110 Br. J. Obstetrics & Gynecology 94, 95 (2003) (describing history of use and research on ethanol as a tocolytic agent for preterm labor as recently as 1981 and citing reports that "for ethanol to be effective you needed to achieve blood levels between 1.2 and 1.8 g/l. However, this caused depression and incontinence in women"); Nancy D. Berkman et al., *Tocolytic Treatment for the Management of Preterm Labor: A Review of the Evidence*, 188 Am. J. Obstetrics Gynecology 1648, 1649 (2003) (noting ethanol as among "five classes of tocolytic agents currently used to treat women in preterm labor," although ethanol has been surpassed in usage by new treatments that are more effective and have fewer harmful side effects). Uncertainty about the optimal and, of course, harmful, dosage and timing of ethanol infusion merely highlights the difficulty of charging women without medical expertise with such knowledge for the purposes of imposing criminal liability.

30. *See, e.g.*, Elizabeth M. Armstrong & Ernest L. Abel, *Fetal Alcohol Syndrome: The Origins of a Moral Panic*, 35 Alcohol & Alcoholism 276, 277 (2000) (comparing warning of the United States Surgeon General in 1981 that "women who are pregnant (or considering pregnancy) not to drink alcoholic beverages and to be aware of the alcoholic content of foods and drugs" to 1996 guidelines of the British Royal College of Obstetricians and Gynecologists recommending that "women should be careful about alcohol consumption in pregnancy and limit this to no more than one standard drink per day") (citations omitted).

31. *See, e.g.,* Elizabeth M. Armstrong, *Diagnosing Moral Disorder: The Discovery and Evolution of Fetal Alcohol Syndrome*, 47 Soc. Sci. Med. 2025–42, 2029 (noting disagreement among American and European researchers over risks of alcohol ingestion during pregnancy to fetal outcomes); Ulrik Kesmodel et al., *Does Alcohol Increase the Risk of Preterm Delivery?*, 11 Epidemiology 512, 512 (2000) (noting controversy among researchers over "whether there is a safe level of drinking during pregnancy"); Eugene Pergament et al., *Alcohol and Pregnancy*, Ill. Teratogen Information Service Newsletter (1994), *available at* http://66.242.154.95/resources/wp-content/uploads/2009/05/alcohol_jun1994.pdf.

32. *See, e.g.,* Armstrong, *supra* note 31, at 2028 (noting possibility that effect of enzyme deficiencies that prevent breakdown of alcohol — rather than effect of alcohol itself — may explain why similar patterns of alcohol consumption do not necessarily correlate with the same incidence of fetal symptoms).

33. *See* Kenneth R. Warren & Laurie L. Foudin, *Alcohol-Related Birth Defects—The Past, Present, and Future*, 25 Alcohol Research & Health 153, 156 (2001).

34. Armstrong & Abel, *supra* note 30 (disproportionate incidence of symptoms associated with fetal alcohol syndrome among poor women may result from their simultaneous experience with "smoking and poor diet, [which] exacerbate the effects of alcohol") (citation omitted); Nesrin Bingol et al., *The Influence of Socioeconomic Factors on the Occurrence of Fetal Alcohol Syndrome*, 6 Advances in Alcohol & Substance Abuse 105 (1987) (demonstrating that differences in infant health are attributable to differences in economic status).

35. *See, e.g.*, Adam Nossiter, *In Alabama, A Crackdown on Pregnant Drug Users*, N.Y. Times, Mar. 15, 2008, at A10, *available at* http://www.nytimes.com/2008/03/15/us/15mothers.html (describing Alabama Prosecutor Greg Gambril's arrests of at least eight women who were pregnant and sought to continue to term in spite of their drug use problems).

36. Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993).

37. Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311, 1313 (9th Cir. 1995).

38. *Id.*

39 Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579, 583 (1993) (quoting district court).

40. *Id.* at 593.

41. *Id.* This list of factors is not exhaustive.

42. *Id*.

43. Daubert v. Merrell Dow Pharmaceuticals, 43 F.3d 1311, 1315-16 (9th Cir. 1995) (emphasis added).

44. *Id.* at 1316.

45. *Id.* at 1313 (internal citations omitted).

46. *Id*. at 1313–14.

47. *Id.* at 1315.

48. *Id.* at 1317–18.

49. *Id*. at 1319.

50. *Id.* at 1320 n.20.

51. *Id.* at 1321 n.18.

52. *See, e.g.,* Merrell Dow Pharmaceuticals v. Havner, 953 S.W.2d 706, 709–10 (Tex. 1997) (discussing the numerous federal and state Bendectin cases).

53. *See, e.g.*, E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549 (Tex. 1995); Rodriguez ex rel. Posso-Rodriguez v. Feinstein, 793 So.2d 1057 (Fla. Dist. Ct. App. 2001); Duran v. Cullinan, 677 N.E.2d 999 (Ill. App. 1997).

54. Lewin v. County of Suffolk, 795 N.Y.S.2d 659 (N.Y. App. Div. 2nd Dept. 2005).

55. *Id.*

56. Steven B. Karch, *Peer Review and the Process of Publishing of Adverse Drug Event Reports*, 14 J. Forensic & L. Med. 79 (2007).

57. *See* In re Unborn Child of Starks, 18 P.3d 342 (Okla. 2001); Order, In re Unborn Child of Starks, No. 93,606 (Okla. Sept. 23, 1999) ("petitioner's confinement … is inefficacious and unenforceable as an unauthorized application of judicial force.").

58. Transcript of Proceedings Held on August 30, 1999 at 12, In re Unborn Child of Starks, No. JF-99-127 (Okla. Dist. Ct. Rogers County Jan. 24, 2000).

59. Transcript of Jury Trial at 129-130, In re Unborn Child of Starks, No. JF-99-127 (Okla. Dist. Ct. Rogers County Jan. 24, 2000).

60. *Id.* at 284.

61. *Id.* at 333–34.

62. *See* Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers,* 39 Buff L. Rev. 737 (1991).

63. Am. Coll. Obstetricians & Gynecologists, *Maternal Decision Making, Ethics, and the Law*, ACOG Committee Opinion, No. 321, Nov. 2005.

64. *See, e.g.*, Peter Neufeld, *The (Near) Irrelevance of Daubert to Criminal Justice and Some Suggestions for Reform*, 95 AM. J. PUB. HEALTH S107 (2005).

65. Stallman v. Youngquist, 531 N.E.2d 355, 360 (Ill. 1988).

66. *Id.* at 360.

67. Sample motions to dismiss are available from National Advocates for Pregnant Women.

68. *See, e.g.*, ARLENE EISENBERG, HEIDI E. MURKOFF, & SANDEE E. HATHAWAY, WHAT TO EXPECT WHEN YOU'RE EXPECTING 54–57 (2d ed. 1996).

69. *See, e.g.*, R.L. Goldenberg, *Stillbirth: A Review*, 16 J. MATERNAL-FETAL & NEONATAL MED. 79, 79 (2004).

70. Jennifer L. Howse, *Infant Mortality: Don't Blame Parents*, WALL STREET J., Feb. 27, 1992, at 13. ■

About the Authors

Lynn M. Paltrow is the Founder and Executive Director of National Advocates for Pregnant Women. She has served as a senior staff attorney at the ACLU's Reproductive Freedom Project and is a frequent guest lecturer and writer for law reviews and medical journals.

PLEASE SEND PHOTO

Lynn M. Paltrow
National Advocates for Pregnant Women
15 West 36th Street, Suite 901
New York, NY 10018
212-255-9252
Fax 212-255-9253
E-MAIL lmp@advocatesforpregnantwomen.org

Kathrine Jack is a staff attorney at National Advocates for Pregnant Women. Prior to law school, she focused on the economics of health care as a research assistant at Columbia University. She is an online contributor to the American Constitution Society Blog.

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Kathrine D. Jack
National Advocates for Pregnant Women
15 West 36th Street, Suite 901
New York, NY 10018
212-255-9252
Fax 212-255-9253
E-MAIL info@advocatesforpregnantwomen.org

Federal Court of Appeals Decision Prevents Pregnant Woman's Challenge to Wisconsin's "Unborn Child Protection Act"

June 18, 2018 - Today a three-judge panel of the U.S. Court of Appeals for the Seventh Circuit vacated a well-reasoned decision by a federal district court that had struck down Wisconsin's Unborn Child Protection Act (Act 292) as unconstitutional. The appeals court panel avoided grappling with Act 292's numerous constitutional problems by ruling that the woman challenging it, Tamara Loertscher, could not continue to do so because she had moved out of Wisconsin.

Lynn M. Paltrow, Executive Director of National Advocates for Pregnant Women said "As a result of this decision, women in Wisconsin who are pregnant and seek health care must continue to fear that the government will detain them, force them into treatment, and even send them to jail if they use - or even disclose past use of - alcohol or a controlled substance."

This is the second time that a federal court has relied on "mootness" grounds to prevent a Wisconsin woman from challenging Act 292. In the first case, a federal court held that because Alicia Beltran was no longer being forced to submit to treatment, she did not have standing to challenge the law. Nancy Rosenbloom, Director of Legal Advocacy at National Advocates for Pregnant Women explained that "The decision today demonstrates that it is extremely difficult for a woman to get justice in the federal courts when a law deprives her of her constitutional rights because she is pregnant."

The federal trial court decision that is vacated as a result of the 7th Circuit decision had concluded that Act 292 is a vaguely worded law that violates the U.S. Constitution's guarantee of due process of law. That court explained that Act 292 "affords neither fair warning as to the conduct it prohibits nor reasonably precise standards for its enforcement." As a result, the district court concluded, "erratic enforcement, driven by the stigma attached to drug and alcohol use by expectant mothers, is all but ensured."

Ms. Loertscher's own experience confirmed this conclusion. As a result of her seeking health care for a thyroid condition and to confirm pregnancy -- what the federal district court described as "her commitment to having a healthy baby and to take care of herself"-- the government seized her, ordered her into forced treatment and jailed her pursuant to Act 292. As the district court explained, "her history of modest drug and alcohol use, which she self-reported while seeking medical care," became the basis for Taylor County's claim that she "habitually lacked self-control" and a court hearing to determine whether she could be deprived of her freedom.

Under Act 292 Ms. Loertscher had no right to legal counsel appointed at that first hearing, but a lawyer was immediately appointed to represent her 14-week fetus. Following the hearing at which she was not represented, she essentially had the choice between being forcibly detained indefinitely in unnecessary residential drug treatment, or going to jail for 30 days. Ms. Loertscher ended up incarcerated in a county jail for weeks, where she was also held in solitary confinement for several days because she declined to take a pregnancy test.

Today's appeals court opinion does not address any of the evidence presented and ruled on by the district court. It ignores fundamental questions of whether Act 292 is constitutional in its wording, procedures, or in authorizing the state to lock up pregnant women who are not represented by counsel and without requiring any diagnosis or qualified medical evidence. The opinion merely denies this particular woman the opportunity to bring the challenge, despite her having diligently pursued three and one-half years of litigation and presented an extensive record showing how Act 292 strips pregnant women of their constitutional rights.

Nancy Rosenbloom explained, "In vacating on supposed mootness, the 7th Circuit opinion suggests that Act 292 is both clear and benign. It is neither. For example it omits the facts that Ms. Loertscher

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was not diagnosed with a substance use disorder and that she did not use any substances after confirming that she was pregnant. The opinion ignores that the doctor whose testimony was used to order unnecessary forced treatment admitted she was not an expert on the effects of drugs and had no idea her testimony would be used as a basis for jailing a pregnant woman."

Sarah Burns of the NYU School of Law Reproductive Justice Clinic said, "Competent, confidential, patient-centered prenatal care, above all else, is the greatest guarantee of a healthy pregnancy. Ms. Loertscher voluntarily sought that and the government took that away from her. The state violated her confidentiality, ordered her into a treatment facility that did not provide prenatal care, and incarcerated her in a county jail designed to hold suspected criminals, which also did not provide prenatal care."

National Advocates for Pregnant Women, the NYU School of Law Reproductive Justice Clinic, and the Perkins Coie law firm in Madison, Wisconsin represent plaintiff Tamara Loertscher.

For more information, please contact Shawn Steiner, Media and Communications Manager
SCS@AdvocatesforPregnantWomen.org | 212.255.9252 | 917.497.3037

Posted by Lisa McClain-Freeney on June 18, 2018 09:29 PM | Permalink

Arkansas Court of Appeals Overturns Criminal Conviction for Concealing a Birth

March 14, 2018

The Arkansas Court of Appeals has issued a unanimous ruling reversing Anne Bynum's conviction for "concealing a birth" that resulted in a sentence of six years in prison. The criminal charge and conviction stemmed from the state's claims about Ms. Bynum's actions after she experienced a stillbirth at home in 2015. The three-judge panel found that the trial court in Drew County had abused its discretion by allowing the jury to consider evidence about Ms. Bynum's past pregnancies and outcomes including abortion, that "clearly prejudiced" the verdict in the case.

It is rare to have a conviction overturned on the grounds of "abuse of discretion." As the court found in throwing out Ms. Bynum's conviction, the trial court here "act[ed] improvidently, thoughtlessly, or without due consideration." Because the prosecutor introduced and the trial court allowed prejudicial evidence, the Court of Appeals remanded the case back to the trial level, which allows the prosecutor to choose whether to retry Ms. Bynum on the same charge.

National Advocates for Pregnant Women (NAPW) Director of Legal Advocacy Nancy Rosenbloom said, "The appeals court did not rule on several constitutional challenges to the law and how it was used, finding that the original trial attorney did not preserve those issues for appellate review. If the prosecutor opts to bring Ms. Bynum to trial again, constitutional claims will be raised."

Ms. Bynum, an Arkansas mother, was arrested and charged with abuse of a corpse and concealing a birth after she had a pregnancy that ended with a stillbirth at home. After the stillbirth, Ms. Bynum safeguarded the fetal remains and several hours later brought those remains to a hospital, asking to see a doctor. Ms. Bynum was arrested five days later on charges of "concealing a birth," a felony carrying a potential six-year prison sentence and fine of up to $10,000, and "abuse of a corpse," a felony carrying a sentence of up to 10 years in prison and a fine of up to $10,000. Local law enforcement alleged that Ms. Bynum took a number of pills to induce an abortion, after which her pregnancy ended with a stillbirth. In fact, as the Court of Appeals recognized, Ms. Bynum had planned to give birth and have her baby adopted.

After a motion made by defense counsel, the trial court dismissed the abuse of a corpse charge before the case went to the jury. The jury, however, convicted her of concealing a birth. This law has only been used rarely and only in cases where people attempted to conceal the fact of a birth altogether. In this case the prosecutor argued that the jury should convict Ms. Bynum – an adult in her 30's - for concealing a birth because she had not told her mother she was pregnant and because she temporarily placed the stillborn fetus in her car for several hours before going to the hospital. He made this claim despite the evidence that established she notified many people about her pregnancy, contacted several people after the stillbirth, and then went to the hospital with the fetal remains. Notably, in the decision, the court recognizes that the Arkansas concealing birth law, which "does not provide for any exceptions, including a 'grace period' for concealment," is "harsh." NAPW Executive Director Lynn M. Paltrow said, "The concealing birth law and this prosecution will leave pregnant women in Arkansas with extreme confusion about what to do when they have a stillbirth or miscarriage at home. If a woman waits even one minute before calling the authorities, she could potentially be charged with concealing a birth."

Paltrow continued, "Pregnant women should not have to endure the threat of criminal prosecution for pregnancy or for failing to guarantee a healthy pregnancy outcome."

NAPW represented Ms. Bynum on the appeal. Consulting attorney Daniel Arshack argued for NAPW in front of a three-judge panel in January. The National Perinatal Association offered a friend of the court (amicus) brief in support of Ms. Bynum in this case, which the court did not accept without

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explaining why. Pending the final outcome of the case, Ms. Bynum has been home with her young son.

For more information, please contact Shawn Steiner, Media and Communications Manager, NAPW: SCS@AdvocatesforPregnantWomen.org | 212.255.9252 | 917.497.3037

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Personhood Ballot Initiative in Mississippi Could Ban Some IVF Practices:

A Mississippi initiative to define embryos as persons could outlaw some in-vitro practices.

Michelle Goldberg, The Daily Beast 10/24/2011

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In September, Mississippi's Supreme Court ruled that a ballot initiative to amend the state's constitution to define embryos as persons could go forward in November. Since then, Dr. Randall Hines, one of four physicians in the state who perform in vitro fertilization, has been fielding panicked calls from women with fertility problems. "We have patients calling us who are extremely anxious," he says. "If they are contemplating IVF, they're asking, 'Do I need to go ahead and do it right now, before this becomes law?'"

"I try to reassure people, to calm them down and tell them we're going to do everything we can to ensure that this doesn't pass," says Hines. Still, he allows that for some women, getting started on IVF treatments before Mississippi voters decide on Amendment 26 "wouldn't be a bad idea." The so-called Personhood Amendment won't outlaw all IVF, but it could drastically change how it's practiced, making it less effective and more dangerous. "It's certainly possible that certain IVF practices would become illegal," says Hines. "It could alter the way an individual patient and physician would interact. Quite honestly nobody knows what would happen, because this is uncharted territory."

The personhood movement, which aims to put initiatives like Mississippi's on the ballots of nine other states in the next year, represents a radical new anti-abortion legal strategy. It's built around a few lines in *Roe v. Wade* that grapple with the question of whether a fetus is a person under the 14th Amendment. "If this suggestion of personhood is established, the appellant's case, of course, collapses, for the fetus' right to life would then be guaranteed specifically by the Amendment," wrote Justice Harry Blackmun, before concluding that a fetus is not in fact a person. The personhood movement believes that by legally changing the definition of what a person is, it can undermine *Roe v. Wade* and outlaw abortion. But should any state actually pass a personhood amendment, it would impact IVF as well. That is not accidental.

Should Mississippi's initiative pass, "it would ban some current practices of IVF," acknowledges Keith Mason, the 30-year-old president of Personhood USA, an organization pushing for personhood amendments at both the state and federal level: "The creation of 30 or 60 embryos and then picking through them to see which ones are

most likely boys or girls, or basically looking at the ones you want to give life to and destroying the rest." Eric Webb, an anti-abortion Mississippi ob-gyn and prominent supporter of Amendment 26, has said repeatedly that it will outlaw the freezing of embryos, an important part of the IVF process.

As Hines explains, for IVF to have a decent chance of success, doctors have to try to fertilize more eggs than they intend to implant. "A basic problem in IVF is that we cannot look at an egg and determine that egg will get you pregnant," he says. "In order to enhance the pregnancy rate, we stimulate the patient and take all the eggs that we can get and combine those with sperm. Then the eggs and the sperm determine which ones are actually going to lead to pregnancy. Some will not fertilize. Some will not become embryos, and some embryos will not progress."

However, if several embryos do progress, it can be dangerous to implant them all, since that can lead to multiple pregnancies. The extra embryos are typically frozen, even though many are damaged in the process, because those that aren't can be used in another IVF cycle, saving the woman from having to go through the process of egg-retrieval all over again. If doctors only try to fertilize as many eggs as they're willing to implant, says Hines, "We would find lower pregnancy rates overall, but potentially higher multiple pregnancy rates in certain patient groups."

The first personhood initiative to make it onto a state ballot was in Colorado in 2008, a campaign Mason managed. It lost overwhelmingly, getting just 27 percent of the vote. Anti-abortion activists tried again two years later, and lost again, though that time they got 30 percent of the vote. Mason counts such incremental improvements as victories. "We literally converted people at the polls, and it's likely that we converted some Democrats to vote for the most pro-life position you could have," he says.

The campaign, he says, was a powerful anti-abortion organizing tool. "I've lived in Colorado," says Mason. "Before personhood, there were pro-life efforts, but they were hard to see. After personhood, we have a database of 320,000 pro-lifers in Colorado, with 4,000 people actively volunteering and donating."

Soon, with the help of Personhood USA, activists in other states were planning similar measures. "We are going to push to see personhood on the ballot in Arkansas, Nebraska, Oklahoma, North Dakota, Montana, Colorado, Florida, Oregon, and Ohio," says Mason. But first, there's Mississippi, which is probably the state where personhood has the best chance of passing.

For those who are pro-choice, it's easy to be complacent about this. After all, even if personhood passes, it almost certainly will be ruled unconstitutional. There are plenty of people in the anti-abortion movement who object to the personhood strategy for precisely this reason. Phyllis Schlafly's Eagle Forum came out against Colorado's personhood amendment, writing, "This poorly designed initiative would not prevent a single abortion even it if became law, and its vague language would enable more mischief by judges."

Alexa Kolbi-Molinas, staff attorney at the ACLU's Reproductive Freedom Project, agrees that the amendment won't stand, but insists that it could still have troubling repercussions. "People think, Oh well, they're going to try to ban abortion but they're not going to get away with it," she says. "In Mississippi, there are a host of other issues—how does it change property law, districting, how do you count your citizens. You could imagine a new court case filed every day."

It's important to note that while abortion and contraception are constitutionally protected rights, IVF is not. "It seems to me that there is a real denial of what this could or could not mean for IVF," says Jonathan Will, director of the Bioethics and Health Law Center at the Mississippi College School of Law. "In my mind what that it comes down to is how committed are we to this position that pre-embryos are people just like you and me. Because if we are committed to that position, these sort of restrictions logically follow from that commitment."

Mason insists that his preferred approach to IVF has been used successful in other countries, particularly Germany and Italy, which have had Europe's strictest laws governing IVF. In those countries, he says, "You create life that you're willing to give life to. In Germany, for instance, you create one embryo and you implant that embryo. In Italy, it's four children, whatever a woman can safely carry."

This isn't quite true, though Germany, where the legacy of Nazism has made anything that smacks of eugenics taboo, does indeed tightly regulate IVF. German doctors are limited to retrieving three eggs at a time, and all resulting embryos must be implanted, whatever their quality. (Egg donation and surrogacy are banned.) One result of these rules is that many Germans leave the country to seek help for infertlity; according to *The Independent,* of 400 foreign couples treated by Spain's Infertility Institute of Valencia in 2001, half came from Germany.

Meanwhile, following the passage of Italy's 2003 law regulating IVF, success rates dropped precipitously—according to one study, among younger patients with good ovarian response, the pregnancy rate went from 48.9 percent to 26.6 percent. The law has since been declared unconstitutional.

For Mississippi women desperate to become pregnant, the prospect of seeing their chances drastically curtailed is terrifying. Thus, they've been some of the strongest voices against the personhood amendment. A little over a month ago, Atlee Breland, a mother of three children conceived through intrauterine insemination—a less invasive form of assisted reproduction that couples often try before progressing to IVF—founded Parents Against 26, and has been traveling the state speaking out. "The medical realities of the IVF process definitely mean that 26 is a serious, serious threat to the family-building options of thousands and thousands of Mississippi women just like me," she says.

Her website is full of the testimonies of women, many of them anti-abortion, who worry that should Amendment 26 pass, they'll never have babies. "I will need another IVF cycle if not 2 or 3 more to achieve my dream of becoming a mother," wrote one woman. "My last IVF cycle, I had 21 eggs retrieved. A few days later, I had only 2 viable

embryos available to transfer. I cannot afford to do IVF if I can only have 2-3 eggs fertilized."

Mason is unapologetic about the limitations he hopes to impose. "I liken it to a building contractor that builds homes," he says. "[He] would prefer to build these homes without any building code, it would be cheaper, it would be easier for him to do that, but we have building codes to protect human life. We have regulations to protect human life. Personhood would create a need for regulation to protect human life in the IVF process. It may not be as financially lucrative for the IVF physician, but that shouldn't matter when we're dealing with human lives."

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-16-879

ANNE O'HARA BYNUM APPELLANT V. STATE OF ARKANSAS APPELLEE	**Opinion Delivered** March 14, 2018 APPEAL FROM THE DREW COUNTY CIRCUIT COURT [NO. 22CR-15-58] HONORABLE SAM POPE, JUDGE REVERSED AND REMANDED

DAVID M. GLOVER, Judge

Anne O'Hara Bynum was charged in Drew County Circuit Court with the offenses of concealing birth and abuse of a corpse. The circuit court granted Bynum's motion for directed verdict as to the offense of abuse of a corpse.[1] A jury, after deliberating for only four minutes, convicted Bynum of concealing birth, a Class D felony, and sentenced her to the maximum sentence of six years in prison. Bynum appeals, arguing the circuit court (1) erred in denying her motion to dismiss, timely renewed as a motion for directed verdict, both as a matter of statutory construction and constitutional law; (2) abused its discretion in allowing discussion of abortion, evidence of her abortion history, and evidence she ingested medication before giving birth; and (3) erred in allowing evidence of her purported admission during a pretrial competency exam when competency was not an issue at trial.

[1] The State cross-appealed the circuit court's grant of Bynum's directed-verdict motion for this offense but makes no argument on appeal regarding this issue. Therefore, the State has abandoned its cross-appeal.

We find merit in Bynum's argument that the circuit court abused its discretion in allowing the discussion of prior abortions, evidence of her abortion history, and evidence that she ingested medication prior to giving birth; therefore, we reverse and remand.

Factual Summary

There are no factual disputes. In early 2015, Bynum, a 37-year-old divorced woman living with her mother, stepfather, brother, and four-year-old son, T.B., outside of Monticello, discovered she was pregnant. She believed her mother would not allow her and T.B. to continue living in her home if her mother learned Bynum was pregnant; therefore, Bynum did not tell her mother about the pregnancy. However, Bynum told friends, her attorneys, and her priest about the pregnancy and of her intent to put the child up for adoption when it was born.

On March 27, 2015, when Bynum was more than thirty weeks pregnant, she traveled to a hotel in Little Rock and met her friends, Andrea Hicks and Karen Collins (the person whom she wanted to adopt her baby), the next day. Driving to Little Rock, Bynum ingested 44 casings from the drug Arthrotec, which contained the drug Misoprostol; she believed the Misoprostol would induce labor. Bynum's reasoning was it was becoming more difficult to lie all the time, she was getting larger, she was becoming attached to the baby, and she was concerned she would not be able to give the baby up if she carried it much longer. She claimed she was not trying to hurt the baby but was just trying to safely deliver it. Her plan was for Collins to take the baby to Children's Hospital after delivery; however, Bynum did not go into labor while in Little Rock. She returned home to Monticello, where she ingested eight more Arthrotec casings. Then, on March 31, 2015,

she learned from her attorneys, Sara Hartness and Sandra Bradshaw, that Collins would not be able to adopt her child due to domestic-abuse issues concerning her own children and her ex-husband; that information did not dissuade Bynum from pursuing other adoption alternatives with another family.

Bynum went into labor in the middle of the night on April 1, 2015, at her mother's mobile home. By herself, she delivered the fetus, which was still in its intact amniotic sac, in the bathroom after 3:00 a.m.[2] She said although she called for her brother, who was sleeping in the living room, he did not answer, and she did not awaken any other person in the house. According to Bynum, the baby did not move or cry, and she concluded the baby was deceased. In her third interview with Deputy Tim Nichols of the Drew County Sheriff's Department, Bynum stated she placed the baby in plastic sacks, put the bundle on a towel, cleaned up the bathroom, and took the baby to her vehicle, where she placed it on the front seat. She admitted she took those actions to keep her mother from finding out about the birth. Bynum stated she would have left the fetal remains in the bathroom if she had "felt like getting kicked out of the house immediately"; further, she placed the baby in the front seat of her vehicle because her vehicle was parked in front of the house and her mother always went out the back door.

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[2] Bynum had been pregnant with twins, but one fetus died earlier in the pregnancy, at an estimated gestational age of 16 weeks, while the second fetus died at an estimated gestational age of 33 weeks. The fact there were two fetuses was unknown to Bynum until the fetal remains were examined by a medical examiner. While there were two fetuses, Bynum was charged with only one count of concealing birth, and for the purposes of this opinion, we will refer to a single fetus.

Bynum's recall of events was that she became lightheaded after placing the baby in her vehicle, and she knew she could not drive; so she went back inside and went back to bed. Her mother awakened her a little after 6:00 a.m. Bynum got T.B. dressed, and her mother took him to school. Bynum ate a bowl of cereal and texted Hartness, who advised her to go see a doctor. Bynum had to wait until 8:00 a.m., when the doctor's office opened, to make an appointment; she attempted to see two doctors, but was unable to secure an appointment for that day with either of them. In the meantime, Hartness called a funeral home and was advised to have Bynum take the fetal remains to the hospital. Bynum arrived at Drew Memorial Hospital at approximately 10:40 a.m. on April 1. The fetal remains were subsequently examined by a medical examiner at the Arkansas State Crime Lab, where it was determined that the fetus was stillborn.

Sufficiency of the Evidence

On appeal, a motion for directed verdict is treated as a challenge to the sufficiency of the evidence. *Stearns v. State*, 2017 Ark. App. 472, 529 S.W.3d 654. Our court views the evidence in the light most favorable to the State and affirms if there is substantial evidence to support the verdict; only evidence supporting the verdict will be considered. *Id.* Substantial evidence is evidence forceful enough to compel a conclusion one way or the other beyond suspicion or conjecture. *Kauffeld v. State*, 2017 Ark. App. 440, 528 S.W.3d 302. Our court does not weigh the evidence presented at trial or assess the credibility of the witnesses, as those are matters for the fact-finder. *Id.* The trier of fact is free to believe all or part of any witness's testimony and may resolve questions of conflicting testimony and inconsistent evidence. *Mercouri v. State*, 2016 Ark. 37, 480 S.W.3d 864.

When reviewing a sufficiency-of-the-evidence challenge, appellate courts consider evidence both properly and improperly admitted. *Means v. State*, 2015 Ark. App. 643, 476 S.W.3d 168.

Arkansas Code Annotated section 5-26-203(a) (Repl. 2013) provides that a person commits the offense of concealing birth "if he or she hides the corpse of a newborn child with purpose to conceal the fact of the child's birth or to prevent a determination of whether the child was born alive."

Bynum argues Arkansas Code Annotated section 5-26-203(a) cannot apply to the facts of this case because the statute "does not criminalize a woman's choice to withhold the fact of pregnancy or a stillbirth from her own mother," and the State "presented no proof of hiding or prevention of the determination of whether there was a live birth." Bynum argues she did not conceal the delivery of her stillborn child, as she disclosed the fact she had delivered the child by contacting her attorney via text, seeking medical assistance, and taking the fetal remains to the hospital within hours after the delivery, thereby facilitating the determination that it was a stillbirth. Bynum contends this statute seeks to punish people who seek to permanently conceal a birth, not those who do not immediately tell their mothers about a stillbirth. She alleges that section 5-26-203(a) does not include a requirement to report a stillbirth, much less prescribe a time limit for doing so.

We hold that sufficient evidence supports Bynum's conviction under the statute. To support a conviction under this statute, the State must prove that a person hid a newborn's corpse with purpose (1) to conceal the fact of the child's birth; or (2) to prevent a

determination of whether the child was born alive.[3] One's intent or purpose at the time of an offense, being a state of mind, can seldom be positively known by others. *Turner v. State*, 2018 Ark. App. 5, ___ S.W.3d ___. Since intent cannot ordinarily be proved by direct evidence, jurors are allowed to draw on their common knowledge and experience to infer intent from the circumstances. *Id.* Because of the difficulty in ascertaining a person's intent, a presumption exists that a person intends the natural and probable consequences of his or her acts. *Id.*

Here, Bynum admitted she hid her stillborn child from her mother when she wrapped the child in plastic sacks, laid the bundle on a towel, placed it in the front seat of her vehicle, and locked the car. Bynum testified she knew her mother would not see the stillborn child because her mother left the house through the back door, not the front door, and Bynum's vehicle was parked in front of the house. The statute does not specify how long a newborn's corpse must be concealed to be found guilty of this offense, nor does it provide for the prospect that a person can conceal a birth by hiding the corpse temporarily but then can be exempt from the statute's dictates if he or she reveals the birth to a person a few hours later.

Viewing the evidence in the light most favorable to the State, as we must, we hold that the jury, as the finder of fact and the assessor of witness credibility, could, on the evidence presented, determine that Bynum purposely concealed the fact of the child's birth

[3] The evidence shows medical personnel were able to determine that the child was stillborn; therefore, the second purpose for concealing the birth—to prevent the determination of whether the child was born alive—does not apply in this case.

when she hid the corpse of her stillborn child in her vehicle, thus committing the offense of concealing birth. Therefore, we affirm on this point.

Constitutional Arguments (Void for Vagueness)

In her motion to dismiss, Bynum argued Arkansas Code Annotated section 5-26-203 is void for vagueness because "it lacks ascertainable standards of guilt such that persons of average intelligence must necessarily guess at its meaning and differ as to its application." (citing *Booker v. State*, 335 Ark. 316, 984 S.W.2d 16 (1998)). She argues a person of reasonable intelligence "could not have known that experiencing a stillbirth at home at 3 a.m. and not telling her mother, but telling her lawyer, physicians, and medical authorities and bringing the unaltered fetal remains to a hospital within eight hours constitutes a crime." Bynum further contends the statute is vague because it encroaches upon a defendant's fundamental constitutional privacy rights and infringes on a defendant's due-process rights to liberty and privacy under the Fourteenth Amendment.

Preclusion. First, we must determine if Bynum can make a constitutional argument on appeal. The State argues Bynum cannot raise a challenge regarding the constitutionality of section 5-26-203 because she failed to notify the Attorney General of her intent to mount a constitutional challenge. Arkansas Code Annotated section 16-111-111 (Repl. 2016) (formerly codified at Arkansas Code Annotated section 16-111-106), provides, "When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. . . . [I]f [a] statute is alleged to be unconstitutional, the Attorney General of the State shall also be served with a copy of the proceeding and be

entitled to be heard." The purpose of notifying the Attorney General of constitutional attacks on statutes is to prevent a statute from being declared unconstitutional in a proceeding that might not be a complete and fully adversarial adjudication. *In re Guardianship of A.M.*, 2012 Ark. 278. We disagree with the State's argument that Bynum's arguments regarding the constitutionality of section 5-26-203, if preserved, cannot be heard for failure to notify the Attorney General. The cases cited by the State in support of this contention are civil matters, not criminal matters. In a criminal trial, the prosecutor, who is the person who determines what criminal charges to bring against a defendant, is necessarily a party to the matter and is available to provide a complete and fully adversarial adjudication of the matter of the constitutionality of a criminal statute. As the State was a party to the proceedings and had the opportunity to fully defend against the constitutional challenge, we hold the State's preclusion argument must fail.

Encroachment. Even though Bynum is not precluded from making constitutional arguments on appeal, we nevertheless hold that her arguments that the statute is vague due to encroachment on a defendant's privacy rights and is a violation of due-process rights to liberty and privacy under the Fourteenth Amendment are not preserved for our review. These arguments were mentioned in passing to the circuit court; no substantial argument was presented. In criminal cases, issues raised, including constitutional issues, must be presented to the circuit court to preserve them for appeal; the circuit court must have the benefit of the development of the law by the parties to adequately rule on the issues. *Gooch v. State*, 2015 Ark. 227, 463 S.W.3d 296. We will not consider an argument raised for the first time on appeal or that is fully developed for the first time on appeal. *Id.* Furthermore,

a party cannot change his or her grounds for an objection or motion on appeal but is bound by the scope of arguments made at trial. *Id.*

Fair Notice. Bynum next argues that finding the concealing-birth statute to be constitutional is an impermissible judicial expansion of the law and makes the statute too vague to give any pregnant woman and newly delivered mother clear notice of what constitutes concealment of birth. While this argument was preserved for appellate review, we cannot agree with Bynum's contention.

There is a presumption of validity attending every consideration of a statute's constitutionality that requires the incompatibility between it and the constitution to be clear before the statute is held to be unconstitutional; if possible, the appellate courts will construe a statute so that it is constitutional. *Anderson v. State*, 2017 Ark. 357, 533 S.W.3d 64. Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality, and the heavy burden of demonstrating the unconstitutionality is on the one attacking the statute. *Id.* As statutes "are presumed to be framed in accordance with the Constitution, they should not be held invalid for repugnance thereto unless such conflict is clear and unmistakable." *Bowker v. State*, 363 Ark. 345, 355, 214 S.W.3d 243, 249 (2005). "Invalidating a statute on its face is, manifestly, strong medicine that has been employed sparingly and only as a last resort." *Anderson*, 2017 Ark. 357, at 3, 533 S.W.3d at 67.

A law is unconstitutionally vague under due-process standards if it does not give a person of ordinary intelligence fair notice of what is prohibited, and it is so vague and standardless that it allows for arbitrary and discriminatory enforcement. *Bowker, supra.* The constitutionality of a statutory provision being attacked as void for vagueness is determined

by the statute's applicability to the facts at issue. *Id.* When challenging the constitutionality of a statute on grounds of vagueness, the person challenging the statue must be one of the "entrapped innocent" who has not received fair warning; if, by his or her action, that individual clearly falls within the conduct proscribed by the statute, he cannot be heard to complain. *Id.*

Concealment. A person conceals a birth if the corpse of a newborn child is hidden for the purpose of either concealing the fact of the child's birth or preventing a determination of whether the child was born alive. The portion of the statute at play in this case is whether the child was hidden to conceal the child's birth. Bynum argues she could not have known that experiencing a stillbirth at home at 3 a.m. and not telling her mother, but telling her attorney, physicians, and medical authorities later in the morning and taking the fetal remains to a hospital eight hours later constitutes a crime. Bynum further argues that the statute was impermissibly expanded by the circuit court from a statute prohibiting an intentional action—concealing—to effectively mandating specific actions—reporting within a time frame. We cannot agree.

There is no question Bynum hid the stillborn fetus by placing it in her vehicle, where only she knew of it. Furthermore, as discussed above, the jury was tasked, as the finder of fact, to decide why Bynum had placed the stillborn fetus in her vehicle, and the jury determined it was to conceal the fact of the birth. This statute does not provide for any exceptions, including a "grace period" for concealment, nor does it require the concealment be permanent. A jury could determine that the offense was committed when Bynum hid the fetus in her vehicle. While harsh, this statute is clear enough to survive Bynum's

constitutional challenge. Bynum cannot, in other words, successfully claim to be an "entrapped innocent," as her actions fell within the conduct proscribed by the statute. We affirm on this point.

Evidentiary Issues

Bynum next argues the trial court abused its discretion by allowing discussion of abortion, Bynum's abortion history, and evidence that Bynum had ingested medication prior to giving birth. We agree that the trial court abused its discretion in allowing this information to be presented to the jury; therefore, we reverse and remand on this issue.

A circuit court has broad discretion in evidentiary rulings, and the appellate courts will not reverse an evidentiary ruling absent an abuse of that discretion. *Jefferson v. State*, 2017 Ark. App. 536, 532 S.W.3d 593. Abuse of discretion is a high threshold that does not simply require error in the circuit court's decision but requires the circuit court act improvidently, thoughtlessly, or without due consideration. *Id.* Furthermore, we will not reverse absent a showing of prejudice, as prejudice is not presumed. *Id.*

Bynum filed a motion in limine on August 10, 2015, seeking to prohibit the State from referencing or introducing evidence she had ingested pharmaceutical substances prior to her delivery of the stillborn fetus and to prevent any mention of abortion. She argued there was no contention pharmaceutical drugs had caused the stillbirth; therefore, evidence of such ingestion was not probative of any element of the offense charged and was therefore not relevant. She further argued that even if there was some relevance, prejudice would outweigh any probative value. The State opposed the motion, arguing her plan to achieve concealment was to take the labor-inducing drugs to induce premature delivery in secret,

and such actions were proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident. The State claimed it was entitled to present evidence that explained the act, provided a motive for acting, or illustrated the accused's state of mind. After a hearing on the motion on February 16, 2016, the circuit court denied Bynum's motion, holding that the State bore the burden of showing the purpose to conceal, and proof of a plan or motive was helpful and made the motive or plan admissible.

Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would without the evidence." Ark. R. Evid. 401. Rule 402 of the Arkansas Rules of Evidence provides, "All relevant evidence is admissible, except as otherwise provided by statute or by these rules or by other rules applicable in the courts of this State. Evidence which is not relevant is not admissible." Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice. Ark. R. Evid. 403. "Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." Ark. R. Evid. 404(b).

Bynum makes a passing argument that constitutional due process guarantees "fundamental fairness," which the State argues is not preserved for appellate review because it was not made below. The State is correct; no constitutional argument was made to the circuit court. Appellate courts will not consider an issue raised for the first time on appeal. *Gooch*, *supra*.

The State argues that Bynum failed to object to the admission of the three recorded statements she gave to the sheriff's department, and that this court should not address her expanded arguments that are raised for the first time on appeal. We do not agree with the State's assertion. Bynum made a motion in limine to exclude evidence of her ingestion of the pharmaceutical substances prior to delivery and to exclude any discussion of abortion. The circuit court denied her motion. Therefore, Bynum has properly preserved this issue for appellate review.

The State argues the circuit court properly admitted evidence of abortion, Bynum's Arthrotec consumption, and her abortion history under Rule 404(b) of the Arkansas Rules of Evidence because, even though it did not speak directly to an element of the charges against her, it was relevant to demonstrate proof of her motive to induce labor through abortion-related drugs and then conceal the birth. Bynum counters that the evidence was not relevant and served only to support the State's theory that she had intended to have an abortion rather than an early delivery. She further argues such evidence inflamed the jurors' passions and encouraged them to deliver a guilty verdict in four minutes on the improper basis of her abortion history and ingestion of Arthrotec.

We find merit in Bynum's argument and hold that the circuit court abused its discretion in admitting this evidence. The elements of the offense of concealing birth that must be proved by the State are that the corpse of a newborn child is hidden with purpose (1) to conceal the fact of the child's birth or (2) to prevent a determination of whether the child was born alive. It is undisputed that the child was not born alive. Neither whether Bynum had taken pharmaceutical drugs prior to delivery nor any evidence of abortions (or

the number of them) she had previously undergone is relevant to the charge that she had committed the offense of concealing birth; they did not tend to make it more or less probable Bynum had hidden her newborn's corpse with purpose to conceal the birth. Even if they could be deemed relevant, their probative value was substantially outweighed by the danger of unfair prejudice. No evidence was presented to show Bynum's ingestion of Arthrotec was the reason the child was stillborn, and rightly so, as Arkansas Code Annotated section 5-61-102(c) (Repl. 2016), the statutory provision addressing unlawful abortion, provides, "Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero." Therefore, Bynum could not be charged with, or convicted of, a criminal offense in the death of her stillborn child; yet the State was allowed—through the introduction of the evidence of Bynum's prior abortion history and that she had taken medication prior to delivery of her stillborn child that might induce early labor—to imply Bynum's "[M]otive or plan" was to have another abortion. Bynum's attorney rhetorically asked at oral argument, "motive or plan to do what?" The only evidence of plan or motive was that Bynum intended to have her baby adopted, that she had taken substantial steps to do just that by contacting an adoption attorney, that she was attempting to have one of her friends adopt the child, and when that was not possible, that she pursued alternative adoptive placements. Bynum was clearly prejudiced by the introduction of this irrelevant evidence, as shown by the four-minute verdict and maximum prison sentence allowed by law.

Purported Admission During Pretrial Competency Examination

In her last argument, Bynum contends the circuit court abused its discretion in allowing her purported admission during a pretrial competency exam, when competency was not an issue at trial. Prior to trial, Bynum's defense counsel requested an evaluation of Bynum's mental competence at the time of her alleged conduct, and the circuit court ordered a competency exam. Dr. Myeong Kim performed the mental evaluation, determining Bynum was competent at the time of the offense and was competent to stand trial. Dr. Kim noted in his report that Bynum was advised of the nature and purpose of the exam, the exam was voluntary and not confidential, a report would be made to the circuit court, and the examiner might be required to testify. Having been apprised of these parameters, Bynum agreed to be interviewed. Over Bynum's objection, Dr. Kim was called as a witness for the State at trial, and his testimony was that Bynum had told him she was guilty of concealing birth but not guilty of abusing a corpse. Bynum argues it was error for that statement to be admitted.

A circuit court's decision to admit expert testimony is reviewed for an abuse of discretion. *Miller v. State*, 2010 Ark. 1, 362 S.W.3d 264. To show that a circuit court abused its discretion, it must be established the circuit court acted improvidently, thoughtlessly, or without due consideration, thereby causing prejudice. *Id.*

Bynum argues that even though there was no issue raised at trial regarding her competency, the circuit court nevertheless, over her objection, allowed Dr. Kim to testify about statements she allegedly made during the competency exam. Dr. Kim was declared to be an expert in the field of forensic psychological examinations. He testified to, and

included in his report, his recollection that Bynum told him during her examination that she was guilty of concealing birth but not guilty of abusing a corpse.

Bynum argues admission of this statement violated her federal constitutional rights to due process and against self-incrimination. In support of her argument, Bynum cites *Porta v. State*, 2013 Ark. App. 402, 428 S.W.3d 585, in which our court held it was error for the circuit court to allow a forensic psychologist to testify about incriminating statements made by Porta during the mental-health examination during the State's case-in-chief because allowing the incriminating statements placed Porta in a situation that required him to sacrifice one constitutional right (exercising his Fifth Amendment right to not incriminate himself) in order to claim another (his due-process right to seek out available defenses).

We cannot reach the merits of Bynum's constitutional arguments because these specific arguments were never made to the circuit court. Even constitutional arguments must be first raised in the circuit court to preserve them for appellate review. *Gooch, supra.*

Bynum next argues that allowing her statement to Dr. Kim that she had committed the offense of concealing birth violated the physician-patient privilege under Rule 503 of the Arkansas Rules of Evidence. Arkansas Code Annotated section 5-2-307 provides that a statement made by a person during an examination is admissible as evidence only to the extent permitted by the Arkansas Rules of Evidence and if the statement is constitutionally admissible. Arkansas Rule of Evidence Rule 503(d)(2) provides, "If the court orders an examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, communications made in the course thereof are not privileged under this rule

with respect to the particular purpose for which the examination is ordered unless the court orders otherwise."

Like her constitutional arguments, Bynum has raised the violation of evidentiary rules for the first time on appeal. Because she did not make this argument to the circuit court, it is not preserved for appellate review. *Gooch, supra.*

Bynum's last argument is that Dr. Kim's testimony regarding her statements made during her competency exam amount to a legal conclusion. We do not agree. A legal conclusion is opinion testimony that "tells the jury what to do." *Marts v. State*, 332 Ark. 638, 642, 968 S.W.2d 41, 48 (1998). As the State points out, Dr. Kim did not offer any opinion testimony about whether Bynum was guilty of concealing birth; he merely reported that Bynum made the statement during her examination that she was guilty of concealing birth. He did not testify whether he believed Bynum was guilty of concealing birth. Dr. Kim provided a factual account of Bynum's admission; this recitation alone did not make the statement become Dr. Kim's opinion. It was not an inadmissible legal conclusion. We affirm on this point.

Reversed and remanded.

GRUBER, C.J., agree.

HARRISON, J., concurs.

ARKANSAS COURT OF APPEALS

DIVISION III
No. CR-16-879

	Opinion Delivered March 14, 2018
ANNE O'HARA BYNUM APPELLANT	APPEAL FROM THE DREW CIRCUIT COURT [NO. 22CR-15-58]
V.	HONORABLE SAM POPE, JUDGE
STATE OF ARKANSAS APPELLEE	CONCURRING OPINION

BRANDON J. HARRISON, Judge

I join my colleagues' thorough opinion in every respect except one point of dictum. The majority cites Ark. Code Ann. § 5-61-102(c) and states that Bynum could not have been charged with or convicted of a criminal offense in the death of her stillborn child. The statement is made in the context of explaining why a prejudicial evidentiary error was injected into the case. My concern is that this statute is not at issue in this case because Bynum was not charged with committing a crime under it, and the jury was not instructed to return a verdict on such a charge. In its entirety, that statute states:

> (a) It is unlawful for any person to administer or prescribe any medicine or drug to any woman with child with the intent to produce an abortion or premature delivery of any fetus before or after the period of quickening or to produce or attempt to produce the abortion by any other means.
>
> (b) Any person violating a provision of this section is guilty of a Class D felony.
>
> (c) Nothing in this section shall be construed to allow the charging or conviction of a woman with any criminal offense in the death of her own unborn child in utero.

Ark. Code Ann. § 5-61-102 (Repl. 2016).

First, the statute appears to be at war with itself: is subsection(a) not in conflict with subsection(c)? If not, why not? Whatever the answers, the main hang-up for me is that the parties did not brief the role that section -102 had in the case, the circuit court never made any decisions based on it, and the jury was not tasked to return a verdict on whether section -102 had been violated. I therefore prefer to express no view on the statute's potential application or scope.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

TAMARA M. LOERTSCHER,

Plaintiff,

v.

OPINION & ORDER

ELOISE ANDERSON, BRAD D. SCHIMEL, and TAYLOR COUNTY,

14-cv-870-jdp

Defendants.

Under 1997 Wisconsin Act 292, Wisconsin's juvenile courts may treat an unborn child of any gestational age as a child in need of protection or services if the "expectant mother's habitual lack of self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, [poses] a substantial risk" of harm to the unborn child. Wis. Stat. § 48.193.

Plaintiff Tamara M. Loertscher filed this case when she was an expectant mother subject to a state-court child in need of protection or services order issued under the authority of Wisconsin's Children's Code, as amended by Act 292. Following a report of unborn child abuse, Loertscher was detained for several days in a hospital, and later incarcerated for contempt of the juvenile court for 18 days, until she signed a consent decree requiring her to submit to drug monitoring and treatment by county authorities. She gave birth in January 2015. Her consent decree has since expired, and all proceedings against her have terminated. But Loertscher persists in her challenge to Act 292, which she contends is unconstitutional both facially and as applied to her.

Loertscher brings this case under 42 U.S.C. § 1983, which authorizes suits in federal court to redress violations of federal constitutional rights by state actors. Loertscher contends

that the Act is void for vagueness and that it violates her substantive due process rights, procedural due process rights, First Amendment rights, Fourth Amendment rights, and right to equal protection. She asks this court to declare Act 292 unconstitutional and to enjoin its enforcement. Loertscher also seeks money damages from Taylor County for its hand in enforcing Act 292 against her.

Now before the court are the parties' motions for summary judgment, which address each of the constitutional issues in the case. But the court will decide only two of these issues, which will dispose of this case.

First, the court concludes that the Act is void for vagueness, and it will grant Loertscher's motion for summary judgment on that basis. At the heart of the Act are two concepts: "habitual lack of self-control" and "substantial risk to the physical health of the unborn child." Both concepts are essential components of the jurisdictional and substantive standards in the Act. But, for reasons explained in this opinion, neither of these concepts is amenable to reasonably precise interpretation. Thus, the Act affords neither fair warning as to the conduct it prohibits nor reasonably precise standards for its enforcement. The court will enjoin enforcement of the Act statewide. Because Loertscher will get the injunctive relief she requests as a result of this ruling, the court need not reach the other difficult constitutional questions raised by the parties' motions. The Act's other potential constitutional problems may be ameliorated if its jurisdictional and substantive standards are drawn with adequate clarity.

Second, the court will grant summary judgment in favor of the County as to Loertscher's claim against it under *Monell v. Department of Social Services of New York*, 436 U.S. 658 (1978). Loertscher has failed to show that the manner in which the Act was enforced

against her can be traced to decisions by the County itself. As a consequence of this decision, Loertscher is not entitled to monetary damages.

UNDISPUTED FACTS

Except where noted, the following facts are undisputed.

A. The Act

Under Wisconsin's Children's Code, the Department of Children and Families and county social service departments are responsible for protecting children who are being abused or neglected. If the county social service department deems it necessary, such a child may be the subject of a petition concerning a child in need of protection or services—commonly known as a CHIPS petition—filed with the juvenile court of that county. If the court grants the CHIPS petition, protective services may be ordered for the child. In severe cases, the child may be removed from the parents' home and placed in protective custody.

In 1997, the Wisconsin Supreme Court held that Wisconsin's Children's Code did not authorize a juvenile court to exercise jurisdiction over an adult pregnant woman in connection with a CHIPS proceeding. *See State ex rel. Angela M.W. v. Kruzicki*, 209 Wis. 2d 112, 561 N.W.2d 729 (1997). And so the legislature set out to change that, by passing 1997 Wisconsin Act 292 (the Act).

1. Early reactions

Before the legislature passed the Act, the Wisconsin Legislative Council warned the legislature that extending the Act to "all stages of pregnancy" would render its constitutionality "*highly doubtful*." Dkt. 179-2, at 2 (emphasis in original). And the Wisconsin Division of Children and Family Services (now the Department of Children and Families),

the Division of Public Health's substance abuse bureau, and the City of Milwaukee Health Department opposed the Act. Specifically, the DCFS feared that the Act would scare women away from treatment and vital prenatal care, and the City of Milwaukee Health Department opposed the Act in light of "the serious potential [the Act] has for reducing the length and quality of prenatal care in this state, thereby negatively affecting the health of mothers and children." Dkt. 179-3, at 2. Both organizations were concerned that "a criminal justice approach to maternal and child health is not the best alternative, that it is destructive, and that readily available drug and alcohol treatment for expectant mothers would be preferable to threatening mothers with incarceration and loss of paternal rights." Dkt. 218, ¶ 35.

Regardless of the foregoing, the legislature passed the Act, and it went into effect in June 1998.

2. The specifics

The Act grants juvenile courts jurisdiction over "an unborn child" and the "expectant mother" when the mother "habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control." Wis. Stat. § 48.133. The Act extends various aspects of the Children's Code to unborn children in need of protection or services; the court will highlight a few. The Act allows those who enforce it to take a pregnant woman into custody. § 48.193. The Act allows those who enforce it to hold a pregnant woman in custody if there is "probable cause to believe that the adult expectant mother is within the jurisdiction of the court," and to believe that the woman "is refusing or

has refused to accept any alcohol or other drug abuse services offered to her or is not making or has not made a good faith effort to participate in any alcohol or other drug abuse services offered to her." § 48.205(1m). The court may appoint a guardian ad litem to "advocate for the best interests of" the unborn child and "[m]ake clear and specific recommendations to the court concerning the best interest of the . . . unborn child at every stage of the proceeding." § 48.235(3). The court may order a pregnant woman to submit to inpatient alcohol or drug treatment. § 48.347.

The Child Protective Services Access and Initial Assessment Standards (CPS Standards), drafted by the Department of Children and Families, guide child protective services caseworkers when they screen, investigate, and assess reports of child abuse. The standards provide that an agency that receives a report of unborn child abuse must document the report and make a screening decision—i.e., whether to dismiss the report or pursue it. The screening standard is whether there is reasonable suspicion that the woman is pregnant, that her behavior indicates "a habitual lack of self-control . . . in the use of alcohol, controlled substances or controlled substance analogs to a severe degree," and that the abuse could cause physical harm to the unborn child or a risk of serious harm to the child when born. Dkt. 169-1, at 23.

After a report is screened in, the case is assigned to a county initial assessment worker for investigation and assessment. The individual will gather the following information from the reporter:

> Verification of pregnancy or information to support that the woman or girl is pregnant and, if possible, what month of the pregnancy she is in.
>
> A description of the substances and quantity of substances she is alleged to be using.

> A description of the behaviors that lead the reporter to believe that the expectant mother is demonstrating a habitual lack of control or that her substance abuse is exhibited to a severe degree.
>
> The history of her substance abuse, treatment received and previous children who were born with the effects of alcohol or other drugs used during pregnancy.
>
> A description of the prenatal care the expectant mother is receiving, if any, and the name of the doctor and medical clinic where she receives services.
>
> A description of the expectant mother, highlighting individual functioning and her parenting practices, if other children are residing in the household.

Id. at 16.

B. County enforcement of the Act

The CPS program is state supervised and county administered in 71 counties, including Taylor County. The CPS Standards are designed to control county-level decisions as employees navigate unborn CHIPS (UCHIPS) reports from beginning to end. Between 2005 and 2014, 3,326 reports of unborn child abuse were "screened-in" under the Act, and 467 of those reports were substantiated.

C. Loertscher's experience

In 2014, Loertscher was 29 years old and living in Taylor County, Wisconsin. Loertscher had radiation treatment in her teens that left her without a functioning thyroid: she suffers from hypothyroidism and cannot produce thyroid hormones without medication. When she does not take her thyroid medication, Loertscher experiences severe depression and fatigue. Loertscher believed that her hypothyroidism would make it difficult, if not impossible, for her to get pregnant.

Loertscher was unemployed in February 2014, which left her unable to pay for her thyroid medication. And so she sank into depression. In late February or early March 2014, Loertscher began using methamphetamine two to three times per week to "help her get out of bed in the morning." Dkt. 218, ¶ 74. Loertscher was also using marijuana at that time.

1. Loertscher's pregnancy

In early July 2014, Loertscher suspected that she might be pregnant, took a home pregnancy test, and received what appeared to be a positive result. Yet Loertscher continued to use methamphetamine. Loertscher took a second pregnancy test on July 30, received a positive result, and "believed for the first time that she might actually be pregnant." *Id.* ¶ 84. (Defendants dispute that Loertscher did not believe that she was pregnant until then, pointing to Loertscher's admissions to medical staff that she had "cut back" her drug use after taking the first pregnancy test and that she knew that she was taking illicit drugs while pregnant.)

Two days later, Loertscher went to the Taylor County Department of Human Services (TCDHS) to confirm her pregnancy and to receive treatment for her thyroid condition. TCDHS personnel told Loertscher to go to the Eau Claire Mayo Clinic Hospital emergency room, and she did. When she arrived, Loertscher explained that she needed medical and psychiatric care, that she believed that she was pregnant but wanted confirmation, and that she wanted to make sure that her baby was healthy. Loertscher provided a urine sample, and testing revealed a positive pregnancy and "unconfirmed positives" for methamphetamine, amphetamine, and THC (marijuana). The emergency room doctor told Loertscher that drug use is bad for a baby, and Loertscher indicated that she wanted to stop. Loertscher wanted to have a healthy baby and to take care of herself.

That evening, Loertscher was voluntarily admitted to the Mayo Clinic Behavioral Health Unit. The next morning, Mayo Clinic personnel gave Loertscher the thyroid medication she needed. A psychiatrist informed her that her thyroid stimulating hormone levels were very high and that healthy thyroid function was important to ensure a healthy pregnancy. The psychiatrist asked Loertscher about her past drug use, and Loertscher stated that she had been self-medicating with marijuana and, primarily, methamphetamine. Loertscher emphasized that she had been using the drugs before she knew that she was pregnant. (Again, defendants dispute this point, pointing to medical records from that time that indicate that Loertscher knew she was pregnant as she continued to use drugs.)

Later that evening, Loertscher met with Jennifer Bantz, an obstetrician at Mayo. Bantz showed Loertscher ultrasound images of her fetus and told her that the baby looked fine. Bantz asked Loertscher about her alcohol use, and Loertscher explained that she drank a small amount of alcohol during her pregnancy, before she knew she was pregnant.

Loertscher's medical records from that time indicate that she "has polysubstance abuse," that she cut back her methamphetamine use to "perhaps once or two times a week" after "she found out that she was pregnant," and that she suffers from methamphetamine dependence, marijuana dependence, and alcohol abuse. Dkt. 184-7, at 36-37, 39.

2. Mayo reports Loertscher to the County

Two days later, on August 4, while Loertscher was still in the hospital, Corinna Everson, a Mayo social worker, contacted the TCDHS to report that Loertscher was three months pregnant, had tested positive for methamphetamine, amphetamine, and THC, had "used alcohol during her pregnancy as well, to the point of blacking out," and had confirmed that she had used drugs while pregnant. Dkt. 169-4, at 6. Everson reported that a Mayo

physician had stated that Loertscher's behavior was putting her fetus in serious danger of harm.

TCDHS employees "screened" the Mayo report that day. An intake worker screened in Loertscher's case and assigned it to TCDHS social worker Julie Clarkson. The intake worker did not contact a physician or review Loertscher's medical records when she decided that the County would investigate and assess the report.

Clarkson began her investigation by contacting Everson to gather more information. Clarkson's notes indicate that Loertscher had been diagnosed with "Major Depressive Disorder with Recurrent psychosis-NOS, meth dependence, marijuana dependence and alcohol abuse," although it is unclear where Clarkson got that information. *Id.* at 12. At 12:30 that afternoon—August 4, 2014—Clarkson, TCDHS Deputy Director Liza Daleiden, and Mike Sanderson (an Alcohol and Other Drug Abuse counselor) decided to recommend that Loertscher be placed in an inpatient treatment facility.

Clarkson continued her investigation to substantiate the alleged abuse. Applicable state guidelines from the Department of Children and Families instruct child protective services caseworkers to gather information regarding (1) "[t]he unborn child's fetal development as reported by a physician"; (2) "[t]he expectant mother's current use of substances and the impact it is having on her, the unborn child and, when applicable, other children in her care"; and (3) "[a]ny substance abuse history and treatment, criminal history, and, when applicable, any history of other children born with the effects of alcohol or other drugs used during pregnancy." Dkt. 179-8, at 5-6. Clarkson requested Loertscher's medical records from Mayo, which stated that she had "polysubstance abuse," that she used methamphetamine daily but decreased her use to "perhaps once or two times a week" after

she "found out that she was pregnant," and that she knew she was pregnant when she continued to use methamphetamine. Dkt. 184-7, at 36-37, 42. (Loertscher disputes this and maintains that she did not know, for sure, that she was pregnant when she was using.)

At 3:20 p.m., Clarkson called Loertscher and informed her of the open investigation. Clarkson told Loertscher that if she did not agree to voluntarily receive AODA treatment, the TCDHS may request to take Loertscher into temporary physical custody. Around 40 minutes later, County personnel had completed a temporary physical custody request.

That same day, Loertscher met with a hospital social worker. After, Loertscher told hospital staff that she did not want to speak with the social worker again, "because the social worker had been judgmental and unhelpful." Dkt. 218, ¶ 128. Loertscher then told staff that she wanted to leave. But a nursing manager told Loertscher that she could not leave because there was a "hold" on her. In the meantime, the County had appointed a guardian ad litem (GAL) to act on behalf of Loertscher's fetus.

3. Temporary physical custody hearing

On August 5, 2014, a Mayo social worker led Loertscher to a conference room at the hospital and told Loertscher that there was a judge on the phone for her. In fact, Loertscher was about to participate, by phone, in her temporary physical custody hearing. The State maintains that Everson had told Loertscher about the hearing earlier that morning; Loertscher maintains that she did not understand what was going on. Loertscher stated that she did not wish to speak without legal representation and that she did not want to take part in the proceeding until she had a lawyer. Then Loertscher left the room. The Taylor County court commissioner, TCDHS corporation counsel, the GAL, and other TCDHS personnel were present on the other end of the phone. The court commissioner determined that

Loertscher had waived her appearance and that the hearing would continue in her absence. The court took testimony from Bantz, the Mayo obstetrician, who later testified that she did not fully understand the purpose or implications of the hearing. Dkt. 149 (Bantz Dep. 49:18-23). Bantz testified that Loertscher was approximately 14 weeks pregnant and that she had reported using methamphetamine three times per week during her pregnancy, using marijuana throughout her pregnancy, and using alcohol a few times. Bantz testified about the effects of methamphetamine and marijuana use and alcohol consumption on pregnancy. Bantz disclaimed that she is "not an expert witness in this respect," but went on to testify that THC could "potentially" cause "cognitive deficits" and that methamphetamine tends to lead to newborns that are "smaller at the gestational age" and could cause cognitive problems later in life. Dkt. 1-2, at 17. Bantz stated that she believes "that if [Loertscher] continued with the methamphetamine use that potentially she's putting an increased risk for more complications in that child, potentially cognitive," and that continued use could "directly affect her ability to perhaps make good decisions, such as proper prenatal care and—and adequate care for herself, such as nutrition which would affect the growth of the baby." *Id.* at 18-19. Bantz was also concerned about Loertscher's hypothyroidism. She ultimately recommended inpatient drug treatment for Loertscher. At the close of the hearing, the court entered an order of temporary physical custody against Loertscher: the order required Loertscher to stay at Mayo until she was "cleared," at which time she would transfer to an inpatient drug treatment facility "until the program directors deem it appropriate to release her." Dkt. 1-3, at 4-5.

4. Loertscher leaves Mayo

But Loertscher was not resigned to her fate. On August 7, Mayo personnel told Loertscher that she would need to submit to a tuberculosis blood test before the inpatient treatment facility—the Fahrman Center—would admit her. She refused (although she did offer to submit to an alternative tuberculosis test that did not require a blood draw). Loertscher told Mayo personnel that she wanted to stay on her thyroid medication, get a prescription for prenatal vitamins, choose her own healthcare providers, and leave the hospital immediately. Mayo authorized her discharge. Her treating doctor told Clarkson that he did not feel that Loertscher was "an imminent danger to herself or others and that just because she has used in [t]he past does not mean she will again." Dkt. 179-20, at 7.

5. Contempt

Several days later, on August 11, 2014, the GAL representing Loertscher's fetus's interests filed a motion for remedial contempt against Loertscher in the Circuit Court for Taylor County, requesting that the court hold Loertscher in contempt pursuant to Wis. Stat. § 785.04 if she did not comply with the terms of the temporary physical custody order (i.e., inpatient drug treatment). Essentially, the GAL argued that Loertscher violated the order when she refused to submit to a tuberculosis test. The court scheduled a hearing on the motion for August 25.

Two days later, the County filed a "motion to take expectant mother into immediate custody." Dkt. 1-5. The court granted the motion the same day, stating that "[i]t is contrary to the unborn child's best interest for her mother to be released from custody and returned home due to the expectant mother's habitual use of controlled substances and her violation of the TPC Order." Dkt. 1-6, at 2. As a result, a police officer came to Loertscher's

grandparents' house, where she was staying, and told her family that he had come to arrest her pending a court date. Loertscher's grandfather assured the police officer that Loertscher would appear for the hearing, and the officer left without arresting her.

True to her word, Loertscher appeared at the August 25 hearing. The GAL, the County's corporation counsel, and two TCDHS social workers also appeared. Loertscher did not have counsel. Loertscher requested a different judge hear the motion, and the hearing was cut short, to be rescheduled for September 4. That evening, another police officer came to Loertscher's grandparents' house and stated that he had a warrant for her arrest. Loertscher's family explained that she was pregnant and stressed and did not need to be in jail, and the officer agreed to leave without arresting her.

On September 4, Loertscher again appeared, without counsel, in the Circuit Court for Taylor County. The GAL entered a plea on behalf of the fetus, admitting all of the allegations against Loertscher in the UCHIPS petition. Clarkson testified that Loertscher had not complied with the temporary physical custody order because she had refused to submit to a tuberculosis test, did not go to the inpatient treatment facility, and did not respond to the County's attempts to contact her. Then Loertscher testified, "I don't feel like I need treatment. Like I feel like I went to the hospital and sought treatment and then they violated my rights and all these people got this information that I feel they shouldn't have gotten. And I feel my whole stay there was made worse." Dkt. 1-8, at 19. At the conclusion of the hearing, the court set the UCHIPS petition for trial and found Loertscher in contempt. The court ordered her to either cooperate with the TCDHS and go to the inpatient treatment facility, or serve 30 days in jail.

6. Loertscher goes to jail

That evening, Loertscher declined the court-ordered inpatient drug treatment and surrendered to the Taylor County Jail. She spent 18 days incarcerated there. During that time, she did not receive any prenatal care, because the jail would not provide prenatal care if Loertscher did not submit to a pregnancy test to "confirm" her pregnancy. Loertscher experienced pain and cramping, and she feared that she may have a miscarriage. Loertscher repeatedly asked to see an obstetrician; instead, she saw the jail doctor, who was not an obstetrician. The jail doctor told Loertscher to take a pregnancy test. When she refused, jail personnel put her in solitary confinement.

Eventually Loertscher found a list of Taylor County public defense attorneys and called the number listed. A public defender was appointed to represent Loertscher.

7. Loertscher signs a consent decree

Pursuant to her attorney's advice, Loertscher signed a consent decree to purge her contempt and resolve the UCHIPS petition. The consent decree provided that Loertscher would be permitted to go home if she agreed to: (1) undergo an AODA assessment; (2) comply with any recommended treatment resulting from the assessment; (3) submit to drug testing on a weekly basis at her own expense; (4) sign any and all releases necessary to transfer drug test results to the TCDHS; and (5) sign any other releases the TCDHS requested. Dkt. 1-13. At a September 22, 2014 hearing, the court adopted the consent decree and made compliance with its terms sufficient to purge the earlier finding of contempt.

Loertscher complied with the terms of the consent decree. All further drug tests were negative.

8. Maltreatment finding

On September 29, the TCDHS informed Loertscher that it had administratively determined that she had committed "child maltreatment." The County eventually withdrew the finding, and the CPS Standards no longer require or allow an administrative maltreatment finding in unborn child abuse cases.

9. The baby

In January 2015, Loertscher delivered a healthy baby boy. The consent decree has since expired.

D. Evidence about alcohol and drug use during pregnancy

The State adduces evidence of alcohol and other substance abuse by pregnant women, both in Wisconsin and nationwide. The court need not repeat each statistic here, but the court will note some highlights. Nationwide, 5.4 percent of pregnant women use illicit drugs during their pregnancies, and 9.4 percent use alcohol. In Wisconsin, approximately 1,600 women tested positive for alcohol, opioid, heroin, or marijuana at the time of delivery in 2014, compared to 600 cases in 2009. Babies born with neonatal abstinence syndrome (NAS)—which occurs when the baby is exposed to drugs in utero—usually stay at the hospital significantly longer than healthy babies, which costs significantly more money. The State has also adduced evidence that pregnant women with alcohol or other substance abuse issues have a hard time stopping use while pregnant. Experts offer opinions that discuss the severity of certain cases of and risks associated with alcohol and other drug exposure in utero, including physical and cognitive deficits and behavioral problems later in life. Some cases result in death. And, as the State sums up, "All together the effects of prenatal alcohol exposure create significant costs to individuals, families, schools, communities, and the

criminal justice system," and "[p]rior research has clearly demonstrated the harmful effects of alcohol and illicit drug use in pregnancy." Dkt. 224, ¶¶ 40, 91.

That said, Loertscher has adduced evidence that the risks of harm to an unborn child or child when born from the pregnant mother's consumption of alcohol or controlled substances varies from no risk to greater risk. The State concedes that "the amount of alcohol that must be consumed to cause fetal damage is not known and must be determined to some extent by individual variability." *Id.* ¶ 45.

Experts from both sides agree that this is an area plagued by at least some degree of medical and scientific uncertainty.

The State has also adduced evidence that drug treatment during pregnancy has improved participation in prenatal care and has reduced fetal complications associated with illicit drug use. Some experts opine that treatment is beneficial for women with substance use disorders, even if that treatment is recommended by child protective services. Others opine that women who use controlled substances while pregnant may not be able or willing to enter treatment on their own. Still other experts opine that substance abuse reporting during pregnancy may dissuade women from seeking prenatal care.

The reality is that both sides have adduced voluminous and, at times, conflicting evidence regarding the specific risks associated with alcohol and other substance abuse while pregnant and the efficacy of state-mandated treatment programs. But one thing remains undisputed: the experts cannot ascertain with any degree of medical certainty the precise levels of alcohol and controlled substance use that trigger a risk of serious danger to the unborn child. There appears to be a consensus that certain high levels of use pose a danger to fetal health; there are disputes about whether certain low levels of consumption pose any risk.

But all agree that medical science can draw no reasonably precise line where consumption levels transition from benign to seriously risky.

E. Procedural history

Loertscher initiated this case on December 15, 2014. Loertscher's initial complaint asserted only a facial challenge to the Act. After an initial of flurry of requests for emergency injunctive relief, Dkt. 13 and Dkt. 28, the State moved to dismiss Loertscher's claims, contending that: (1) the court must abstain from taking up Loertscher's claims under *Younger v. Harris*, 401 U.S. 37 (1971); (2) Loertscher's claims were moot because the state proceedings against her had terminated; and (3) Loertscher had failed to state a claim upon which relief could be granted. The court denied the motions. Dkt. 61. Loertscher then amended her complaint to add an as-applied challenge and damages claims against Taylor County and three of its employees, Amber Fallos, Liza Daleiden, and Julie Clarkson. Dkt. 66. The State moved to dismiss a third time, citing mootness, and the County defendants moved to dismiss, citing qualified immunity and failure to state a *Monell* claim. Dkt. 68 and Dkt. 83. The court denied the motions to dismiss for the most part, but it dismissed Loertscher's claims against the individual County defendants because they were entitled to qualified immunity. Dkt. 118. And so Loertscher's facial and as-applied challenges to the Act and her *Monell* claim against the County remain.[1]

[1] The parties agreed to dismiss Loertscher's claims against Fallos, Daleiden, and Clarkson in their official capacities. Dkt. 145.

ANALYSIS

All parties move for summary judgment. Loertscher moves for summary judgment on her facial challenge; the State moves for summary judgment on Loertscher's facial challenge and her as-applied challenge; and the County moves for summary judgment on Loertscher's *Monell* claim.

Summary judgment is appropriate if a moving party "shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). When, as here, the parties have filed cross-motions for summary judgment, the court "look[s] to the burden of proof that each party would bear on an issue of trial; [and] then require[s] that party to go beyond the pleadings and affirmatively to establish a genuine issue of material fact." *Santaella v. Metro. Life Ins. Co.*, 123 F.3d 456, 461 (7th Cir. 1997). If either party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden at trial," summary judgment against that party is appropriate. *Mid Am. Title Co. v. Kirk*, 59 F.3d 719, 721 (7th Cir. 1995) (quoting *Tatalovich v. City of Superior*, 904 F.2d 1135, 1139 (7th Cir. 1990)). "As with any summary judgment motion, this [c]ourt reviews these cross-motions 'construing all facts, and drawing all reasonable inferences from those facts, in favor of . . . the non-moving party.'" *Wis. Cent., Ltd. v. Shannon*, 539 F.3d 751, 756 (7th Cir. 2008) (quoting *Auto. Mechs. Local 701 Welfare & Pension Funds v. Vanguard Car Rental USA, Inc.*, 502 F.3d 740, 748 (7th Cir. 2007)).

Loertscher mounts a number of constitutional attacks against the Act, contending that it violates substantive due process, procedural due process, equal protection, and the Fourth Amendment, and that the Act is void for vagueness.[2] As explained in the introduction, the court will reach two issues: Loertscher's claim that the statute is void for vagueness, and her claim that the County is liable for the violation of her constitutional rights.

A. Void for vagueness

1. The standard

Due process requires that a law clearly define its prohibitions. *Karlin v. Foust*, 188 F.3d 446, 458 (7th Cir. 1999) (citing *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972)). The required clarity serves two purposes. First, a statute must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108. Put simply, statutes must provide "fair warning." *Id.* Second, a statute must provide "explicit standards for those who apply them." *Id.* "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Id.* at 108-09. A statute is unconstitutionally vague if it fails to provide either fair notice or standards for fair enforcement. But "the more important aspect of vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal guidelines to govern law enforcement.'" *Kolender v. Lawson*, 461 U.S. 352, 358 (1983) (quoting *Smith v. Goguen*, 415 U.S. 566, 574 (1974)).

[2] Loertscher includes a First Amendment claim in her amended complaint, but she appears to have abandoned that claim.

Due process does not require mathematical precision; a statute may impose an imprecise yet comprehensible standard. *See Grayned*, 408 U.S. at 110. "The degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 498 (1982). Courts tend to be more lenient in evaluating civil statutes, "because the consequences of imprecision are qualitatively less severe." *Id.* at 499. But when a constitutional right is at stake, the court must apply a "more stringent vagueness test." *Karlin*, 188 F.3d at 458.

The State contends that because the Act is a civil statute, the court's vagueness examination should be less exacting. But this is too simplistic a view. Although the Act is nominally a civil statute and does not impose criminal liability, its consequences are nearly equivalent to criminal sanctions: a woman subject to the Act may be involuntarily detained for treatment, as Loertscher's own case shows.

Also contrary to the State's contention, the Act plainly implicates constitutional rights, particularly the right to be free from physical restraint. *See Washington v. Glucksberg*, 521 U.S. 702, 719 (1997); *Foucha v. Louisiana*, 504 U.S. 71, 80, 86 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action," and "[f]reedom from physical restraint [is] a fundamental right."). Restraint under the Act is not criminal incarceration. But "[a] person's core liberty interest is also implicated when she is confined in a prison, a mental hospital, or some other form of custodial institution, even if the conditions of confinement are liberal. This is clear beyond cavil, at least where adults are concerned." *Reno v. Flores*, 507 U.S. 292, 315-16 (1993) (O'Connor, J., concurring).

The Act implicates a second constitutional right: the right to be free from coerced medical treatment. *Cruzan by Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 278 (1990) (holding that "a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment"); *see also Glucksberg*, 521 U.S. at 720 (citing *Cruzan* and stating that "[w]e have also assumed, and strongly suggested, that the Due Process Clause protects the traditional right to refuse unwanted lifesaving medical treatment"). "Because any medical procedure implicates an individual's liberty interests in personal privacy and bodily integrity, the Supreme Court has indicated that there is 'a general liberty interest in refusing medical treatment.'" *United States v. Husband*, 226 F.3d 626, 632 (7th Cir. 2000) (quoting *Cruzan*, 497 U.S. at 278). The Act implicates that liberty interest because its enforcers may seek, and the juvenile court may order, that a pregnant woman submit to involuntary treatment. *See* Wis. Stat. §§ 48.01(am) (a pregnant woman may be "ordered to receive treatment, including inpatient treatment, for [her] habitual lack of self-control"); 48.235(3)(b)2 (a GAL, on behalf of and in the best interests of the unborn child, may "[m]ake clear and specific recommendations to the court concerning the best interest of the . . . unborn child at every stage of the proceeding"); 48.347 (a judge may order a pregnant woman to submit to a "care and treatment plan," which may include "special treatment or care" or "alcohol or drug treatment"). The State concedes that the Act provides for involuntary treatment, even if it is supposed to be a last resort. Dkt. 189, at 17.

Although Loertscher seeks facial relief, "[i]t is well established that vagueness challenges to statutes which do not involve First Amendment freedoms must be examined in the light of the facts of the case at hand." *United States v. Mazurie*, 419 U.S. 544, 550 (1975). So the court must consider Loertscher's claim with an eye towards her facts, "for '[a] plaintiff

who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18-19 (2010) (quoting *Hoffman Estates*, 455 U.S. at 495). This requirement is, in effect, a sort of standing: if a plaintiff clearly falls within the challenged statute, she cannot secure relief by relying on the statute's application to someone else or to purely hypothetical examples. *See Hoffman Estates*, 455 U.S. at 495 n.7.

One last point before turning to the Act itself. The Act cannot survive Loertscher's vagueness challenge simply because some imagined, extreme conduct would unequivocally fall within the Act under any definition of its terms. So it is not quite right to say that an act is void for vagueness only if it is vague in all applications, even though some cases have suggested so. That has been cleared up in *Johnson v. United States*: "although statements in some of our opinions could be read to suggest otherwise, our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp." 135 S. Ct. 2551, 2560-61 (2015). If analysis shows a statute to be vague, it is necessarily vague in all applications, even if one could posit some unproblematic prototypical cases. *Id*. at 2561.

The bottom line is that the Act, though civil, provides remedies more akin to criminal penalties than to economic regulations. And the Act implicates fundamental constitutional rights. Thus, the Act warrants a stringent vagueness analysis that cannot be overcome by positing extreme cases. And, with these principles in mind, we turn to the Act.

2. The Act

The Act's critical language appears in the section that articulates the circumstances under which a juvenile court may assert jurisdiction over a pregnant woman and her unborn child[3]:

> The court has exclusive original jurisdiction over an unborn child alleged to be in need of protection or services which can be ordered by the court whose expectant mother habitually lacks self-control in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, to the extent that there is a substantial risk that the physical health of the unborn child, and of the child when born, will be seriously affected or endangered unless the expectant mother receives prompt and adequate treatment for that habitual lack of self-control. The court also has exclusive original jurisdiction over the expectant mother of an unborn child described in this section.

Wis. Stat. § 48.133. Elements of the jurisdictional standard also appear throughout the Act as the *substantive* standard that the juvenile court applies when ordering remedies under the Act. *See, e.g.*, §§ 48.08, 48.193(1)(c), 48.193(1)(d)2, 48.205(1m), 48.213, 48.347.

The State's main argument on vagueness is a simple one: the Act is not vague because the words used to establish jurisdiction over a pregnant woman "are all easily understood nontechnical words and phrases." Dkt. 189, at 5-6. And a law is not unconstitutionally vague just because it does not provide statutory definitions; under Wisconsin law, statutory terms get their ordinary meanings. Dkt. 167, at 56 (citing *State v. Ehlenfeldt*, 94 Wis. 2d 347, 288 N.W.2d 786, 790 (1980) (citing Wis. Stat. § 990.01(1))). To make this point, the State cites dictionary definitions of the material terms: habitually, severe, serious, affect, and endanger. *Id.* at 56-57. The State supplements the dictionary definitions with a couple of cases that

[3] An "unborn child" is statutorily defined as "a human being from the time of fertilization to the time of birth." Wis. Stat. § 48.02(19).

interpret "lack of self-control" to mean "serious difficulty in controlling [her] behavior," and "substantial risk" to mean a danger that is "[t]rue or real; not imaginary." *Id*. at 57-58.

The State is correct that there is no requirement that a statute set out special definitions for its terms; plain English may work just fine. But using non-technical words does not in itself avoid a vagueness problem. It's probably fair to say that every statute that has been held to be unconstitutionally vague used words that have dictionary definitions. Take the ordinance in *Coates v. City of Cincinnati*, which prohibited people from assembling in groups of three or more and acting "in a manner annoying to persons passing by." 402 U.S. 611, 611 (1971). The Court held that the term "annoying" is so inherently subjective that a prohibition of annoying behavior was unconstitutionally vague. *Id.* at 614. Everybody knows what "annoying" means—and its definition is in the dictionary—but that did not save the ordinance from vagueness.

The fundamental problem with the State's argument is apparent as soon as you look at the definitions it provides. "Habitually" means "done by habit," and habit means a "recurrent, often unconscious, pattern of behavior acquired through frequent repetition." Dkt. 167, at 56. "Affected" means "produce[s] an effect on" or "influence[s] [it] in some way." *Id.* at 57. The State's dictionary-definition approach is a festival of circularity, in which the statutory terms are simply replaced with synonyms that add no real meaning.

A closer review of the jurisdictional standard reveals that the Act suffers from several critical ambiguities. We will start by parsing the Act's jurisdictional standard into its major elements. The standard consists essentially of a two-part test. The expectant mother must:

1. severely and habitually lack self-control in the use of alcohol, controlled substances, or controlled substance analogs; and the lack of self-control must

2. pose a substantial risk that the physical health of the child will be seriously affected or endangered.

The court will refer to the first prong as the "self-control" prong and to the second prong as the "health" prong.

The first ambiguity is in the self-control prong, arising from terms of degree that are not amenable to reasonably precise definition: severe and habitually. Presumably, these terms are intended to prevent enforcement of the Act against minimal users of alcohol or controlled substances. But where to draw the line? The State contends that its experts and social workers in the field can draw the line. But their answers are just as circular and standardless as the dictionary definitions. Taylor County social worker Clarkson could not offer a general definition of "severe," but methamphetamine was "reportedly very serious and severe," so apparently any use of that drug would be severe. Dkt. 159 (Clarkson Dep. 80:10-16). For Daleiden, "severe" meant use that "could endanger . . . the unborn child." Dkt. 157 (Daleiden Dep. 53:15-19). The State's expert David Wargowski, MD, says that "habitually used alcohol to a severe degree" means that "there was heavy alcohol exposure during the pregnancy." Dkt. 163 (Wargowski Dep. 88:24-89:8). So for him, "severe" means "heavy." None of these explanation attempts give the term "severe" a reasonably precise meaning.

"Habitually" is also a term of degree. Habitually means in some sense "recurrent," so it, too, poses a quantitative question: how often is often enough to be "habitual"? The State's answer, drawn from the deposition testimony of its expert Michael Porte, MD, is that it depends on the drug. Dr. Porte testified that, based on his recall of the literature and "studies," habitual use of marijuana is daily; for meth it would be two or three times per week; for alcohol it would be binge drinking. Dkt. 164 (Porte Dep. 106:10-22). But Dr. Porte acknowledged that his testimony on this subject was outside the scope of his expertise as a

neonatologist. And in any case, the social workers in Loertscher's case did not apply Dr. Porte's definition. For Daleiden, "habitual means that it happens often, it is [a] habit, it is occurring often." Dkt. 157 (Daleiden Dep. 53:9-10). Circular again.

This reveals a fundamental ambiguity in the self-control prong: the concept of "habitual lack of self-control." The Act could have phrased the first prong simply in terms of *use*, prohibiting some quantum of regular or extensive use of alcohol or controlled substances while pregnant. But instead, the standard is directed to the expectant mother's habitual lack of self-control when it comes to use. This introduces the possibility that the Act could be enforced against any drug- or alcohol-dependent woman who was pregnant, because her history of substance abuse could be invoked to demonstrate the requisite lack of self-control, regardless of whether she actually used controlled substances while pregnant. The State disavows this possibility, contending that the Act is directed solely at the behavior of expectant mothers, not at the mother's physical dependency on drugs or alcohol. Dkt. 189, at 9. But then why is the statutory language couched in terms of self-control rather than in terms of habitual use? This point proved critical in Loertscher's case, because she professed no intent to continue her drug and alcohol use once her pregnancy was confirmed. Her purported habitual lack of self-control was based on her history of modest drug and alcohol use, which she self-reported while seeking medical care.

Which raises another question: how would the Act deal with an expectant mother who does not believe that alcohol—or some other drug—is really dangerous to the unborn child, and on the basis of that belief, consciously chooses to drink or use drugs during her pregnancy? There would be no demonstrated lack of self-control in such a case. So under the terms of the Act, a defiant—as opposed to dependent—expectant mother would not be

subject to State control. But Loertscher, despite her good intentions, was somehow suspected of habitually lacking self-control and she was involuntarily detained for the good of her fetus. The point is that the conduct covered by the Act is fundamentally unclear.

The State does not squarely address this issue or really explain what it means to "habitually lack self-control." Instead, the State refers to the deposition testimony of Loertscher's expert, Kathy Hartke, MD. The State contends that Dr. Hartke testified that in two instances she had been able to determine whether an expectant mother "habitually lacks self-control" in the use of controlled substances. *Id.* at 7. But this is not a fair assessment of Dr. Hartke's testimony. Dr. Hartke testified that in two cases she had determined that the expectant mother did *not* habitually lack self-control. She has never determined that an expectant mother *did* habitually lack self-control. Dr. Hartke's previous *negative* conclusions provide no support for the notion that a qualified medical expert would understand and be able to apply the concept "habitual lack of self-control."

The second prong—the health prong—also suffers from ambiguities, beginning with the term "substantial risk." "Risk" is a probabilistic concept: it is itself a matter of degree. When it is modified by "substantial," we end up with a concept that is doubly indeterminate. Based on dictionary definitions, the State suggests that substantial simply means "real" as opposed to imaginary. But the State's expert, Dr. Porte, conceives of "substantial risk" in comparative terms. He contends that a "substantial risk" is a risk "well above that group that does not use these drugs prenatally." Dkt. 164 (Porte Dep. 109:15-17). Dr. Porte's definition includes another undefined term of degree, "well above." But more problematic is the fact that his report discusses the health effects of prenatal drug use, but nowhere does it *quantify*

the risk. Nor does he compare that risk to the baseline risks the children of non-drug users face.[4]

The concept of "substantial risk" here is closely analogous to one of the concepts that the Supreme Court found unconstitutionally vague in the Armed Career Criminal Act's residual clause. *Johnson*, 135 S. Ct. at 2558. The residual clause provided that a predicate offense included not only crimes that involved the use of force, but also any crime that "otherwise involves conduct that presents a serious potential risk of physical injury to another." *Id.* at 2557. One of the reasons the residual clause was unconstitutionally vague was that it "leaves uncertainty about how much risk it takes for a crime to qualify as a violent felony." *Id*. at 2558. The Act here suffers from the same problem: how much risk constitutes a substantial risk to the health of the child? The State has no meaningful answer, and the Act itself certainly does not provide one.

A more fundamental ambiguity lies at the heart of the health prong, which requires that the mother's lack of self-control pose a substantial risk that the health of the child *will be seriously affected or endangered*. The State offers three experts on the subject: Dr. Wargowski on fetal alcohol syndrome, Dr. Porte on the effects of street drugs on infants, and Barbara Knox, MD, who addresses both. All submit evidence that an expectant mother's use of alcohol and street drugs poses health risks to the unborn child, and they catalog the potential effects of drugs and alcohol, based on their review of the relevant literature and their own treatment of affected infants. Here's what's important to this case: none of the three can say what level of

[4] The research itself poses a problem here. The parties' submissions indicate that there is a correlation between drug use and poor fetal health, but that it is difficult to isolate the effect of the drug use, because drug-dependent mothers also tend to be poorer, have worse prenatal care, and less information about pregnancy and fetal health. *See, e.g.*, Dkt. 198, at 39 n.6, 40 n.7 and Dkt. 163 (Kandall Dep. 67:21-69:2).

drug or alcohol consumption poses a *substantial risk* of *serious* damage to the unborn child. Dr. Wargowski says that recent studies suggest that even one episode of binge drinking could adversely affect an unborn child. Dkt. 173-1, ¶ 12. And all agree that more and prolonged exposure is worse, and that no "safe" level of alcohol consumption has been established. Dr. Knox disputes the opinion of Loertscher's expert, Mishka Terplan, MD, that some level of "normal" alcohol consumption early in pregnancy poses a low risk to the unborn child. But the expert evidence here makes one thing abundantly clear: current medical science cannot tell us what level of drug or alcohol use will pose a substantial risk of serious damage to an unborn child.

In light of this uncertainty, many physicians take the cautious route and advise complete sobriety before and during pregnancy. And some women, likely because of serious drug or alcohol dependencies, will abuse substances throughout their pregnancies, exposing their unborn children to substantial risk. But no one can tell where, on the vast spectrum between these two poles, the substantial risk of serious fetal damage begins or ends.

So did the Act provide fair notice to Loertscher? It's worth reiterating that "[t]he due process clause . . . does not demand 'perfect clarity and precise guidance.'" *Hegwood v. City of Eau Claire*, 676 F.3d 600, 603 (7th Cir. 2012) (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989)). But a statute must provide a reasonably comprehensible standard. Both prongs of the Act's two-part test are fundamentally ambiguous. The concept of "habitual lack of self-control" is, at bottom, an undefined subjective determination. And, although danger to the unborn child is in some sense an objective consideration (though the Act does not make this clear), no one knows at what level drug or alcohol use will pose a risk to the unborn child. An expectant mother who does not maintain complete sobriety simply cannot know

when she would be subject to the Act. There is no way for her to know what type of behavior demonstrates a habitual lack of self-control to a severe degree in the eye of the enforcer, much less whether behavior *prior to pregnancy* may end up being sufficient to trigger the Act's control over her once she conceives.

Loertscher's case leaves the court—and her—to "guess at whether the rule applies to [her] conduct." *Brown v. Bd. of Educ. of Chi.*, 84 F. Supp. 3d 784, 791 (N.D. Ill. 2015) (citing *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1048 (1991)), *aff'd*, 824 F.3d 713 (7th Cir. 2016). Nothing in the record indicates what behaviors were sufficient to demonstrate a habitual lack of self-control to a severe degree, or why. Loertscher herself expressed a willingness and an ability to stop her drug use for the duration of her pregnancy. And, significantly, it is unclear how her conduct created a "substantial risk" of serious endangerment to her unborn child. There was virtually no concrete evidence to substantiate the purported risk to the child. In fact, two experts disagree about whether Loertscher exhibited a habitual lack of self-control in the use of alcohol or controlled substances. *Compare* Dkt. 165 (Knox Dep. 187:7-188:8) *with* Dkt. 137 (Hartke Dep. 52:15-53:24). A reasonable person could not determine whether the amount of drug use that Loertscher engaged in, combined with her desire to stop in light of her pregnancy, would mean that she had exhibited, to a severe degree, a habitual lack of self-control in the use of alcohol or controlled substances and that she posed a substantial risk of seriously affecting her unborn child.

Does the Act provide meaningful standards for enforcement? Again the answer is "no." As the testimony of the social workers in the case demonstrates, enforcers have no meaningful definition of "habitual lack of self-control." In application, the self-control prong is largely reduced to "any amount of use that would endanger the child." Not only does that

ignore the statutory language, it leads to the fundamental ambiguity in the health prong, which is that no one knows what level of drug or alcohol use poses a risk to the child.

The State contends that the Department of Children and Families has developed a set of standards to guide county workers enforcing the Act: the CPS Standards. Dkt. 189, at 8-9 (citing Dkt. 169-1, at 16). The CPS Standards cover initial assessments for child protective services generally; the discussion of unborn child abuse spans only a couple of pages. The CPS Standards provide a list of six topics about which information should be gathered in cases of alleged unborn child abuse. For example, the case worker should provide:

> A description of the behaviors that lead the reporter to believe that the expectant mother is demonstrating a habitual lack of control or that her substance abuse is exhibited to a severe degree.

Dkt. 169-1, at 16. This is no standard; it simply tells the county worker to collect information on a general topic. Nothing in the CPS Standards clarifies the fundamental ambiguities in the Act.

Because the jurisdictional and substantive standards of the Act are fundamentally indeterminate, those who enforce the Act are free to do so on the basis of "nothing but their own preferences and beliefs." *See Karlin*, 188 F.3d at 465. This unfettered discretion is particularly dangerous here because the Act authorizes such a broad range of initial enforcers—including "[a]ny person authorized to provide . . . intake or dispositional services for the court under s. 48.067 or 48.069." Wis. Stat. § 48.08(3). Erratic enforcement, driven by the stigma attached to drug and alcohol use by expectant mothers, is all but ensured.

The Act did not provide for fair notice or fair enforcement in Loertscher's case. But "[u]nder Wisconsin law, before a court can conclude that a challenged statute is void for vagueness, it must first determine whether the statute can be 'construed so as to avoid

constitutional objections.'" *Karlin*, 188 F.3d at 474 (quoting *State v. Fry*, 131 Wis. 2d 153, 388 N.W.2d 565, 570 (1986)). That is, the court must determine whether the statute is "readily susceptible" to a narrower, constitutional construction. *Id.* (quoting *State v. Thiel*, 183 Wis. 2d 505, 515 N.W.2d 847, 858 (1994)). But the court will not bend over backwards to try to save the Act; "we must apply the Constitution to the law the state enacted and not attribute to the state a law we could have written to avoid the problem." *K-S Pharmacies, Inc. v. Am. Home Prods. Corp.*, 962 F.2d 728, 730 (7th Cir. 1992). This is not a case where "difficulty is found in determining whether certain marginal offenses fall within [a statute's] language." *Johnson*, 135 S. Ct. at 2576 (Alito, J., dissenting) (quoting *United States v. Nat'l Dairy Prods. Corp.*, 372 U.S. 29, 32 (1963)). The two-part standard under the Act is fundamentally flawed. The Act is unconstitutionally vague, and the court will grant Loertscher the facial relief she seeks.

B. Loertscher's *Monell* claim against the County

Loertscher also claims that the County violated her constitutional rights. But the County is liable under 42 U.S.C. § 1983 only if its employees' conduct and the resulting constitutional violation(s) can be traced back to County action. *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 694 (1978). And this would require Loertscher to show that the alleged constitutional violation was "caused by: (1) an official policy adopted and promulgated by [the County's] officers; (2) a governmental practice or custom that, although not officially authorized, is widespread and well settled; or (3) an official with final policy-making authority." *Thomas v. Cook Cty. Sheriff's Dep't*, 604 F.3d 293, 303 (7th Cir. 2010). The County contends that Loertscher's rights were not violated pursuant to any County policy, and it moves for summary judgment on that basis.

The County is not liable merely because it enforces or implements state law. *Snyder v. King*, 745 F.3d 242, 247 (7th Cir. 2014) (colleting cases). But "a municipality engages in policy making when it determines to enforce a state law that authorizes it to perform certain actions but does not mandate that it do so." *Id.* (quoting *Vives v. City of New York*, 524 F.3d 346, 351 (2d Cir. 2008)). The question "is whether the municipality enforcing a state law has enough discretion in implementation to make the municipality 'responsible' for any constitutional violation that occurred." *N.N. ex rel. S.S. v. Madison Metro. Sch. Dist.*, 670 F. Supp. 2d 927, 936 (W.D. Wis. 2009).

So even when a state law is in play, as in this case, a plaintiff must identify a *municipal policy, practice, or custom* responsible for the alleged constitutional violation. It all comes back to *Monell*: "[t]he overarching questions in any case involving municipal liability under § 1983 are whether the unconstitutional act 'may fairly be said to represent official policy' of that municipality and whether the policy was the 'moving force' behind the violation." *Snyder*, 745 F.3d at 933 (quoting *Monell*, 436 U.S. at 694). "The plaintiff who wants a judgment against the municipality under that statute must be able to trace the action of the employees who actually injured him to a policy or other action of the municipality itself." *Bethesda Lutheran Homes & Servs., Inc. v. Leean*, 154 F.3d 716, 718 (7th Cir. 1998). Because Loertscher has not demonstrated that a County policy, practice, or custom came into play during her case, her *Monell* claim fails.

1. Official policy

Loertscher concedes that she is unable to identify any written County policy that governed the County's enforcement of the Act against her. But she contends that the record

"suggests" that the County acted against her pursuant to an official policy: a policy of pursuing the most extreme measures available under the Act.

Loertscher has not adduced any evidence of such a policy. She points to a Taylor County UCHIPS case from 2010 in which County employees (1) recommended inpatient treatment for the pregnant woman, and (2) determined that the woman had maltreated her unborn child. But that case and Loertscher's case do not evince an official County policy. Loertscher does little more than speculate that such a policy exists. The fact that County employees made "harsh" decisions (a qualitative call on Loertscher's part) on two separate occasions over the course of nearly 20 years since the Act's enactment hardly means that they made those decisions pursuant to County directive. No reasonable jury could find that County employees acted pursuant to an official County policy based on this evidence.

Loertscher also suggests that the County acted pursuant to official policies that it had developed for CHIPS proceedings. Dkt. 200, at 30. But Loertscher does not explain what these policies required or how they played a role in her case. The argument is underdeveloped and insufficient to raise a genuine dispute of material fact as to the existence of an unwritten County policy.

2. Widespread, well-settled practice or custom

Loertscher contends that, even if there is no official policy in place, the County has a practice or custom of "impos[ing] more severe sanctions that cause greater constitutional injury" under the Act. *Id.* at 8. To prevail on this theory, Loertscher must show both that there was a widespread, well-settled practice and that the County was deliberately indifferent to the practice's known or obvious constitutional consequences. "In other words, they must have been aware of the risk created by the custom or practice and must have failed to take

appropriate steps to protect the plaintiff." *Thomas*, 604 F.3d at 303. And, critically, the practice "must be the *moving* force behind the constitutional violation." *Id.* at 306.

Beginning with the first element, the court considers whether Loertscher has identified and adduced evidence of a widespread and well-settled practice or custom. A practice is not a random event, and isolated acts by individual employees are not sufficient to establish a widespread practice. *Id.* at 303-04. A widespread practice is one "which, although unwritten, is so entrenched and well-known as to carry the force of policy." *Hahn v. Walsh*, 762 F.3d 617, 640 (7th Cir. 2014) (quoting *Rice ex rel. Rice v. Corr. Med. Servs.*, 675 F.3d 650, 675 (7th Cir. 2012)).

Loertscher falls short of demonstrating the existence of a widespread, well-settled County practice. Again, Loertscher points to her own case and the 2010 case, discussed above. But two examples of "severe sanctions" do not a widespread and well-settled practice make. The Seventh Circuit has not adopted "any bright-line rules defining a 'widespread custom or practice.'" *Thomas*, 604 F.3d at 303. But the complained-of conduct must have occurred more than once, if not more than three times. *Id.* ("[T]here is no clear consensus as to how frequently such conduct must occur to impose *Monell* liability, 'except that it must be more than one instance,' or even three." (quoting *Cosby v. Ward*, 843 F.2d 967, 983 (7th Cir. 1988)). Two examples is simply not enough to show a widespread practice so entrenched and well known that it carries the force of a County policy.

Loertscher contends that the fact that County employees "acted promptly and deliberately" and "met frequently and coordinated their efforts" throughout Loertscher's case suggests the existence of a County practice or custom. Dkt. 200, at 8, 28. But Loertscher does not explain why coordinated "team" decisions show a County practice or custom. It is

just as likely that the County employees met to apply what they thought were *state* standards and policies, such as those suggested in the CPS Standards. On the record submitted at summary judgment, no reasonable jury could find that as of August 2014, there was a widespread and well-settled County practice of "impos[ing] more severe sanctions that cause greater constitutional injury" under the Act.

Even if Loertscher's two examples were sufficient to establish a widespread and well-settled practice, she must also adduce evidence sufficient to allow a reasonable jury to find that the County acted with deliberate indifference to her constitutional rights. In other words, Loertscher would have to show that "a repeated pattern of constitutional violations" made the deficiencies in the system "plainly obvious to the city policymakers." *Jenkins v. Bartlett*, 487 F.3d 482, 492 (7th Cir. 2007) (quoting *City of Canton v. Harris*, 489 U.S. 378, 390 n.10 (1989)). "A plaintiff must show that municipal policymakers made a 'deliberate choice' among various alternatives and that the injury was caused by the policy." *Frake v. City of Chicago*, 210 F.3d 779, 781 (7th Cir. 2000) (quoting *Pembaur v. City of Cincinnati*, 475 U.S. 469, 483 (1986)).

Loertscher's weak showing on the existence of any widespread practice makes a showing of deliberate indifference particularly difficult. Loertscher has not adduced any evidence that County officials were aware, or should have been aware, that its employees were making extreme decisions in UCHIPS cases, much less that the decisions were causing constitutional violations. Under the best case scenario for Loertscher, by the time her case came up, there had been *one* constitutional violation caused by County enforcement of the Act. And that is certainly not enough to demonstrate deliberate indifference on the part of the County. *See Cornfield by Lewis v. Consol. High Sch. Dist. No. 230*, 991 F.2d 1316, 1326

(7th Cir. 1993) ("[A] single isolated incident of wrongdoing by a non-policymaker is generally insufficient to establish municipal acquiescence in unconstitutional conduct."). And Loertscher adduces no evidence that the County was on notice that its 2010 enforcement of the Act was constitutionally suspect.

3. Absence of a County policy and insufficient training

Loertscher's last argument is that even if County employees did not act pursuant to a County policy, practice, or custom, the County is still on the hook for its *inaction*. Loertscher contends that the County did not institute any policies or training to guard against constitutional violations attributable to the Act's enforcement, and this inaction demonstrates deliberate indifference to the "significant constitutional dangers" posed by the Act. Dkt. 200, at 30.

Loertscher is correct that "the absence of a written policy does not wholly exempt a municipality from liability." *Cornfield*, 991 F.2d at 1326. But still, Loertscher must come up with evidence that the County was aware of its problem: "an allegation of a pattern or a series of incidents of unconstitutional conduct is required to withstand a motion to dismiss for a failure to make policy." *Id.* Similarly, "[a] municipality will be held liable for the violation of an individual's constitutional rights for failure to train adequately its officers only when the inadequacy in training amounts to deliberate indifference to the rights of the individuals with whom the officers come into contact." *Jenkins*, 487 F.3d at 492. "Only where a failure to train reflects a 'deliberate' or 'conscious' choice by a municipality—a 'policy' as defined by our prior cases—can a city be liable for such a failure under § 1983." *City of Canton*, 489 U.S. at 389. It is not enough to show that the violation "could have been avoided if an officer had had better or more training." *Id.* at 391.

Loertscher contends that the problems with the Act were so plainly manifest that even without an established pattern of violations, the constitutional problems were "plainly obvious to the [county] policymakers." *Jenkins*, 487 F.3d at 492 (quoting *City of Canton*, 489 U.S. at 390 n.10). This is because, Loertscher argues, the Act provides for the detention of expectant mothers in a way that plainly implicates fundamental rights. Dkt. 200, at 30-33. The backlash against the Act at the time of its enactment made its potential problems obvious both to lawmakers and to the county officials who were expected to enforce it. Under these circumstances, the County was aware of the constitutional dangers of the Act, and was obligated to devise policies to ensure that its enforcement would be constitutional. The County should have developed "discrete policies or guidelines to govern action against pregnant women." *Id.* at 31.

Loertscher's argument fails for two reasons. First, the County was entitled to rely on the Act's presumption of constitutional validity, particularly because the Act had been on the books and unchallenged for 16 years by the time Loertscher's case came up. Second, the State provided instructions for enforcing the Act in its instructions for CHIPS enforcement, so the need for separate County policies was not apparent. And under the State's enforcement policies, an expectant mother is "screened in" for enforcement under the Act if there is *any* credible evidence to establish habitual lack of self-control or substantial risk to the health of the child. Dkt. 169-1, at 25. Aggressive enforcement is built into the state guidelines. Critically, the County was not required to adopt its own policies to avoid implementing the Act. "[M]unicipalities do not have to choose between following their own interpretation of the Constitution and putting themselves at 'war with state government.'" *Madison Metro.*, 670 F. Supp. 2d at 941 (quoting *Bethesda*, 154 F.3d at 718).

Ultimately, as the court explained in a previous order, "[t]he fact that Act 292 was valid at the time the county defendants enforced it means that they did not have to guess whether it was constitutional." Dkt. 118, at 15. "[N]o case law has placed defendants on notice that Act 292 may be unconstitutional." *Id.* at 16.

4. Conclusion

Loertscher is correct that County employees retain at least some discretion as they enforce the Act, and that certain conduct by County employees was *authorized* but not *required* under the Act. But the exercise of discretion by County employees as they enforced the Act against Loertscher does not mean that they made discretionary decisions *pursuant to municipal policy*. "[A] municipality cannot be held liable under § 1983 for efforts to implement a state mandate when the plaintiff cannot point to a separate policy choice made by the municipality." *Madison Metro.*, 670 F. Supp. 2d at 941.

Loertscher's *Monell* claim fails, and the court will grant the County's motion for summary judgment.

ORDER

IT IS ORDERED that:

1. Defendants Brad Schimel and Eloise Anderson's motion for summary judgment, Dkt. 166, is DENIED.

2. Plaintiff Tamara M. Loertscher's motion for summary judgment, Dkt. 176, is GRANTED. The State is enjoined from enforcing 1997 Wisconsin Act 292 statewide.

3. Defendant Taylor County's motion for summary judgment, Dkt. 180, is GRANTED.

4. Defendants Brad Schimel and Eloise Anderson's motion to compel, Dkt. 238, is DENIED as moot.

5. The clerk of court is directed to enter judgment in plaintiff's favor and against defendants Brad Schimel and Eloise Anderson on plaintiff's void for vagueness challenge. The clerk of court is directed to enter judgment in the County's favor on plaintiff's *Monell* claim. All remaining claims are dismissed.

Entered April 28, 2017.

BY THE COURT:

/s/

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JAMES D. PETERSON
District Judge