CONSOLIDATED APPEALS
NOS. 13-07-529-CR (Lovill) & 13-07-668-CR (Ex Parte Lovill)

IN THE COURT OF APPEALS
FOR THE THIRTEENTH DISTRICT OF TEXAS
AT CORPUS CHRISTI

AMBER LOVILL, Appellant,
v.
STATE OF TEXAS, Appellee.

EX PARTE LOVILL.

ON APPEAL FROM THE 28TH DISTRICT COURT,
NUECES COUNTY, TEXAS

AMICI CURIAE BRIEF IN SUPPORT OF APPELLANT

LEAD COUNSEL:

Lisa Graybill
Texas Bar No. 24054454
Legal Director
American Civil Liberties
Union Foundation of Texas
1210 Rosewood Avenue
Austin, Texas 78702
(512) 478-7300
(512) 478-7303 (fax)

OF COUNSEL:

Diana Kasdan (N.Y. Bar No. 4028874)
Alexa Kolbi-Molinas
(N.Y. Bar No. 4477519)
American Civil Liberties Union Foundation
Reproductive Freedom Project
125 Broad Street, 18th Floor
New York, New York 10004
(212) 549-2633
(212) 549-2652 (fax)

Tiloma Jayasinghe (N.Y. Bar No. 4223715)
Lynn M. Paltrow (N.Y. Bar No. 1920156)
National Advocates for Pregnant Women
39 West 19th Street, Suite 602
New York, NY 10011
(212) 255-9252
(212) 255-9253 (fax)

Counsel for Amici Curiae

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Constitutional & Statutory Provisions

Articles, Reports, & Policy Statements

Miscellaneous

INTERESTS OF AMICI CURIAE

Amici curiae are a group of 29 leading organizational and individual public health professionals and advocates.[1] *Amici* are deeply concerned with the issues and outcome in this case because the selective punishment and imprisonment of Amber Lovill presents a troubling and unwarranted departure from established medical science, state law, and constitutional principles. In this case, the State imprisoned Ms. Lovill because she experienced two co-occurring medical conditions: pregnancy and drug dependence. Reinterpreting the State's community supervision laws to permit increasing or revoking conditions of probation for these circumstances not only contradicts the plain language and purpose of these laws, it violates individual constitutional rights and contravenes fundamental precepts of public health and child protection. The practice of selectively punishing drug dependent women who become pregnant and continue their pregnancies undermines the health care provider-patient relationship, ignores the courts' and the medical community's longstanding recognition that addiction is a disease, not a crime, and fails to recognize that the conditions and regulations in jails too often endanger the lives and health of pregnant women and their future children. For the reasons explained

[1] For each *Amici Curiae's* individual statement of interest, *see* App. A1-8. *Amici Curiae* include, American Academy of Addiction Psychiatry, American Medical Women's Association, American Public Health Association, American Society of Addiction Medicine, Association of Reproductive Health Professionals, Center for Gender and Justice, Child Welfare Organizing Project, Citizens for Midwifery, Drug Policy Alliance, Family Justice, Global Lawyers and Physicians, Harm Reduction Coalition, Institute for Health and Recovery, Interfaith Drug Policy Initiative, The International Center for Advancement of Addiction Treatment, Law Enforcement Against Prohibition, National Association of Nurse Practitioners in Women's Health, National Association of Social Workers, National Association of Social Workers – Texas, National Council on Alcoholism and Drug Dependence, National Latina Institute for Reproductive Health, National Women's Health Network, Physicians for Reproductive Choice and Health, Texas Civil Rights Project, Susan C. Boyd, Ph.D., Wendy Chavkin, M.D., M.P.H., Stephanie S. Covington, Ph.D., L.C.S.W., Deborah A. Frank, M.D., and Michael A. Grodin, M.D., F.A.A.P.

below, the health and well-being of both Texas' children and their mothers require reversal of the lower court's order.[2]

2 *Amici* file this brief in support of both Ms. Lovill's direct direct appeal seeking reversal and relief from the judgment below, *see* Appellant's Brief, *Lovill v. Texas*, No. 13-07-529-CR (filed Dec. 21, 2007) (hereinafter "Appellant's Br."), and her appeal from the denial of the petition for a writ of habeas corpus, *Ex parte Lovill*, 13-07-668-CR. *Amici* do not address which procedural posture or form of relief is most appropriate, but assert that in either case, the selective and disproportionate sanction against Ms. Lovill must be held invalid.

FACTUAL BACKGROUND

On January 10, 2005, Amber Lovill pled guilty to the crime of felony forgery and received a sentence of two years in a state jail, suspended pending completion of three years in community supervision.[3] CR 48-49, 55-58.[4] On July 10, 2007, during a routine report to her community supervision officer, Mr. Vargas, Ms. Lovill submitted to a drug test (a condition of her probation) and informed him that she was pregnant. Mr. Vargas received the positive results of the test later that day, but he did not call Ms. Lovill back to discuss the matter then, or at any time before filing a violation report. RR 32:9-33:1; 35:7-13 (Oct 4).[5] Instead, he discussed her pregnancy and positive drug test with his supervisor, then filed a violation report on July 16th, which was swiftly processed as a motion to revoke. RR 11:2-7 (Oct. 4) (explaining that a violation report is filed with the understanding that once it "is processed, it turns into a motion to revoke"). Within two days he phoned the warrant officer to expedite having Ms. Lovill "arrested since she is consuming methamphetamines and is five months pregnant." RR 29:19-31:5; 37:16-38:5 (Oct. 4); CR 83-85.

Both probation officers who worked on Ms. Lovill's case confirmed that this was not the standard course of action in response to a positive drug screen. *See, e.g.*, RR 18:3-19:16 (Oct. 4) (Officer Garza) (explaining that because of Ms. Lovill's pregnancy,

---

3 "Community supervision," an alternative to incarceration under the Texas Code of Criminal Procedure, is also commonly referred to as probation. *Amici* use the terms interchangeably.

4 Cites to CR refer to the Clerk's Record in Appeal No. 13-07-529-CR.

5 Cites to RR refer to the specific page and line numbers in one of the two Reporter's Records in this case. The two Reporter's Records referenced, the August 6-7, 2007, hearing on a Motion to Revoke, and the October 4, 2007 hearing on the Motion for New Trial, are distinguished by inclusion of the hearing month and day in parenthetical.

they were not willing to "work with" her as they do in other cases); 31:1-34:16 (Oct. 4) (Officer Vargas) (agreeing that increasing the frequency of drug tests and visits to the probation department to see if probationer can get back on track are typical responses). In fact, the record is replete with admissions by the probation officers that they simply decided that less restrictive approaches, frequently taken and within their discretion, were not an option because Ms. Lovill was pregnant. RR 9:20-10:8: 11:20-12:9 (Aug. 6-7).[6] Moreover, the State made clear that, whether the court proceeded with a sanction or revocation of probation, what it sought was Ms. Lovill's incarceration for "the term of her pregnancy." RR 15:8-21 (Aug. 6-7) (arguing Ms. Lovill's "problem with drugs . . . is a danger to her unborn child" requiring "a secure environment" with or without drug treatment).

The State also repeatedly and explicitly stated that its reason for seeking to incarcerate Ms. Lovill during her pregnancy was concern for the "unborn child." *Id.*; RR 30:19-31:2; 33:11-17; 33:21-24; 35:17-22 (Oct. 4). But the State was well aware that as a result of the penalties it sought, for the remainder of her pregnancy Ms. Lovill would remain incarcerated in Nueces County Jail (NCJ) with no access to any drug treatment, nor access to appropriate prenatal care. Ms. Lovill's probation officer testified that it would be more than three months before the prison-based Substance Abuse Felony

---

6 *See* RR 21:24-22:16 (Oct. 4) (stating "in all likelihood maybe we would have proceeded with a review" instead of reporting a violation if she had not been pregnant) (Probation Officer Garza); 33:11-24 (stating that because of Ms. Lovill's pregnancy "I didn't feel I had any other options") (Probation Officer Vargas); 33:25-34:6 ("If she was not pregnant, there is the possibility that we would have allowed the warrant to either go through the normal channels. There is a possibility that we may have conducted a review before the Court to discuss where to go from there.") (Vargas); 37:24-38:5 (admitting "in all likel[ihood]" he would not have placed call to expedite warrant for her arrest if she were not pregnant) (Vargas); 39:13-41:9 (stating if she had not been pregnant "in all likelihood" he would have first pursued other options "to see if she can do it on her own") (Vargas).

Punishment (SAFP) program could accept Ms. Lovill – who was by then entering her seventh month of pregnancy. RR 17:7-12; 19:20-25 (Aug. 6-7).

In contrast to imprisonment without appropriate health care for her circumstances, the officer acknowledged that Ms. Lovill could immediately be placed in an outpatient treatment program that specialized in pregnant and parenting women and had experience working with probationers. *Id.; see also* RR 43:3-46:15 (Oct. 4). Ms. Lovill expressed her strong motivation to work within such a program: "I was clean for 21 months and I had one relapse. And I know I can stay clean again. I'd just like the chance because I want to keep my baby with me." RR 16:14-17 (Aug. 6-7). Nonetheless, the probation officer recommended sanctioning her to SAFP, which had no beds open for her, and the prosecutor requested that she be incarcerated in either a SAFP unit or in prison for eighteen months. RR 15:8-21 (Aug 6-7). The court decided to impose a sanction, ordering a one year increase in the length of Ms. Lovill's probation and that she be detained in the NCJ until a bed became available at the SAFP program. RR 23:16-22 (Aug 6-7); CR 87-90.

NCJ has a well-known and documented history of severe health and safety violations, it has no special programs or care for pregnant women in the jail, and it offers no treatment for drug dependence. It also allows the practice of shackling pregnant women who are pregnant. *See, e.g., infra* IV.B. In fact, the State had no reason to believe that NCJ would provide a "safe" environment for Ms. Lovill during her pregnancy and much to indicate that it would significantly increase risks to both maternal and fetal health. Indeed, Officer Vargas testified that after he had Ms. Lovill arrested he

called NCJ to check on her because "there has been a lot of issue[s] that have happened over here at the Nueces County Jail. And I just wanted to do my part to make sure that she was going to be okay." RR 38:6-21 (Oct. 4). In addition, to the detriment of her child's wellbeing, Ms. Lovill and her newborn were separated shortly after birth and they will remain separated for the duration of her incarceration. RR 27:16-28:15 (describing the SAFP program that she was finally admitted to after giving birth as "lock-down facility" where babies cannot stay with mothers); *see also infra* at Part IV.B.

In short, the record establishes that a sanction and imprisonment were sought for the primary and explicit reason that Ms. Lovill was pregnant when she tested positive for methamphetamine. Notwithstanding the State's purported concern for a healthy pregnancy outcome, and the fact that her counsel was able to arrange a space for her at a program specifically designed to provide pregnant women with treatment for drug dependence, the State forced Ms. Lovill to complete her pregnancy in a jail lacking those services and to remain incarcerated and separated from her newborn.

SUMMARY OF THE ARGUMENT

The probation sanction ordered against Ms. Lovill constitutes an unauthorized re-writing of the community supervision law to address issues of pregnancy and addiction, and an instance of selective enforcement based on pregnancy. This contravenes basic principles of due process, violates Ms. Lovill's fundamental constitutional rights, and imposes unnecessary risks to both maternal and fetal health.

First, the State usurped the legislative function by extending the community supervision law beyond its intended purpose. In enacting its system of community

supervision, the Texas Legislature clearly did not authorize supervision and punishment of pregnancy. Nevertheless, the State here effectively rewrote the community supervision law to permit this result. The State attempts to characterize its actions as mere application of penalties against a probationer who suffered a drug relapse. However, the State's articulated reasons for seeking the sanction and admitted practice of not recommending such penalties for similar relapses by other probationers makes clear that this case involves selective enforcement against pregnant women.[7]

Second, applying the State's community supervision law in this way violates Ms. Lovill's fundamental constitutional right to bear a child and right to be free from sex discrimination. The effect of imposing, or threatening, increased punishments against women with drug dependence problems because they become pregnant and continue a pregnancy, is both punitive and coercive. This intrusion on a woman's ability to make free and independent decisions to have a child violates her right of procreative autonomy. Also, applying the State's community supervision laws in this way violates Ms. Lovill's fundamental right to equal treatment under the law. Treating female probationers more harshly because of pregnancy constitutes discrimination on the basis of sex and does not withstand scrutiny under the Texas Equal Rights Amendment.

---

[7] For reasons fully discussed in Appellant's Brief, regardless of whether there were other, valid, reasons to issue a sanction, the record overwhelmingly establishes that Ms. Lovill's pregnancy was a determinative factor in this case; hence, the sanction constitutes an instance of selective enforcement. *See* Appellant's Br. at 2-11, 18-19, 27-31; *see also infra* note 6 and accompanying text (quoting statements by probation officers admitting that pregnancy motivated their decisions and actions against Ms. Lovill). Thus, *amici* elaborate on *why* targeting pregnant women for punitive treatment undermines maternal and fetal health and fails to justify the resulting deprivations of women's right of due process, procreative autonomy, and equal treatment under the law.

Finally, a punitive approach to pregnancy and drug dependence reflects a course that the medical community and state policy-makers have rejected. They have rejected it because they recognize that drug dependence is a health problem not a crime; that the threat or imposition of heightened criminal sanctions deters pregnant women from seeking prenatal care and treatment for substance addiction; and that such punitive approaches undermine the health of women and children. Moreover, while *amici* do not suggest that methamphetamine use during pregnancy is benign, the existing medical research shows that its potential adverse effects cannot be separated from other factors that impact pregnancy outcomes.

By every measure, selective enforcement of criminal laws, including probation sanctions, to punish and imprison pregnant women who use drugs fails to advance the State's claimed interest in protecting maternal and fetal health. For these reasons, *amici* urge this Court to lift the sanction imposed, which is based on an unauthorized interpretation of Texas law and violates Ms. Lovill's fundamental constitutional rights.

ARGUMENT

I. The Texas Code of Criminal Procedure Does Not Authorize the Imposition of Probation Sanctions in the Name of Protecting Fetal Health.

The Texas Code of Criminal Procedure Article 42.12, which governs community supervision, does not mention pregnancy, pregnant women, or fetuses. Rather, under this system courts may only impose a "reasonable condition" designed to advance either of the two purposes of community supervision: 1) to protect or restore the community or victim, or 2) to punish, rehabilitate or reform the defendant. *Id.* § 11(a). Community

supervision is plainly not intended to protect fetal health, and there is no valid basis to use community supervision to prohibit pregnancy or to penalize a woman for becoming pregnant or continuing a pregnancy. Thus, the selective sanctioning and imprisonment of Ms. Lovill – because she was continuing her pregnancy while in the process of recovering from her drug-dependence problem – is an unauthorized attempt to expand the reach of the criminal code. This is evident not only from the plain language of the community supervision provisions, but from the structure of the Texas Penal Code, relevant decisions of Texas courts, and principles of strict statutory construction and due process.

Beyond the statutory provisions at issue here, the Texas Legislature has rightly avoided enacting laws that respond to the issue of pregnancy and drug use through the criminal justice system. For instance, when the Legislature amended the Penal Code in 2003, to criminalize acts that harm a fetus, it targeted the third party conduct perpetuated against a pregnant woman. Recognizing that a fetus is physically part of a woman's own body, the law explicitly ensured that pregnant women would not be treated as third party entities. *See* Senate Comm. On State Affairs, Bill Analysis, Tex. S.B. 319, 78th Leg., R.S. (2003) ("S.B. 319 amends the Penal Code to allow the prosecution of a person who harms or kills an unborn child, unless the death is . . . the result of an action by the mother."); *see also* Tex. Pen. Code §§ 19.06, 22.12 & 49.12 (excluding pregnant woman from prosecution for harm to the fetus under sections relating to homicide, assault, intoxicated assault, and intoxicated manslaughter).

Recognizing that the Texas Legislature has chosen to address issues of pregnancy and drug use through the civil law and public health approaches, Texas courts have uniformly rejected requests to judicially expand the Penal Code to police and punish pregnant women who continue to term in spite of a drug or alcohol problem. For example, in *Collins v. State*, the Court of Appeals reversed the conviction, for injury to a child, of a woman whose newborn tested positive for cocaine. *Collins v. State*, 890 S.W.2d 893 (Tex. App. -El Paso 1994). The court held that the plain language of the injury to a child statute did not apply to the context of pregnancy and as a result Ms. Collins had not been afforded adequate notice that she could face criminal prosecution for that crime as a result of ingestion of cocaine during pregnancy. *Id.* at 898; *see also Ward v. State*, 188 S.W.3d 874 (Tex. App. -Amarillo 2006); *Jackson v. State*, 833 S.W.2d 220 (Tex. App. -Hous. 1992) (refusing to expand drug possession law based on evidence that a pregnant woman used an illegal drug); *see also Ex parte Perales*, 215 S.W.3d 418 (Tex. Crim. App. 2007) (relying on *Ward* and holding statute prohibiting delivery of drugs to a minor inapplicable to context of pregnancy); *Youngblood v. State*, No. 2-06-329-CR, 2007 WL 2460225, at 1 (Tex App. -Fort Worth, Aug. 31, 2007) (not designated for publication) (following *Perales* to overturn similar conviction as impermissible as a matter of law).[8]

None of these decisions reflects a disregard for the value, or health, of pregnant women or fetuses. Rather, they reflect adherence to the principles of strict statutory

[8] The Attorney General has issued an opinion employing similar reasoning for the proposition that the expanded definition of "individual" in the Penal Code does not impose a duty on physicians, under the Family Code, to report as "child abuse" a pregnant patient's use of an illegal drug. *See* Op. Tex. Att'y Gen. No. GA-0291 (2005).

construction, fair notice and due process.[9] *See United States v. Lanier*, 520 U.S. 259, 266 (1997) ("[A]s a sort of 'junior version of the vagueness doctrine,' the canon of strict construction of criminal statutes, or rule of lenity, ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." (citation omitted)); *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) (application of statute that fails to provide "reasonable opportunity to know what is prohibited" *or* is "so "ad hoc and subjective" that enforcement is "arbitrary and discriminatory" is unconstitutionally vague); *Women's Med. Ctr. of Northwest Houston v. Bell*, 248 F.3d 411, 421 (5th Cir. 2001) (collecting cases). These principles apply equally to unforeseeable applications of probation conditions and sanctions. *Douglas v. Buder*, 412 U.S. 430, 432 (1973) (holding that revocation of probation based upon "unforeseeable application" of terms of probation deprived probationer of fair notice, thus violating his right of due process).

Thus, it is well settled that the Penal Code does not permit prosecution and punishment of a woman who becomes pregnant because she seeks to continue to term in spite of a drug-dependency problem. Nonetheless, in the name of protecting Ms. Lovill's

---

9 These decisions are consistent with the reasoning of other states' courts. *See, e.g., Kilmon v. Maryland*, 905 A.2d 306, 311, 314 (Md. 2006)(collecting cases) (reasoning "courts must attempt to construe statutes in a common sense manner" and reversing conviction for reckless endangerment based on ingestion of drugs during pregnancy); *Sheriff, Washoe County, Nevada v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman who uses illegal substance would violate plain meaning of statute, deprive woman of constitutionally mandated due process notice and render statute unconstitutionally vague); *Commonwealth v. Welch*, 864 S.W.2d 280, 283 (Ky. 1993) (affirming reversal of child abuse conviction of pregnant woman who used illegal drugs, concluding that conviction would violate plain meaning of statute, deprive woman of constitutionally mandated due process notice and render statute unconstitutionally vague); *State v. Martinez*, 137 P.3d 1195, 1197-98 (N.M. Ct. App. 2006) (holding "to expand ordinary meaning" of child abuse statute to allow State to prosecute woman for cocaine use during pregnancy would deny "reasonable notice . . . violating her due process rights").

fetus, the State has used the community supervision statute as a back door method to achieve just that result. But, like Texas possession, child abuse, and drug delivery laws, the plain language of the community supervision law does not permit such action. Consistent with the principles of strict statutory construction and the mandates of due process, this Court should refuse to empower probation officers and courts to punish women who become pregnant and continue a pregnancy to term in spite of a drug-dependency problem.

II. The Selective and Disproportionate Punishment of Ms. Lovill, Because She Was Pregnant, Violates Her Constitutional Right to Bear a Child.

By enforcing a sanction against Ms. Lovill, who was recovering from a drug-dependency problem, *because* she was pregnant, the State severely penalized her for deciding to bear a child. As the record reveals, the resulting deprivations were extreme – including incarceration throughout her pregnancy and beyond. *See supra* p. 4. Imposing such liberty-depriving penalties on women because they become pregnant, or continue a pregnancy, despite a drug problem is an extraordinary intrusion on their freedom to make independent decisions about pregnancy and childbearing. To be clear, *amici* are not suggesting that pregnant women have a special right to be free from criminal laws that legitimately apply to them. Rather, *amici* argue that the selective enforcement of criminal penalties to reach and punish pregnancy, as in this case, constitutes a violation of the fundamental human right of women to become pregnant and to continue pregnancies to term despite drug dependence, or other health, problems.

A. The Use of Criminal Laws to Penalize Women Recovering From Drug Dependence, Because They Choose to Become Pregnant or to Continue a Pregnancy, is Subject to Strict Scrutiny Under the United States and Texas Constitutions.

The fundamental right to procreate has long been recognized as protected by the Fourteenth Amendment to the United States Constitution. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942); *see also Carey v. Population Servs. Int'l*, 431 U.S. 678, 685 (1977) ("The decision whether or not to beget or bear a child is at the very heart" of the right of privacy); *Eisenstadt v. Baird*, 405 U.S. 438, 453 (1972) (recognizing the right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child"). The right of individual privacy is also "implicit among those 'general, great, and essential principles of liberty and free government' established by the Texas Bill of Rights. Tex. Const., art. I, Introduction to the Bill of Rights." *Tex. State Employees Union v. Tex. Dep't of Mental Health & Mental Retardation*, 746 S.W.2d 203 (Tex. 1988) (describing State constitutional right of privacy as similar to zone of privacy recognized in *Roe v. Wade*, 410 U.S. 113 (1972) and *Griswold v. Connecticut*, 381 U.S. 479 (1965)).

The constitutional guarantee of procreative privacy specifically protects women from measures that penalize them for carrying pregnancies to term. *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 859 (1992) (noting that its decision in *Roe v. Wade*, 410 U.S. 113 (1973), "had been sensibly relied upon to counter" attempts to interfere with a woman's decision to become pregnant or to carry to term). For example, in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the Court found unconstitutional a rule that required pregnant schoolteachers to take unpaid maternity

leave because "[b]y acting to penalize the pregnant teacher for deciding to bear a child, overly restrictive maternity leave regulations can constitute a heavy burden on the exercise of these protected freedoms" "of personal choice in matters of marriage and family life." *Id*. at 639-40. Even when the State acts in the name of protecting the fetus – and even when the asserted concern is prenatal exposure to an illegal drug – pregnant women are entitled to the full protections of the Constitution. *See Ferguson v. City of Charleston*, 532 U.S. 67, 81-86 (2001) (considering the constitutionality of a public hospital's policy, implemented in coordination with law enforcement, of drug testing pregnant women and holding that notwithstanding the State's asserted interest in protecting the fetus, the full protections of the Fourth Amendment applied).

Thus, under the federal Constitution, "where a decision as fundamental as that whether to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests." *Carey*, 431 U.S. at 686; *see also Vaughn v. Ruoff*, 253 F.3d 1124, 1128-29 (8th Cir. 2004) (recognizing that "a personal decision relating to procreation or contraception is a protected liberty interest," and that involuntary sterilization has been held constitutional only where "it is a narrowly tailored means to achieve a compelling government interest").[10] The Texas Constitution requires similarly exacting scrutiny. *Texas State Employees Union*, 746 S.W.2d at 205 (holding right to privacy may yield

[10] The United States Supreme Court has departed from the strict scrutiny standard with respect to the right to choose to have an abortion, which is now protected under an "undue burden" standard. *See Casey*, 505 U.S. at 852, 876-79. However, strict scrutiny remains the standard for evaluating the right to procreate and bear a child. *See id.* at 858-59.

only when state demonstrates "compelling governmental objective that can be achieved by no less intrusive, more reasonable means").

B. Selectively Enforcing Sanctions Against Pregnant Women Penalizes the Decision to Carry to Term and is Not Narrowly Tailored to Advance a Compelling State Interest.

The constitutional right of procreative privacy protects women both from being forced to terminate wanted pregnancies and from being penalized for carrying pregnancies to term. As discussed below, imposing more onerous sanctions, such as imprisonment, on female probationers who have a drug relapse while they are pregnant can have both of these effects. Unintended or not, such a result is unconstitutional: it violates the right to procreate and far from advancing any interest in fetal health, it disserves the interest by undermining prenatal care.

As the Supreme Court made clear in *LaFleur*, if a policy has the *effect* of impinging on the independence of a woman's decision to have a child, it will not be upheld merely because it does not have that intent. 414 U.S. at 647-48 (holding school board policy unconstitutional where board acted upon "laudable goal," but effect was to "penalize a female teacher for deciding to bear a child"). Thus, even though punishing childbirth, or encouraging abortions, is not the stated *purpose* of the selective sanction against Ms. Lovill, that does not end the constitutional inquiry. Because it has that *effect* – in this case penalizing her decision to have a child – the burden shifts to the State to prove that its actions are narrowly tailored to further a compelling state interest. *Carey*, 431 U.S. at 686. The State cannot meet that burden.

The coercive and punitive effects of using the penal system to control pregnant women's behavior are well established. Selective punishment of pregnant women for drug use carries with it the prospect of incarceration, lack of adequate health care, intrusion on confidential doctor-patient relationships, separation of mothers and their newborns, and permanent termination of parental rights. *See infra* Part IV.A & B (describing health risks to pregnant women and children that flow from such penalties). In the face of these severe deprivations, some women experiencing drug dependency will feel that continuing a pregnancy is no longer a bearable option. For this reason, numerous courts have recognized that expanding the criminal laws to reach and punish women who continue to term in spite of a drug problem will create a state-based incentive to have an abortion. *See e.g. Johnson v. State*, 602 So.2d 1288, 1296 (Fla. 1992) ("Prosecution of pregnant women for engaging in activities harmful to their fetuses or newborns may also unwittingly increase the incidence of abortion."); *State v. Gethers*, 585 So.2d 1140, 1143 (Fla. Dist. Ct. App. 1991) ("Potential criminal liability would also encourage addicted women to terminate or conceal their pregnancies" (internal quotation marks omitted)).

Women who nonetheless continue their pregnancies may suffer severe punishments and liberty deprivations – as did Ms. Lovill. *See supra* p.4 (describing penalties suffered by Ms. Lovill). Indeed, the selective enforcement used in this case, if permitted, sends a dangerous message that will invite an unprecedented use of the criminal code to supervise and control women who become pregnant and continue

pregnancy to term, while on probation.[11] Courts, researchers, and health providers have all cautioned that the threat of such punishment and ongoing government intrusion only serves to make women avoid medical treatment and be less candid with their physicians, all to the detriment of prenatal, fetal, and newborn health – and therefore, contrary to the State's interest in fostering those outcomes.

For example, in its unanimous decision in *Johnson v. State*, the Supreme Court of Florida observed that "[r]ather than face the possibility of prosecution, pregnant women who are substance abusers may simply avoid prenatal or medical care for fear of being detected." 602 So. 2d at 1295-96. Given the counterproductive effect of threatening criminal sanctions, penalizing a pregnant woman for potential harm to the fetus "appears to be the least effective response to" drug use during pregnancy. *Id.* at 1295; *see also Sheriff, Washoe County, Nevada v. Encoe*, 885 P.2d 596, 599 (Nev. 1994) (concluding that legislature "found that the state's interest is better served by making treatment programs available to pregnant addicts rather than by driving them away from treatment by criminal sanctions"); *Welch*, 864 S.W.2d at 285 (finding Kentucky "General Assembly has already absorbed the literature and made its decision to take the maternal

[11] As courts have recognized, because numerous behaviors, conditions, and external factors impact pregnancy outcomes, validating selective sanctions of pregnant women for drug use would open the floodgates to innumerable other criminal sanctions in the name of fetal health. *See, e.g., Reinesto v. State*, 894 P.2d 733, 736-37 (Ariz. Ct. App. 1995) (recognizing that "[m]any types of prenatal conduct can harm a fetus" and thus "[a]llowing the state to define the crime of child abuse according to the health or condition of the newborn child would subject many mothers to criminal liability for engaging in all sorts of legal or illegal activities during pregnancy"); *Welch*, 864 S.W.2d at 283 (holding the "District Attorney's interpretation of the statutes, if validated, might lead to a 'slippery slope' whereby the law could be construed as covering the full range of a pregnant woman's behavior - a plainly unconstitutional result" (internal quotation marks omitted)). Allowing the State to thus manage and intervene in the wide range of conduct and decisions that may impact fetal health would be to condone and invite shocking and ongoing state intrusion into the private realms of medical care, sexuality, and a woman's control over her own body.

health approach rather than to use the criminal sanction approach as a deterrent"). And, as discussed fully in Part IV.A, leading experts in the fields of drug treatment, maternal health, fetal health, and child welfare unanimously agree that punitive measures such as prosecution and incarceration have no proven benefits for fetal and infant health and pose numerous harms. Indeed, after considering such recommendations, the Supreme Court, in *Ferguson v. City of Charleston*, recognized "a near consensus in the medical community" that programs that "use the threat of arrest and prosecution in order to force women into treatment," discourage pregnant women who use drugs from seeking care and thus "harm, rather than advance, the cause of prenatal health." 532 U.S. at 84 & n.23.

Finally, it is widely recognized that more effective and less restrictive approaches include continuing or increasing access to voluntary, non-threatening drug treatment services. *See infra* Part IV.A (discussing medical and public health experts, and research findings, supporting non-penal approaches). Such alternatives were available in this case, and Ms. Lovill expressed her commitment to participating in those options so she could continue her efforts toward recovery and stay with her newborn. *Supra* p.4. In contrast, as the State was well aware, sanctioning Ms. Lovill left her with no opportunity for drug treatment or appropriate prenatal care during her pregnancy and instead subjected her to a jail facility with conditions likely to be especially dangerous to maternal and fetal health. *Id.; see infra* Part IV.B.

In short, the State cannot argue that these severe sanctions advance the asserted State interest in protecting the health of pregnant probationers. The selective application

of probation sanctions against women who, like Ms. Lovill, continue pregnancies while in the recovery process, *see infra* Part IV.C (describing normal process of recovery and relapse), results in severe liberty deprivations while undermining, rather than advancing, maternal, fetal, and newborn health. The United States and Texas constitutions do not countenance such results.

III. Enforcing a Probation Sanction Against Ms. Lovill, Because She Was Pregnant, Constitutes Sex Discrimination in Violation of the Texas Equal Rights Amendment.

Allowing the selective and disproportionate enforcement of probation violations against pregnant women will also have devastating consequences on women's equality under law. Our nation has "a long and unfortunate history of sex discrimination . . . rationalized by an attitude of 'romantic paternalism' which, in practical effect, put women, not on a pedestal, but in a cage." *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973); *see also Casey*, 505 U.S. at 897 (recalling prior view that "'special responsibilities'" imposed on women as "'the center of home and family life,'" "precluded [their] full and independent legal status under the Constitution") (quoting with disapproval *Hoyt v. Florida*, 368 U.S. 57, 62 (1961)). The decision to disproportionately penalize Ms. Lovill for probation violations *because she was pregnant* is based on similarly paternalistic considerations. Such invidious discrimination is unconstitutional under the Texas Equal Rights Amendment ("ERA") and has long been rejected by the citizens and the judiciary of Texas.

More than thirty-five years ago, the people of Texas voted four-to-one to pass the ERA, affirming by an overwhelming margin that "[e]quality under the law shall not be

denied or abridged because of sex, race, color, creed or national origin." Tex. Const. art. I., § 3A; *see* William Wayne Kilgarlin and Banks Tarver, *The Equal Rights Amendment: Governmental Action and Individual Liberty*, 68 Tex. L. Rev. 1545, 1548-49 (1990). Importantly, the ERA's guarantee of gender equality goes beyond laws based on overt gender classifications and requires searching judicial scrutiny of state laws or actions that are motivated by sex-based distinctions. *See Bell v. Low Income Women of Texas, et al*., 95 S.W.3d 253, 263 (Tex. 2002) (explaining how policies intended to target women because of pregnancy can constitute sex discrimination under ERA).[12] Thus, when women are targeted for criminal prosecution or other liberty deprivations because of their pregnancy, as in the case at bar, keen judicial vigilance is essential.

A. Selective Punishment of Women Because They are Pregnant Constitutes Sex Discrimination Under the Texas ERA.

The ERA provides "more extensive" and "more specific protection" than the Due Process and Equal Protection clauses of both the United States and Texas constitutions. *In re McLean*, 725 S.W.2d 696, 698 (Tex. 1987). Under the Texas model, sex is a "suspect classification" which is "afforded maximum constitutional protection" subject to "strict judicial scrutiny." *Id.* This review is exacting:

---

[12] The same year the ERA was placed on the ballot, the antidiscrimination statute was also amended to include the term "sex" among the forms of prohibited discrimination. In 1983, the Texas Legislature amended the Human Rights Act to make clear that "discrimination because of sex or on the basis of sex includes discrimination because of or on the basis of pregnancy, childbirth, or a related medical condition." *Bd. of Trustees of Bastrop Ind. Sch. Dist. v. Toungate*, 958 S.W.2d 365, 369 (Tex. 1997) (recounting legislative history in interpreting meaning of sex discrimination). As explained in the joint concurrence of Justices Baker and Enoch, the Human Rights Act's general "protections against sex discrimination" were enacted to "further the Equal Rights Amendment's policies." *Id.* at 374. Specifically, "the Legislature considered and passed [the statutory] prohibition on sex discrimination and the Equal Rights Amendment in the same session. When the Legislature enacts two acts in the same session, [courts] read the acts together." *Id*.

> The appropriate standard is thus one which recognizes that the Equal Rights Amendment does not yield except to compelling state interests. Further it is not enough to say that the state has an important interest furthered by the discriminatory law. Even the loftiest goal does not justify sex-based discrimination in light of the clear constitutional prohibition. . . . *[S]uch discrimination is allowed only when the proponent of the discrimination can prove that there is no other manner to protect the state's compelling interest.*

Id. (emphasis added). A denial of equality on the basis of sex results not only from "overtly" gender-based laws, but also from laws or actions that more "covertly" discriminate against women. *Bell,* 95 S.W.3d at 258 (citing *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273 (1979)). Recognizing that a woman's "ability to become pregnant has historically been at the root of those discriminatory practices which keep women in low paying and dead-end jobs," the Texas Supreme Court has unequivocally stated that "the ERA is directed at just such purposeful gender-based discrimination." *Bell*, 95 S.W.3d at 263.[13] Thus, discrimination "because of sex" includes state action that *explicitly* burdens, restricts, or punishes women based on women's ability to bear children, *or* which is *motivated* by such gender-based distinctions.

In this case, Ms. Lovill's pregnancy was an explicit and determinative consideration in the State's decision to move for revocation of probation and sanctions.

---

13 While the Court in *Bell* ultimately concluded that the challenged policy was not based on sex, the reasons for that outcome are inapposite here. In *Bell*, the lower had held that a ban on state funding for abortions (because of a lack of matching federal funds under the Hyde amendment) was pregnancy discrimination and that pregnancy discrimination is a form of sex discrimination under the Texas ERA. *Low-Income Women of Texas v. Bost*, 38 S.W.3d 689, 699-700 (Tex. App. -Austin 2000). On appeal, the Supreme Court agreed that purposeful pregnancy discrimination constitutes the type of discrimination against women prohibited by the ERA. 95 S.W.3d at 263. However, it concluded that the "discouragement of abortion through funding restrictions" is not "by itself . . . purposeful discrimination against women." *Id*. Thus, the conclusion that the State's denial of benefits for "abortion as a medical treatment," *id.* at 258, is not pregnancy discrimination does not apply to the State's decision to impose punishment on pregnant women that it would not impose on similarly situated non-pregnant women, or on men.

The State repeatedly conceded this at the revocation hearing and the motion for a new trial. In fact, when asked why the probation department was unwilling to consider alternatives to a sanction in Ms. Lovill's case, the probation officer stated simply: "She's pregnant." R.R. 9:20-10:8 (Aug. 6-7); *see also supra n.* 6 (listing numerous statements by probation officers that pregnancy was determinative factor). In this respect, the State's selective application of sanctions against Ms. Lovill qualifies as the type of overt gender-based classification that triggers strict scrutiny without the need to show discriminatory intent. *Cf. Bell*, 95 S.W.3d at 258 (explaining that if, for example, State denied funding to "all medically necessary pregnancy-related services, the classification might be comparable to the overt gender-based distinction in *McLean*"). At the same time, because pregnancy admittedly motivated the State to depart from the standard, less severe, handling of similar probation violations by others, *supra* pp. 2-3, there is clear evidence of its purposeful gender-based discrimination against Ms. Lovill. *See* 95 S.W.3d at 260 (explaining that in determining whether State discriminates because of sex, court should look to evidence of, *inter alia*, disproportionate impact on a suspect class and "departures from the normal procedural and substantive course" of events) (relying on discriminatory motive analysis set forth in *Vill. of Arlington Heights v. Met. Hous. Dev. Corp.*, 429 U.S. 252 (1977)).[14] Thus, under both an "overt" and "covert" discrimination analysis, the selective enforcement of a probation sanction against Ms. Lovill constitutes sex discrimination.

[14] The Court in *Bell* thus acknowledged that gender discrimination is not necessarily present because a policy impacts women only, but clearly instructed that such a result "might be evidence to weigh in deciding whether it is intended to discriminate against women." *Id*.

The State's discriminatory response to Ms. Lovill's pregnancy is further evidenced by the misinformed and paternalistic views upon which it is based. Indeed, women have long been subjected to increased control and criminalization because of discriminatory assumptions about their childbearing and caretaking capacities. For example, in *Muller v. Oregon*, the United States Supreme Court upheld maximum hours laws intended to protect a woman's "proper discharge of her maternal functions," emphasizing that "healthy mothers are essential to vigorous offspring." 208 U.S. 412, 421-22 (1908); *see also Breedlove v. Suttles*, 302 U.S. 277, 282 (1937) (preservation of race cited as a basis for exempting women from poll taxes, on assumption that "burdens necessarily borne by them" as mothers prevented them from earning a living). Women's roles as potential mothers have also been used as a basis to limit education. *See United States v. Virginia*, 518 U.S. 515, 536 n.9 (1996) (explaining that in the late 19th century women were excluded from higher education out of concern that "the physiological effects of hard study and academic competition with boys would interfere with the development of girls' reproductive organs").

These decisions relegating women to a lesser constitutional status by virtue of their reproductive capacity were written "when a different understanding . . . of the Constitution prevailed." *Casey*, 505 U.S. at 896. Yet just like the erroneous reasoning once endorsed in the cases above, paternalistic stereotypes and misunderstandings about women's reproductive health underlie the differential treatment in this case. *See infra* Section IV.C (describing State's inaccurate medical and health assumptions about pregnancy and impact of drug use). The selective enforcement against Ms. Lovill thus

constitutes an abuse of the State's law enforcement power to perpetuate the view – long imposed on women – that the state may control women's conduct "in order to preserve the strength and vigor of the race." *Muller*, 208 U.S. at 421. This approach necessarily discriminates on the basis of sex and is subject to strict scrutiny review under the ERA.

B. Selectively Sanctioning Ms. Lovill Because She Was Pregnant Was Not Narrowly Tailored to Advance a Compelling State Interest.

Because, as discussed above, the State's selective enforcement of probation sanctions against Ms. Lovill subjected her to unequal treatment based on sex, under the ERA the burden shifts to the State to show that there is no other manner in which it could protect a compelling interest. *In re McLean*, 725 S.W.2d at 698; *see also Bell*, 95 S.W.3d at 263. In other words, the State must show that compelling interests *require* unequal treatment of pregnant probationers. Because targeting women who use drugs during pregnancy for criminal sanctions and imprisonment does not advance maternal and fetal health, and because similar conduct by men also carries risks for fetal outcomes, the State cannot show that selective enforcement against women is the only way to advance its asserted interests in maternal and fetal health.

First, assuming the State acted on a compelling interest in advancing maternal and fetal health, for all the reasons discussed *supra* Part II.C and *infra* Part IV, far from being the *only* manner in which the State could protect its interests, selecting pregnant women for punitive treatment has been recognized as among the least effective methods for advancing fetal and newborn health. Second, even if incarceration or penalizing drug use by expectant parents were effective ways to protect fetal and newborn health (which they

are not), incarcerating only women and not men is not the only means of achieving that objective, and thus cannot withstand scrutiny under the ERA.

Studies show that male drug use, like female drug use, presents potential harm to fetuses and newborns. *See, e.g.,* R.A. Yazigi et al., *Demonstration of Specific Binding of Cocaine to Human Spermatozoa*, 266 JAMA 1956 (Oct. 9, 1991) (study of cocaine use suggests male drug use can also affect birth outcome); D.A. Frank et al., *Forgotten Fathers: An Exploratory Study of Mothers' Report of Drug and Alcohol Problems Among Fathers of Urban Newborns*, 24 *Neurotoxicology and Teratology* 339 (2002).[15] Thus, while men's physical distance from pregnancy perpetuates the myth that women are solely responsible for fetal and newborn health, nothing justifies that perception. To the contrary, the evidence shows that men also play a critical, though often overlooked, role in the outcome of a partner's pregnancy.

Because the State's response to Ms. Lovill's pregnancy and drug use is grounded in unfounded assumptions and stereotypes about the conduct of women as solely determinative of pregnancy outcomes, the State cannot demonstrate that the selective enforcement of a probation sanction against Ms. Lovill is the only means to advance fetal and newborn health.

---

15 For similar reasons, the United States Supreme Court has rejected potential birth defects as a justification for gender-based classifications in employment, based on evidence that male workers are equally at risk for causing potential birth defects as female workers. *See Int'l Union, United Auto., Aerospace & Agric. Workers of Am. v. Johnson Controls*, 499 U.S. 187, 198 (1991) (holding that company's policy barring fertile women, but not fertile men, from jobs involving lead exposure was facially discriminatory under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e(k)); *see also* C.R. Daniels, *Fathers, Mothers, and Fetal Harm: Rethinking Gender Difference and Reproductive Responsibility*, Chapter 5 in *Fetal Subjects, Feminist Positions* 83 (Lynn M. Morgan and Meredith W. Michaels eds., 1999) (collecting studies on male exposure to occupational, behavioral, and environmental factors).

IV. Selective Enforcement of Criminal Sanctions Against Pregnant Women Undermines Maternal and Fetal Health.

Punitive responses to the complex health issues of drug use, recovery, and pregnancy harm public health generally, and maternal and fetal health specifically. Indeed, every leading medical, public health, and research group to address the issue of drug use and pregnancy has concluded that punitive approaches such as prosecution, probation sanctions, and imprisonment are counterproductive and dangerous to women, fetuses, and newborns. The State's actions in this case, imprisoning Ms. Lovill because of her pregnancy, thus imposed precisely the harmful conditions that these experts advise against. Moreover, the State's punitive response to Ms. Lovill's drug relapse is also based on incorrect assumptions about the course of drug recovery and the effects of prenatal exposure to methamphetamine. Finally, separating women from their newborns also presents grave risks to the wellbeing of children, their parents, and the family unit. In these ways, the State's discriminatory and punitive treatment of Ms. Lovill undermines maternal, fetal, and newborn health, and thus fails to further those asserted state interests, let alone, as discussed *supra* Parts II & III, advance them in a constitutionally permissible manner.

A. Medical and Public Health Groups Condemn Punitive Responses to the Issue of Pregnancy and Drug Use as Detrimental to Women and Children's Health.

As one public health expert observed more than a decade ago in the New England Journal of Medicine:

> [M]arriage of the state and medicine is likely to harm more fetuses than it helps, since many women will quite reasonably avoid physicians altogether

> during pregnancy if failure to follow medical advice can result in…involuntary confinement, or criminal charges. By protecting…the integrity of a voluntary doctor-patient relationship, we not only promote autonomy; we also promote the well-being of the vast majority of fetuses.

George J. Annas, *Protecting the Liberty of Pregnant Patients*, 316 New Eng. J. Med. 1213, 1214 (1987). Confirming this assessment are the well-established findings of public health professionals who care for pregnant women, and the research documenting obstacles to prenatal care and appropriate drug treatment for pregnant and parenting women.[16] In 1990, the Texas Commission on Alcohol and Drug Abuse found that 20% of the women surveyed responded that fear of "getting into trouble or being jailed" would keep a pregnant woman from disclosing drug use to her doctor while she was pregnant. Texas Commission on Alcohol and Drug Abuse, *1990 Texas Survey of Post-Partum Women and Drug-Exposed Infants*, 42 (June 1991) (hereinafter "Texas Commission"). This is consistent with national findings.[17] As reported by the Center for Substance

16 *See* M.L. Poland, M.P. Dombrowski, J.W. Ager & R.J. Sokol, *Punishing Pregnant Drug Users: Enhancing the Flight From Care*, 31 Drug and Alcohol Dependence 199 (1993) (survey finding that "drug using pregnant women felt strongly that criminal sanctions by doctors or other healthcare providers would absolutely encourage such women to "go underground" to avoid detection and treatment, for fear of losing their children); *see also* M. Jessup, J. Humphreys, C. Brandis & K. Lee, *Extrinsic Barriers to Substance Abuse Treatment Among Pregnant Drug Dependent Women*, J Drug Issues 285 (2003) (concluding that barriers to care include fear and stigma, as well as disclosure to law enforcement or child welfare officials); T. Brady, W. Visscher, M. Feder & A. Burns, *Maternal Drug Use and the Timing of Prenatal Care*, 14 J Health Care for Poor and Under-served 588 (2003) (concluding that fear is a critical factor in deterring women from prenatal care, and the public health response should be to create trusting environment, not a punitive one).

17 *See* U.S. General Accounting Office Report to the Chairman, Committee on Finance, U.S. Senate, *Drug-Exposed Infants, A Generation at Risk*, GAO/HRD-90-138 at 9, 37 (June 1990) (finding that "women are reluctant to seek treatment if there is a possibility of punishment"). That report also found that "some women are now delivering their infants at home in order to prevent the state from discovering their drug use." *Id*. at 39. *See also* U.S. General Accounting Office Report to the Chairman, Subcommittee on Health and the Environment, Committee on Energy and Commerce, House of Representatives, *ADMS Block Grant, Women's Set-Aside Does Not Assure Drug Treatment for Pregnant Women*, GAO/HRO-91-80 at 20 (May 1991) ("The threat of prosecution poses yet another barrier to treatment for pregnant women and mothers with young children. These women are reluctant to seek treatment if there is the possibility of punishment, which may include incarceration.").

Abuse Treatment, "women in the criminal justice system generally fear that disclosing their need for substance abuse treatment will result in additional sanctions, *including increased time on probation or parole,* incarceration, a transfer to higher security or longer term facilities, or severance of their parental rights." U.S. Dep't of Health and Human Services, *Practical Approaches in the Treatment of Women Who Abuse Alcohol and Other Drugs* (1994) (emphasis added). Thus, private, state, and federal researchers have all concluded that punitive approaches to the issue of pregnancy and drug use frighten women away from needed treatment.

Based on these widely recognized public health concerns, *amici* and other prominent public health and medical organizations agree that a punitive approach to drug use during pregnancy will undermine both maternal and fetal health. For example, the Board of Trustees of the American Medical Association determined that "[p]regnant women will be likely to avoid seeking prenatal or other medical care for fear that their physicians' knowledge of substance abuse or other potentially harmful behavior could result in a jail sentence rather than proper medical treatment."[18] The American Society of Addiction Medicine, composed of the leading specialists in the field of substance abuse treatment and prevention, declared that "criminal prosecution of chemically dependent pregnant or postpartum women will have the overall result . . . of increasing, rather than preventing, harm to children and to society as a whole." American Society of

---

18 American Medical Association, *Legal Interventions During Pregnancy*, 264 JAMA 2663, 2667 (1990). *See also id*. at 2670 (reporting AMA resolution that "[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate").

Addiction Medicine, *Public Policy Statement on Chemically Dependent Women and Pregnancy* 47 (Sept. 1989). Whether the State attempts to use an existing criminal law to punish a pregnant drug-using woman, or threatens a probation revocation, the harm is the same – it is likely to deter women from seeking care that can help ensure healthy birth outcomes for mother and child.

The American College of Obstetricians and Gynecologists (ACOG),[19] the American Academy of Pediatrics,[20] the March of Dimes,[21] the National Association of Public Child Welfare Administrators,[22] the National Council on Alcoholism and Drug Dependence,[23] the American Nurses Association,[24] the Center for the Future of Children,[25] the National Perinatal Association,[26] and the American Psychiatric

---

19 ACOG Committee Opinion 321 (Nov. 2005) ("Pregnant 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.").

20 American Academy of Pediatrics, Comm. on Substance Abuse, *Drug-Exposed Infants*, 86 Pediatrics 639, 642 (1990) ("The public must be assured of nonpunitive access to comprehensive care which will meet the needs of the substance-abusing pregnant woman and her infant.").

21 March of Dimes, *Statement on Maternal Drug Abuse*, 1 (Dec. 1990).

22 National Association of Public Child Welfare Administrators, *Guiding Principles for Working with Substance-Abusing Families and Drug-Exposed Children: The Child Welfare Response* (Jan. 1991) ("Laws, regulations, or policies that respond to addiction in a primarily punitive nature, requiring human service workers and physicians to function as law enforcement agents, are inappropriate.").

23 National Council on Alcoholism and Drug Dependence, *Women, Alcohol, Other Drugs and Pregnancy* (1990) ("A punitive approach is fundamentally unfair to women suffering from addictive diseases and serves to drive them away from seeking both prenatal care and treatment for their alcoholism and other drug addictions. It thus works against the interest of infants and children . . . .").

24 American Nurses Association, *Position Statement* (Apr. 5, 1991) ("ANA . . . opposes any legislation that focuses on the criminal punishment of the mothers of drug-exposed infants . . . The threat of criminal prosecution is counterproductive in that it prevents many women from seeking prenatal care and treatment for their alcohol and other drug problems.").

Association[27] all reached similar conclusions. *See also State v. Luster*, 419 S.E.2d 32, 35 n.2 (Ga. 1992) (listing medical and public health organizations opposing the prosecution of women for cocaine use during pregnancy).

When treatment providers can establish a trusting relationship with pregnant substance abusers, they can offer ongoing support and interventions that substantially improve health outcomes for their patients. When a pregnant patient is persuaded that she will not be targeted for penalties or other forms of sanctions, and that she has the undivided loyalty of her health care provider, she will be far more likely to seek out and complete drug treatment and avail herself of early, comprehensive prenatal care. *See* S.R. Kandall, *Substance and Shadow: Women and Addiction in the United States* 278-79 (1996). In addition, negative health effects associated with prenatal drug exposure can be mitigated through intensive counseling and training in parenting skills. Early, high-quality, comprehensive prenatal care is one of the most effective weapons against infant mortality, including for women suffering from drug dependency. *See* Southern Regional Project on Infant Mortality, *A Step Toward Recovery: Improving Access to Substance*

---

25 Center for the Future of Children, *Drug-Exposed Infants: Recommendations,* 1 *The Future of Children* 8 (1991) ("A woman who uses illegal drugs during pregnancy should not be subject to special criminal prosecutions of the basis of allegations that her illegal drug use harms the fetus. Nor should states adopt special civil commitment provisions for pregnant women who use drugs").

26 National Perinatal Association, *Position Paper, Substance Abuse Among Women,* (no date) ("Such a threat prevents many women from seeking prenatal care and early intervention for their alcohol or drug dependence. It undermines the relationship between the healthcare providers and their patients and may keep women from giving accurate and essential information vital to their care.").

27 American Psychiatric Association, *Care of Pregnant and Newly Delivered Women Addicts, Position Statement,* APA Document Reference No. 200101 (Mar. 2001) ("Policies of prosecuting pregnant . . . women who have used either alcohol or illegal substances during pregnancy, on grounds of 'prenatal child abuse'[and their] subsequent incarceration, either in jails, prisons or in locked psychiatric unit both deprives the mother of her liberty and seriously disrupts the incipient or nascent maternal-infant bond…. Such policies are likely to deter pregnant addicts from seeking either prenatal car or addiction treatment, because of fear of prosecution and/or civil commitment.").

Abuse Treatment for Pregnant and Parenting Women 6 (1993); *see also* Texas Commission at 39 (concluding "infants born to women obtaining adequate prenatal care were healthier, even among substance-using mothers").

Whereas the health and wellbeing of pregnant women and their future children will be enhanced by supportive and voluntary relationships with health care providers, selectively enforcing criminal sanctions against pregnant women who use drugs will have the opposite result – one that frightens pregnant women away from the public health sphere and the critical medical and social services that they need.

B. Incarcerating Ms. Lovill Posed Risks to Maternal, Fetal, and Newborn Health That Public Health Experts Condemn.

The State insisted on incarcerating Ms. Lovill in the local jail, NCJ, was not the only option in response to her violation. *Supra* at pp 3-4. As discussed above, detaining Ms. Lovill there contravened widely recognized medical and public health recommendations for providing pregnant women who need treatment for drug addiction with increased access to comprehensive, community-based health services. Moreover, as discussed below, jails and prisons are not generally equipped to meet the needs of pregnant women, particularly those who need drug treatment.

> Judges who incarcerate pregnant, addicted defendants in order to protect fetal health are understandably concerned about unhealthy pregnancies. . . . [But a] judge who believes incarceration benefits the fetus does not understand that, in some cases, "cold turkey" withdrawal is bad for fetuses. Moreover, many jails and prisons provide unhealthy living arrangements where drugs and violence are common environmental hazards.

Barrie Becker & J. Peggy Hora, *The Legal Community's Response to Drug Use During Pregnancy in the Criminal Sentencing and Dependence Contexts: A Survey of Judges, Prosecuting Attorneys in Ten California Counties*, S. Cal. Rev. L. & Women's Stud., 527, 535 (1993). Indeed, information widely available to the public at the time the State sought revoke Ms. Lovill's probation made clear that she was being sent to a particularly dangerous jail, one especially unlikely to provide a safe or healthy environment for a pregnant woman.

The State claimed to seek incarceration of Ms. Lovill so that she would "be cared for in an environment where we can have some assurance that [her fetus] is safe." RR 14:18-25 (Aug. 6-7). For three months — the remainder of her pregnancy — that environment was NCJ. *See supra* p 4. Investigations of the actual experiences of pregnant women incarcerated in Texas jails, including NCJ, make clear that nothing about these facilities ensure appropriate care or safety for pregnant women or their fetuses.

NCJ, in particular, has come under both federal and state scrutiny regarding inhumane conditions for its imprisoned population, including the discovery of "pregnant women lying on the floor with neither a bed nor a pad." Jaime Powell & Denise Malan, Caller-Times, *County Officials Need to Address Jail Squalor*, June 23, 2006 *available at* http://caller.com/news/2006/jun/23/county-officials-need-to-address-jail-squalor/; *see also* Jaime Powell & Denise Malan, Caller-Times, *Jail's Failed '02 Inspection Surfaces*, July 14, 2006, *available at* http://caller.com/news/2006/jul/14/jails-failed-02-inspection-surfaces/ (describing unsanitary and unsafe conditions leading to three years of failed

inspections at NCJ). The documented evidence of inhumane conditions at NCJ indicates that it may put the lives and health of pregnant women and their future children at risk. In fact, Ms. Lovill's probation officer testified that after having her arrested, he placed a follow up call to the arresting officer because he knew of the problematic conditions in NCJ. *See* RR 38:15-21 (Oct. 4).

Investigations have unveiled similarly intolerable conditions at other Texas detention facilities. A 2006 federal investigation of the Dallas County Jail ("DCJ") documented similar lack of care and facilities. Specific examples of dangerous maltreatment included an instance in which a pregnant woman who complained of continual bleeding could not get help for two months despite her repeated requests. *See* Letter from Wan J. Kim, Assistant Attorney Gen., Civil Rights Div., U.S. Dep't of Justice, to the Honorable Margaret Keliher, Presiding Officer, Dallas County Commissioners Ct., p. 2 (Dec. 8, 2006) (hereinafter the "Department of Justice Report"), http://www.texasjailproject.org/resource_items/articles/must_read_feds_report_on_dallas_countyFedReport.doc.pdf_jail (concluding certain conditions violated the constitutional rights of inmates to adequate medical and mental health care, and safe and sanitary environmental conditions). The investigation also found that prenatal care at DCJ was inadequate. For example, DCJ did not regularly screen and vaccinate pregnant women for preventable illnesses such as hepatitis B, which could prevent maternal-fetal transmission. *See id.*

Other individual reported cases of the treatment of pregnant women in jails and prisons across the State further undermine the State's claim that imprisoning pregnant

women safeguards the health of women, their fetuses, and their newborns. For example, there are documented instances of women giving birth alone in jail cells. In several cases, the baby died. *See* Texas Jail Project, *Diane Wilson's Letter*, Jan. 20, 2006, *available at* http://www.texasjailproject.org/stories/diane_wilsons_letter, (describing tragic experience of woman who suffered stillbirth breach delivery over a toilet, by herself, after staff failed to respond to repeated pleas for help); *see also Inmate Gives Birth to Baby in Jail Toilet*, Houston Chron., July 25, 2003, at A28 (describing another case in which prison medical staff ignored calls of pregnant woman experiencing severe contractions, pain and bleeding, leaving her to deliver in the cell toilet).[28]

The State's claim that incarceration was an appropriate response to Ms. Lovill's pregnancy is further challenged by the fact that Texas permits the shackling of women during pregnancy and even labor, a practice widely recognized by both medical and human rights groups as unnecessary, cruel, inhumane, and medically dangerous. *See* Nicole Porter, *Reproductive Health of Texas Female Prisoners*, http://www.aclutx.org/article.php?aid=386 (last visited Jan. 11, 2008) ("Currently Texas does not have legislation limiting use of shackling on pregnant inmates. Consequently, female prisoners are shackled during labor."). Shackling pregnant women poses serious health risks, as described by Dr. Patricia Garcia in Amnesty International's report on

---

28 These investigations and reports of the experiences of pregnant women in Texas reflect the well-documented failings of prisons and jails throughout the country to meet the medical needs of incarcerated women, particularly pregnant women. *See, e.g.*, Elizabeth E. Coleman & Monica K. Miller, *Assessing Legal Responses to Prenatal Drug Use: Can Therapeutic Responses Produce More Positive Outcomes Than Punitive Responses?*, 20 J.L. & Health 35, 57-58 (2007) (describing how "prison policies, programs, and procedures often neglect the health needs of female inmates. This oversight can be especially harmful to the health of pregnant inmates [who] do not receive regular pelvic exams or sonograms ... [or] education about prenatal care and nutrition") (internal citations omitted).

shackling: "Women in labor need to be mobile. . . . Having the woman in shackles compromises the ability to manipulate her legs into the proper position for treatment [and] mother's and baby's health could be compromised if there were complications during delivery such as hemorrhage or decrease in fetal heart beat." *See Excessive Use of Restraints on Women in U.S. Prisons: Shackling of Pregnant Prisoners,* http://www.amnestyusa.org/Abuse_of_Women_in_Custody/Fact_Sheet_Shackling_of_Pregnant_Prisoners/page.do?id=1108308&n1=3&n2=39&n3=720 (last visited Jan. 11, 2008). Accordingly, the practice of shackling is recognized as a violation of international law. *See generally, The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art. 16*, Dec. 10, 1984, 1465 U.N.T.S. 85, *and the International Covenant on Civil and Political Rights, Art. 7*, Mar. 23, 1976, 999 U.N.T.S. 171.

These local, national, and international reports make clear that Texas prisons and jails cannot be assumed to provide help or appropriate care to pregnant women. No state interest in maternal, fetal, or newborn health can be advanced by incarcerating pregnant women in jails or prisons, such as NCJ, that lack adequate facilities and health services and where dangerous and inhumane policies such as shackling pregnant women are enforced.

C. Incidents of Relapse are Normal and Expected During the Course of Recovery From Drug Use, and Pregnancy Does Not Require or Justify Harsher Treatment.

The fact that Ms. Lovill had a relapse during the course of her recovery from drug use does not make incarceration for the remainder of her pregnancy (and beyond) an

appropriate response. For example, not only did the State know that Ms. Lovill would not have access to drug treatment at NCJ, they knew or should have known that jails do not necessarily provide a woman "with a 'drug free' environment." *See* Becker & Hora at 569; *see also* Matthew Purdy, *Warehouse of Addiction; Bars Don't Stop Flow of Drugs into the Prisons*, N.Y. Times, July 2, 1995, at 1 (reporting "[d]rugs are seeping, and in some cases flowing, into the nation's prisons," and "[d]rug use in prison has become an open secret among many in the corrections industry"). The notion that either relapse in general, or the use of methamphetamine in particular, poses unique harms for pregnant women that justify imprisonment lacks basis in medical evidence.

1. Relapse is part of the recovery process.

"Relapse is a pervasive phenomenon in recovery from drug and alcohol addictions, as well as other chronic diseases." Caron Treatment Center, *Relapse & Recovery; Behavioral Strategies for Change*, 22 (2003) (hereinafter "Relapse and Recovery"). This explains why probation officers do not automatically seek sanctions in response to a drug test or other symptoms of relapse. Even after relapse, there is still the potential for recovery, "in fact, relapse may be part of a learning process that may lead ultimately to recovery." Frank M. Tims et al., *Relapse and Recovery in Addictions* 5 (2001). Only 20% of addicts recover the first time they are treated. *See Addiction & the Problem of Relapse*, Harvard Mental Health Letter (Jan. 2007). Most people experience a period of abstinence, then a relapse, and then again abstinence before achieving sobriety. *Relapse & Recovery* at 7. With respect to certain addictions, such as addiction

to nicotine, relapse is accepted as routine, and non-stigmatized.[29] The literature indicates that "one-third to one-half of relapse prone persons eventually find permanent abstinence." Terence T. Gorski, *Relapse – Issues and Answers,* Alcoholism & Addiction, 9, n.5 (Nov. 1989).

Medical experts have long recognized "that addiction is not simply the product of a failure of individual willpower. Instead, dependency is the product of complex hereditary and environmental factors." American Medical Association, *Proceedings of the House of Delegates: 137th Annual Meeting*, Board of Trustees Report NNN 236, 241, 247 (June 26-30, 1988). *See also* R. K. Portenoy & R. Payne, *Acute and Chronic Pain*, in *Substance Abuse: A Comprehensive Textbook* 563, 582-84 (J.H. Lowinson et al. eds., 1997) (*citing* AMA task force); National Academy of Sciences, Institute of Medicine, *Dispelling The Myths About Addiction: Strategies to Increase Understanding and Strengthen Research*, Ch. 8. (1997).

Accordingly, courts and lawmakers have acknowledged that addiction is a disease marked by "compulsions not capable of management without outside help." *Robinson v. California*, 370 U.S. 660, 671 (1962) (Douglas, J., concurring); *see also* 42 U.S.C. § 201(q) ("The term 'drug dependent person' means a person who is using a controlled substance . . . and who is in a state of psychic or physical dependence, or both . . . ."). And one of the established hallmarks of the disease of drug dependence is the inability to reduce or control substance abuse despite adverse consequences. *See* American Psychiatric Ass'n, *The Diagnostic and Statistical Manual of Mental Disorders - 4th*

[29] As Mark Twain said, "Quitting smoking is easy. I've done it hundreds of times."

Edition (2000) ("DSM-IV-TR"), at 179; *see also National Treasury Employees Union v. Von Raab*, 489 U.S. 656, 676 (1989) ("[A]ddicts may be unable to abstain even for a limited period of time."). This is why the vast majority of drug-dependent people cannot simply "decide" to refrain from drug use or achieve long-term abstinence without appropriate treatment.

This course of recovery and relapse applies equally to pregnant women and there is no medical justification for penalizing them for deciding to continue a pregnancy while experiencing this process. Indeed, numerous studies indicate that pregnant women are especially motivated to address addiction and change behavior for the sake of their future child. *See e.g*., Sheigla Murphy & Marsha Rosenbaum, *Pregnant Women on Drugs: Combatting Stereotypes and Stigmas*, 83-99 (1998); Susan C. Boyd, *Mothers and Illicit Drugs: Transcending the Myths* (1999). Nonetheless, pregnancy does not create a unique capacity to obtain and maintain recovery on pregnancy's timetable. Moreover, as discussed below, risks associated with drug dependence are not different in kind or magnitude from other pregnancy risks. For these reasons, pregnancy offers no unique justification for selectively imposing sanctions and imprisonment when a probationer experiences a relapse – be they man or woman, pregnant or not.

2. Risks associated with drug dependence are not different in kind or magnitude from other pregnancy risks.

In 2006, ACOG 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." ACOG, *Information about Methamphetamine Use in Pregnancy* (Mar. 3, 2006). In 2005, a national expert panel review of published studies concerning the developmental effects of methamphetamine and related drugs concluded that "the data regarding illicit methamphetamine are insufficient to draw conclusions concerning developmental toxicity in humans." Center For The Evaluation of Risks to Human Reproduction, *Report of the NTP-CERHR Expert Panel on the Reproductive & Developmental Toxicity of Amphetamine & Methamphetamine*, 163, 174 (2005). 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. *See* CESAR Weekly Fax from the Center for Substance Abuse Treatment, Vol. 14 Issue 33 (Aug. 2005).

Indeed, nearly two decades of misinformation about the effects of in utero cocaine exposure counsels that assumptions about illegal drug use must be carefully scrutinized. In the face of prosecutions based on public fears fueled largely by media accounts and a handful of methodologically flawed research studies on cocaine, courts properly refused to expand the reach of criminal laws to the context of pregnancy. *See* Laura E. L. Gómez, *Misconceiving Mothers: Legislators, Prosecutors, and the Politics of Prenatal Drug Exposure* 14 (1997). These judicial decisions were well-founded. Although responsible voices had cautioned that findings concerning biological effects were

"contradictory" and that evidence of harm remained "slim" and "inconclusive," *see, e.g.*, Mayes et al., *The Problem of Prenatal Cocaine Exposure: A Rush to Judgment*, 267 JAMA 406 (1992), a comprehensive analysis of the developmental effects of cocaine exposure did not appear until 2001. The conclusion of the analysis was that the claimed link between prenatal exposure to cocaine and harm to children was largely unfounded. *See* D. Frank et al., *Growth, Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 285 JAMA 1613 (2001).

Likewise, the principal import of existing research on methamphetamine ingestion during pregnancy is not that it is "safe," but rather that no medical basis exists for assuming that the risks presented by this drug are any greater than those associated with many other conditions and activities common in pregnancy. There is at least a comparable basis for concern about the potential for serious adverse effects of numerous prescription drugs, including anticonvulsants, mood-stabilizers, benzodiazepines (a class which includes Valium, Librium and Xanax), as well as some antibacterial, anticoagulant, and antihypertensive drugs. *See* K. Jones, *Smith's Recognizable Patterns of Human Malformation*, 495 (5th ed. 1997); J. Berstein, *Handbook of Drug Therapy In Psychiatry*, 407-25 (2d ed. 1988); *The Merck Manual of Diagnosis and Therapy*, 1859 (R. Berkow ed., 16th ed. 1992.) In short, there are numerous factors and substance exposures that may affect a woman's pregnancy - from a pregnant woman's age to having a partner who smokes.[30]

---

[30] For example, there are a range of identified risk factors for low birth weight and stillbirth, including giving birth at age 35 or older, *See* Tough et al., *Delayed Childbearing and Its Impact on Population Rate Changes in Lower*

Because relapse is a normal part of the recovery process, including for pregnant women, and because the risks associated with drug dependence are not fundamentally different from other pregnancy risks, the automatic assumptions that underlie the State's response to evidence of Ms. Lovill's drug use during pregnancy lacks scientific basis.

D. The Practice of Separating Newborns From Incarcerated Mothers Poses Substantial Risk of Harm.

As a result of the State's selective sanction and imprisonment, Ms. Lovill and her newborn were separated shortly after she gave birth and they will remain apart for the duration of her incarceration. Such forced separation amounts to an additional penalty both on the mother and child, and poses additional harms to newborn health and development, further undermining the Sate's claimed interests.

Forced separation at birth prevents the beneficial effects of breast-feeding, maternal-infant bonding and breaks up families. Courts have recognized that the State's interest in protecting the well-being of children is not fully served unless it does so in a manner that also protects the benefits of maintaining family relationships. As expressed by one court, "society's interest in the protection of children is, indeed, multifaceted,

---

Birthweight, Multiple Birth, and Preterm Delivery, 109 Pediatrics 399-403 (Mar. 2002); pregnancies for women with hyperthyroidism and other diseases, s*ee* Atkins et al., *Drug Therapy for Hyperthyroidism in Pregnancy: Safety Issues for Mother and Fetus*, 23 Drug Safety 229 (2000); and toxic exposure in the workplace, *see Johnson Controls*, 499 U.S. at 205; *see also Int'l Union, United Auto., Aerospace & Agric. Workers of Am. v. Johnson Controls Inc.*, 886 F.2d 871, 914 & n.7 (7th Cir. 1989) (Easterbrook, J., dissenting) (noting that an estimated 15 to 20 million jobs entail exposure to chemicals that pose fetal risk); Khattak et al., *Pregnancy Outcome Following Gestational Exposure to Organic Solvents: a Prospective Controlled Study*, 281 JAMA 1106-9 (1999) (finding that pregnant women exposed to organic solvents on the job have a 13-times greater risk of giving birth to babies with major malformations than those not exposed). Studies demonstrate that pregnancy outcomes can also be influenced by male contribution. *See* C.R. Daniels, *Exposing Men, the Science and Politics of Male Reproduction*, 124 (2006) (linking pregnancy loss to paternal workplace exposure to ionizing radiation and paternal smoking); *see also supra* Part III.B.

composed not only with concerns about the safety and welfare of children from the community's viewpoint, but also with the child's psychological well-being, autonomy, and relationship to family." *Tenenbaum v. Williams*, 193 F.3d 581, 595 (2d Cir. 1999) (*quoting Franz v. Lytle*, 997 F.2d 784, 792-93 (10th Cir. 1993)). Accordingly, courts have recognized that "governmental failure to abide by constitutional constraints may have deleterious long-term consequences for the child. . . ." *Wallis v. Spencer*, 202 F.3d 1126, 1130 (9th Cir. 2000); *see also Gethers*, 585 So. 2d at 1143 n.17 ("Criminal prosecution would needlessly destroy the family by incarcerating the child's mother when alternative measures could both protect the child and stabilize the family." (internal quotation marks and citation omitted).

The separation of new mothers from their newborns is thus recognized to harm mothers, children, and the family unit, and has been recognized by international bodies as a violation of international human rights standards. *See* Report of the 8th UN Conference on the Prevention of Crime and Treatment of Offenders, U.N. Doc. A/Conf. 144/28, rev. 1 (91.IV.2), Res. 1(a), 5(b) (1990) (prepared by the Secretariat) ("The use of imprisonment for certain categories of offenders, such as pregnant women or mothers with infants or small children, should be restricted . . . ."); Amnesty International, *"Not Part of My Sentence" Violations of the Human Rights of Women in Custody*, *available at* http://www.amnesty.org/en/alfresco_asset/4beeee24-b56b-11dc-a84c-d5c747e827a7/amr510191999en.html (last visited Jan. 11, 2008) (highlighting the negative repercussions to families and children of incarcerating mothers).

Accordingly, by unnecessarily forcing the separation of Ms. Lovill and her newborn, the State created circumstances that health experts, courts, and human rights bodies oppose as detrimental to the health and welfare of children.

CONCLUSION

The selective enforcement of a probation sanction to imprison Ms. Lovill for the duration of her pregnancy (and beyond) did nothing to advance the State's asserted interests in promoting maternal, fetal, or newborn health. Rather, it ignored both the well-established and overwhelming consensus among medical and health experts that punishment of pregnant women who use drugs does not protect women and their children, and the widespread evidence of inadequate health services for pregnant women in jail. Because neither prenatal nor fetal health are statutorily authorized bases for imposing sanctions, the unprecedented application of the community supervision law on those grounds violates Ms. Lovill's right of due process. And because neither of those interests are in fact advanced by selective enforcement of heightened sanctions on the basis of pregnancy, such punishment of Ms. Lovill violates her constitutional rights of procreative choice and equality under law.

Dated: Austin, Texas
January 17, 2008

Respectfully submitted,

_____

Lisa Graybill
Texas Bar No. 24054454
Legal Director
American Civil Liberties
Union Foundation of Texas
1210 Rosewood Avenue
Austin, Texas 78702
(512) 478-7300
(512) 478-7303 (fax)

Diana Kasdan (N.Y. Bar No. 4028874)
Alexa Kolbi-Molinas
(N.Y. Bar No. 4477519)
American Civil Liberties Union Foundation
Reproductive Freedom Project
125 Broad Street, 18th Floor
New York, New York 10004
212-549-2633
(212) 549-2652 (fax)

Tiloma Jayasinghe (N.Y. Bar No. 4223715)
Lynn M. Paltrow (N.Y. Bar No. 1920156)
National Advocates for Pregnant Women
39 West 19th Street, Suite 602
New York, NY 10011
(212) 255-9252
(212) 255-9253 (fax)

Counsel for *Amici Curiae*[*]

[*] Pursuant to Rule 11 of The Texas Rules of Appellate Procedure, the ACLU of Texas, the ACLU Foundation, and National Advocates for Pregnant Women, counsel for *amici*, certify that no fees were paid or will be paid in connection with the preparation of this *amicus* brief.

CERTIFICATE OF SERVICE

By my signature below, I certify that a true and correct copy of this document was served on the following persons in the manners indicated below on this 17th day of January, 2008.

_____

Lisa Graybill
Texas Bar No. 24054454
Legal Director
AMERICAN CIVIL LIBERTIES
UNION FOUNDATION OF TEXAS
1210 Rosewood Avenue
Austin, Texas 78702
(512) 478-7300
(512) 478-7303 (fax)

Via United States Postal Service, First Class
and by Electronic Mail

Brian Miller
State Bar No. 24002607
The Law Office of Brian Miller
402 Peoples St., Suite 4A
Corpus Christi, TX 78401
(361) 883-2999
(361) 288-4577 (fax)

Counsel for Appellant

Douglas K. Norman
State Bar No. 15078900
Assistant District Attorney
105th Judicial District of Texas
901 Leopard, Room 206
Corpus Christi, Texas 78401
(361) 888-0410
(361) 888-0399 (fax)

Counsel for Appellee