

WISCONSIN'S UNBORN CHILD PROTECTION ACT: Implementation and Consequences

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Executive Summary

This brief provides an overview of Wisconsin's Unborn Child Protection Act ([1997 Wisconsin Act 292](#)), which gives Wisconsin courts the power to make legal decisions and judgments over expectant mothers^a who are suspected of substance use.¹ It describes how and why Wisconsin continues to enforce a law that a federal court declared unconstitutional and compares the law to similar laws in other states.

Part One begins with a history of Act 292 and provides an overview of its text and structure. It then details relevant litigation: Two women challenged the law in two separate court cases,² and in one of those cases, a federal court found the law unconstitutionally vague.³ However, courts in both cases eventually dismissed the claims as moot⁴ (meaning, the case fell outside of the court's jurisdiction because there was no longer an active controversy between the parties). Thus, although the law remains unconstitutional in substance—that is, there is no legal reason a court would not again deem it unconstitutional today—it is formally still on the books. Perhaps surprisingly, state and county officials continue to implement it. Part One further explains how this implementation operates and provides rough estimates of the law's usage.

Part Two compares Act 292 to other prenatal substance use laws in the United States. It explains that, while 44 states have laws that address prenatal substance use,⁵ Wisconsin's law contains many distinctive and potentially problematic features. To compare Act 292 to analogous laws in other states, this brief focuses on five variables: how and by whom the law is invoked, when the law can be invoked, the transparency of the proceedings, the right to counsel, and the legal consequences for pregnant people.⁶ We find that the law's provisions go well beyond most other prenatal substance use laws throughout the United States in several respects and allow significant state control over pregnant people.

Part One: History and Use of Act 292

History, Text, and Structure

1. Statutory History

The Wisconsin legislature enacted Act 292 in 1998.⁷ The Act was the legislature's response to the Wisconsin Supreme Court's decision that the Wisconsin Children's Code definition of a child did not include unborn children.⁸ The Act, which was colloquially referred to as the "cocaine mom" law, was also rooted in concerns—now understood as misconceptions—about the effects of crack cocaine on fetal development and

^a People who identify as women are not the only ones who experience pregnancy; trans and gender-nonbinary individuals can also become pregnant. In this document, we use the term "expectant mother" instead of the more inclusive term "pregnant person" because Act 292 repeatedly uses the former phrase. We have retained the language of the statute for accuracy but do not endorse the word choice.

resulting burdens on the healthcare system.⁹ The Act amended the code to include “unborn children,”^{10,b} defined as human beings from the time of fertilization.¹¹

When the legislature was considering the bill that eventually became Act 292, several state and local organizations expressed their opposition. One line of concern—never fully resolved—questioned the law’s constitutionality. The Wisconsin Legislative Council, a nonpartisan legislative service agency, advised the legislature that the law would likely be unconstitutional because the state’s interest in unborn human life before fetal viability would likely not trump an expectant mother’s liberty and privacy interests under *Roe v. Wade* and *Planned Parenthood v. Casey*.¹² One of the bill’s sponsors, Joanne Huelsman, acknowledged that the law would likely be unconstitutional if it applied before fetal viability and testified in support of a version of the bill that would have only applied once a fetus was viable.¹³

Other opponents of the bill focused on the negative effects it would likely have on public health. For example, while the bill’s proponents touted its ability to deter prenatal substance use,¹⁴ the City of Milwaukee Health Department expressed concern that the law would stigmatize substance use and dissuade pregnant people, who would fear punishment under the Act, from seeking medical care.¹⁵ The Department urged the legislature to seek more effective and less punitive methods to address prenatal substance use.¹⁶ Although beyond the scope of this brief, the Department’s concerns align with a robust social science literature concluding that laws like Act 292 discourage pregnant people from seeking alcohol and drug treatment; discourage pregnant people from seeking prenatal care or disclosing their full medical needs and history to their care team; and disproportionately affect marginalized communities.¹⁷

Despite warnings about Act 292’s unconstitutionality and negative public health consequences, the legislature passed the Act and then-Governor Thompson signed it into law.¹⁸

2. Text and Structure

Act 292 contains thirty-two provisions that cover legislative intent; court jurisdiction over fetuses and their mothers; the criteria and processes for taking, keeping, and releasing an expectant mother in custody; the rights of the mother and fetus to counsel; procedures and rules for related hearings; and reporting of unborn child abuse.¹⁹ We discuss several key features of the statute here.

First, Act 292 proclaims its legislative intent is, among other things, to protect children and families by “assisting parents and the expectant mothers of unborn children, whenever appropriate, in fulfilling their [parental] responsibilities.”²⁰ It states that unborn children have “certain basic needs...including the need to develop physically to their potential and the need to be free from physical harm due to the habitual lack of self-control of their expectant mothers.”²¹ As noted above, the Act’s legislative purpose also discusses the “tremendous burdens” that “the habitual lack of self-control of expectant mothers” imposes both on families and public services.²²

To achieve its goals, the Act gives Wisconsin family courts jurisdiction over a fetus and the expectant mother under certain circumstances: 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” to the physical health of the fetus if the mother does not receive treatment.²³

As explained in more detail below, an Act 292 case typically arises from an allegation of unborn child abuse. Anyone can report unborn child abuse to their local child protective services (CPS) agency,²⁴ but

^b In this document, we use the term “unborn child” instead of the medically accurate term “fetus” because Act 292 repeatedly uses the former phrase. We have retained the language of the statute for accuracy but do not endorse the word choice.

professionals, mainly in the medical, educational, and law enforcement fields, are required to do so.²⁵ Each CPS agency must investigate all reports and determine if each fetus needs protection or services.²⁶ The report investigator must take the expectant mother into custody if they determine that it is in “the best interest of the unborn child in terms of physical safety and physical health to take the expectant mother into custody.”²⁷ Otherwise, they must provide any needed CPS services.²⁸ If the expectant person refuses the services, the agency may request a petition to begin proceedings under Act 292.²⁹

There are two stages of custody under Act 292: brief protective custody and continued custody. First, a court, CPS intake worker, or law enforcement officer can take an expectant mother into brief protective custody if there is “substantial risk” to the physical health of the unborn child.³⁰ The expectant mother must also have refused the substance misuse services offered to them or have “not made a good faith effort to participate” in such services.³¹ CPS intake workers are included here because “any person authorized to provide or providing intake or dispositional services for the court... has the power of [law enforcement]” in the context of taking an expectant mother into custody.³²

When a court takes an expectant mother into custody at this or any stage, it may only hold them in a parent or relative’s home, residential facility, treatment facility, or hospital.³³ In contrast, when a CPS intake worker or law enforcement officer takes an expectant mother into custody at this stage, the statute provides no express limitation as to where they may hold the individual.³⁴ The court, CPS intake worker, or officer should generally use the brief custody option to provide counseling or a warning, and then should release the mother to a hospital, relative, or friend.³⁵ If the court, CPS intake worker, or officer does not release the mother, a court must hold a hearing within 48 hours to determine if the mother will be held in continued custody.³⁶ This is the second stage of custody. By the time the hearing takes place, a district attorney, corporation counsel, the fetus’s assigned guardian, or “other appropriate official” must have filed a petition to begin proceedings under Act 292.³⁷

During this stage, a court again can hold a pregnant person in continued custody in a parent or relative’s home, residential facility, treatment facility, or hospital.³⁸ The court must create a dispositional order that dictates where the expectant mother will be held and in which programs and services she will participate.³⁹ The court must also provide an expiration date for the court order, which may last up to one year, in writing.⁴⁰ Act 292 also provides that, when an expectant mother’s conduct is likely to cause physical harm to herself or others due to mental illness, drug dependence, or developmental disability, proceedings should follow Chapter 51 of state law, which provides for emergency detention and involuntary commitment for treatment.⁴¹

3. Case Law History

Two women challenged Act 292 in two separate federal court cases.

Beltran v. Strachota:⁴² In 2013, Alicia Beltran attended a prenatal appointment where she disclosed to her care team that she previously had a dependency issue with Percocet but had used Suboxone to treat her opioid use disorder.⁴³ Beltran refused to start Suboxone again under the supervision of the medical care team, and the team reported her substance use history to authorities.⁴⁴ Soon after, law enforcement officials arrested her, required her to submit to a medical examination, and took her to a child-in-need-of-protective-services (CHIPS) proceeding.⁴⁵ She was subsequently taken to a halfway house and then to a treatment center for two months.⁴⁶ Beltran never tested positive for any controlled substances.⁴⁷

After Beltran filed for federal habeas corpus challenging her custody, she was released, the CHIPS petition was withdrawn, and the state court case against her was dismissed.⁴⁸ The Wisconsin Eastern District Court dismissed Beltran’s federal habeas corpus case as moot because she was no longer in custody, no longer pregnant, and “no collateral consequences [attended] her.”⁴⁹ (Moot is a legal term which means that a case falls outside a court’s jurisdiction because there is no longer an active controversy between the parties.)

The court found that, even if Beltran became pregnant again, it was “only a remote possibility” that she would be subject to the same treatment again.⁵⁰

Loertscher v. Anderson:⁵¹ In 2014, Tamara Loertscher sought medical care at the Eau Claire Mayo Clinic Hospital, where a urine test confirmed that she was pregnant and also found her positive for methamphetamine and other controlled substances.⁵² Loertscher admitted she had used the substances prior to learning that she was pregnant but said she did not intend to continue use during her pregnancy.⁵³ While she remained in the hospital seeking care for other medical conditions, a hospital social worker reported to the Taylor County Human Services Department that a pregnant woman had tested positive for drug use, and county employees “screened in” the case and determined (without conferring with Loertscher or doctors who treated her) that she should enter an inpatient alcohol and drug treatment facility.⁵⁴ A juvenile court then held a telephonic hearing at which Loertscher’s fetus was provided with an attorney, but Loertscher herself was not.⁵⁵ Based on a doctor’s testimony on the risks of methamphetamine use during pregnancy, the juvenile court ordered Loertscher to report to an alcohol and drug abuse treatment center.⁵⁶ When she did not report to the center, the court placed her in county jail for contempt, where she remained for 18 days.⁵⁷

While in detention, Loertscher received no prenatal care, missed two previously scheduled prenatal appointments, and was placed in solitary confinement for more than 24 hours for refusing to take another pregnancy test.⁵⁸ She ultimately received legal representation after locating a list of public defenders.⁵⁹ She was released from jail when she agreed to enter into a consent decree that required oversight throughout her pregnancy, including participation in a drug treatment assessment and submission to random drug tests throughout her pregnancy,⁶⁰ all of which were negative.⁶¹ She then filed an action in federal court to challenge the constitutionality of Act 292.⁶² Shortly after filing the action, she gave birth to a healthy baby boy.⁶³

In 2017, the Wisconsin Western District Court found Act 292 unconstitutionally vague. The “void for vagueness” doctrine is a component of constitutional due process: A law must clearly define what it prohibits.⁶⁴ In concluding that Act 292 fell short of this requirement, the district court focused on the two phrases that state the Act’s main elements: that a pregnant person must “severely and habitually lack self-control in the use of alcohol [or] controlled substance,” and that the lack of control must “pose a substantial risk that the physical health of the child will be seriously affected or endangered.”⁶⁵ The court found both of these phrases “fundamentally ambiguous.”⁶⁶ The phrases failed to provide fair notice to individuals of what conduct is forbidden; “[t]here is no way...to know what type of behavior” would place an expectant mother under the statute’s jurisdiction.⁶⁷ Indeed, the statute’s language might suggest that a mother’s past substance use could be enough, even if they did not use any drugs or alcohol once pregnant.⁶⁸

The state’s attorney general at the time, Brad Schimel, obtained a stay order from the Supreme Court of the United States, allowing the state to continue to enforce the law pending the appeal of the district court’s decision.⁶⁹ The Court issued no written explanation for granting the stay.⁷⁰ In 2018, the appellate court, the U.S. Court of Appeals for the Seventh Circuit, held that the case was moot because Loertscher had permanently moved out of Wisconsin.⁷¹ The Seventh Circuit then imposed the traditional legal remedy for cases that become moot during the appeal process: It vacated the district court’s judgment, meaning that the judgment is no longer legally enforceable, regardless of whether it was correct on the merits.⁷²

As a result of these litigation developments, Act 292 remains formally on the statute books, even though a federal court declared it unconstitutional. In such circumstances of dubious constitutionality, state and local officials might decide, prudentially, to refrain from enforcement. However, as the next section describes, Wisconsin county CPS agencies still implement the law today.⁷³

Implementation of Act 292

1. Overview of Process

Wisconsin's CPS program is supervised by the state, but it is implemented at the county level. County-level implementation thus determines the real-world effects of Act 292. While some counties might prudentially refrain from exercising a law that is constitutionally suspect, others may not, resulting in a patchwork across the state. Given the pivotal role that county-level enforcement plays, we address here in more detail the regulatory framework and typical process at the county level.

Counties enforce laws related to child welfare by following the Wisconsin Department of Children and Families (DCF) Child Protective Service Access & Initial Assessment Standards (CPS Standards).⁷⁴ The CPS Standards include guidelines on local child welfare agency responsibilities under Act 292, which it refers to as "unborn child abuse."⁷⁵ Under the current CPS Standards, DCF uses a three-step process to address reports of unborn child abuse: an Access Report; a screening decision; and a response time decision, if the report is screened in.⁷⁶

Initially, the law requires mandatory reporters to report to a county agency when they have "reasonable cause to suspect" unborn child abuse.⁷⁷ As noted, after a county agency receives a services report from a voluntary or mandatory reporter, the agency must document the allegation in an Access Report. The CPS Standards provide guidelines on what information the CPS professional should gather in their Access Report. This includes information affirming that the person is pregnant, a description of the type of substances or alcohol and quantity allegedly used, and a description of "behaviors that exhibit the mother's habitual lack of self-control exhibited to a severe degree."⁷⁸ It also involves gathering the expectant mother's history of use and effects on previous children and information about the present harm or future risk of harm on the fetus.⁷⁹ In addition, the professional should describe the prenatal care the expectant mother is receiving and her "individual functioning and parenting practices."⁸⁰

Professionals should screen in a report for an Initial Assessment if it creates a reasonable suspicion of maltreatment based on the totality of the circumstances.⁸¹ An Initial Assessment includes "gathering and documenting all relevant information from reporters, making a screening decision, and ... making the response [time] decision."⁸² It involves close collaboration with "medical professionals, AODA professionals, and legal counsel" to gather information pertaining to the fetus's development and the risk of harm and actual harm to that fetus.⁸³ The screening decision is the "formal decision to accept or not accept a report of alleged child maltreatment...for further assessment... [and] must be documented in the family case record."⁸⁴

An agency must screen in an unborn child abuse report if the elements of unborn child abuse exist.⁸⁵ Per the CPS Standards, the elements of unborn child abuse are:

- (1) "An expectant mother..."
- (2) "is using either alcohol beverages, controlled substances or controlled substance analogs..." and is
- (3) "...exhibiting a habitual lack of self-control in her use of at least one of these controlled substances or controlled substance analogs..." and
- (4) "the habitual lack of self-control is being exhibited to a severe degree..." and
- (5) "is creating serious physical harm to the unborn child," and
- (6) "... the expectant mothers use is creating a risk that the child, once born, will be seriously harmed as a result of the exposure to the mother's use prior to birth."⁸⁶

To make a response time decision, the child welfare professional must consider (1) "alleged conditions that would require immediate hospitalization, detoxification, or intervention," (2) "[t]he anticipated discharge date if the expectant mother is currently hospitalized," and (3) "[r]eported conditions that identify threats

to the safety of any other children in the home.”⁸⁷ The county agency must make a screening and response time decision within 24 hours of receiving a report.⁸⁸

The agency must also conclude whether the maltreatment of the fetus is classified as “Services Needed,” “Services Not Needed,” or “Unable to Locate Source” within 60 days of receipt of a report.⁸⁹ The agencies use these terms for unborn child abuse instead of the usual “Substantiated” or “Unsubstantiated.”⁹⁰ A “Services Needed” determination is appropriate when a case meets all the elements of the definition of unborn child abuse.⁹¹ As described above, the agency may request a petition to begin court proceedings under Act 292 when an expectant mother refuses CPS services.⁹²

Notably, the current iteration of the CPS Standards, published in 2021, is different from the 2015 version that the parties relied on in *Loertscher v. Anderson* in that it requires current physical harm of an unborn child for a case to constitute unborn child abuse. The 2015 version only lists three elements to unborn child abuse: “(1) pregnancy, (2) habitual lack of self control in the use of alcohol or drugs, exhibited to a severe degree, and (3) information to support the belief that there is substantial risk to the physical health of the unborn child due to the substance use.”⁹³ In contrast, the 2021 version includes those three elements but adds the element “is creating serious physical harm to the unborn child.”⁹⁴ Although this appears to be a material substantive change in the standards, we were not able to locate any announcement or notice of the change, and community partners informally note that they have not detected any change in practice based on the change in phrasing.

2. Current Use

DCF reports annually on the number of unborn child abuse reports received per county, the number of those reports that are screened-in, the number of screened in cases that are classified as “services needed,” and the number of children placed in out-of-home care due to unborn child abuse reports. In addition to providing a dashboard of statistics that researchers can access, DCF publishes an annual report that contains information on relevant cases.⁹⁵ A summary of the annual data is provided in the figures below. It does not show any material dip in enforcement after the district court decision in 2017; rather, it reflects that Act 292 actions continue apace today. The data are also suggestive of uneven enforcement among counties, suggesting that county-level education and interventions are important avenues for those who wish to reform the law’s use.

A major limitation of the DCF data is that it does not describe the legal consequences imposed in screened-in cases. Most relevant here, the data does not specify how often pregnant people are detained under Act 292, or what other legal restrictions judges impose on them.⁹⁶ Additional research, and more transparency, are needed in this area.

The following figures contain DCF data on unborn child abuse reports in Wisconsin from January 2007 to January 2020. Between 2007 and 2016, all and screened-in reports for unborn child abuse increased, peaking in 2016, and declining slightly to a fairly stable level between 2017 and 2020 (Figure 1). Figure 2 and 3 show trends in unborn child abuse reports for the five largest counties in the state and a set of other Wisconsin counties, respectively. These data reveal that Wisconsin county agencies continue to use Act 292, even after a district court deemed the law unconstitutional. Rock and Brown counties even show an increase in reports of unborn child abuse from January 2007 to January 2020.

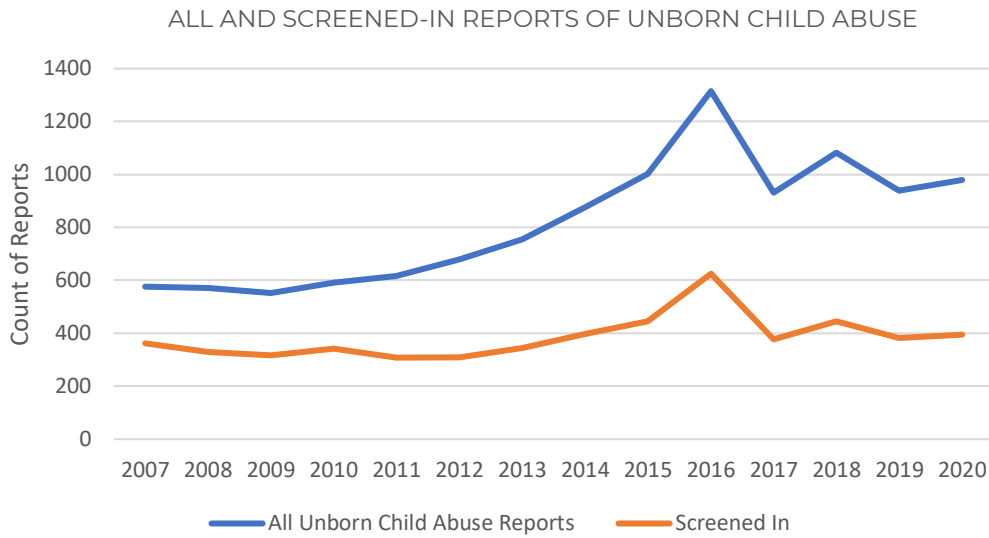


Figure 1: The figure shows the total number of unborn child abuse reports in Wisconsin and the number of those reports that were screened in from January 2007 to January 2020.

Source: Wisconsin Department of Children & Families, Child Protective Services Dashboard.

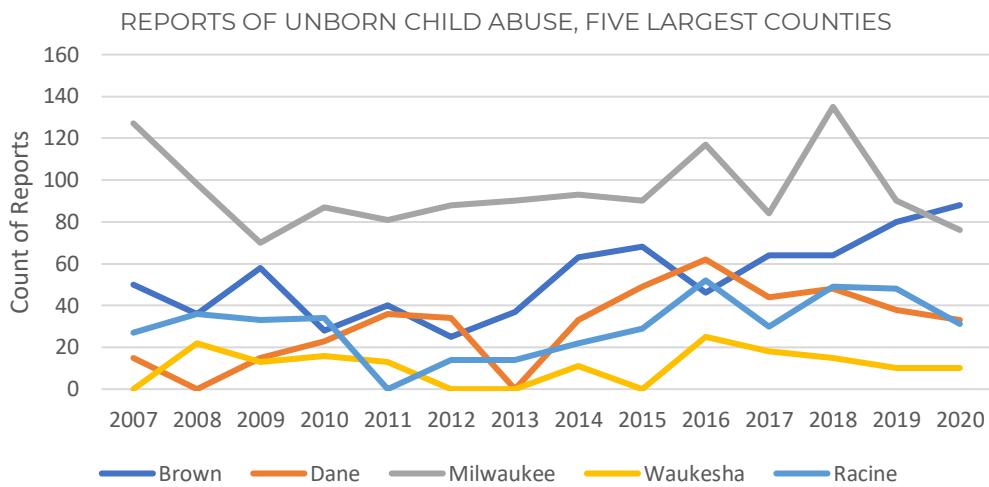


Figure 2: The figure shows the number of unborn child abuse reports per year by the five largest counties (by population) in Wisconsin. Annual reports of less than 10 are suppressed and shown as zero in the figure.

Source: Wisconsin Department of Children & Families, Child Protective Services Dashboard.

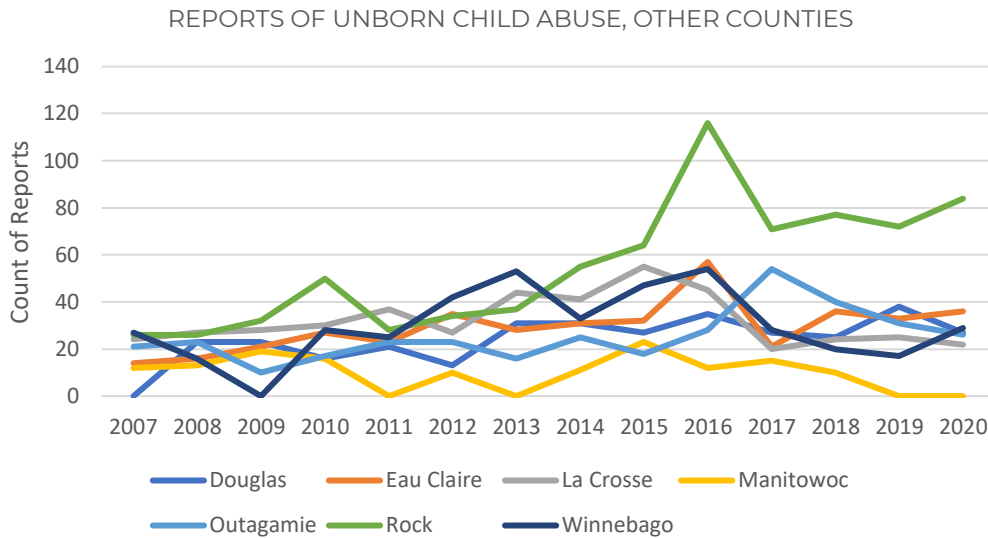


Figure 3: The figure shows the number of unborn child abuse reports per year for other Wisconsin counties outside of the five largest counties. Annual counts of reports less than 10 are suppressed and shown as zero in the figure. Source: Wisconsin Department of Children & Families, Child Protective Services Dashboard.

Part Two: Comparative Research

Overview of Prenatal Substance Use Laws in the U.S.

Forty-four states and D.C. have laws that pertain to substance use during pregnancy.⁹⁷ Twenty-four of these laws label prenatal substance use as noncriminal child abuse,⁹⁸ 42 require reporting to the state’s CPS agency,⁹⁹ and 33 require the CPS agency to create a Plan of Safe Care (POSC) to ameliorate the child’s circumstances.¹⁰⁰ Most states’ laws do not go beyond these three legal consequences.¹⁰¹

State-required reporting and POSC creation is widespread in part because implementing these requirements makes states eligible for grants under the Child Abuse Prevention and Treatment Act (CAPTA).¹⁰² CAPTA grants are intended for use in improving a state’s CPS system.¹⁰³ Wisconsin is one of the many states that follow CAPTA guidelines by requiring reporting and POSCs,¹⁰⁴ but Wisconsin is also one of the few states that goes well beyond those guidelines. As noted, Wisconsin allows the state to hold a pregnant person involuntarily outside of their home for a prolonged period.¹⁰⁵ That remedy is permitted in only four other states.¹⁰⁶

This section explores how Wisconsin’s Act 292 compares to other states’ prenatal substance use laws across five key variables, beginning with how the law is invoked and concluding with the legal consequences courts may impose on pregnant people. This comparative analysis is based on several sources: the statutes and resulting case law in each state; the national Child Welfare Information Gateway;¹⁰⁷ and several studies in the secondary literature that compare state laws on some but not all of these variables.¹⁰⁸ Appendix A, an interactive table summarizing the findings, is available [here](#).

Comparative Research Results

1. How and by Whom the Law is Invoked

As noted in Part One, Wisconsin has two stages of civil commitment: brief protective custody and continued custody.¹⁰⁹ The other four civil commitment states, South Dakota, Oklahoma, Minnesota, and North Dakota, also have short and long duration forms of custody.¹¹⁰

What makes Wisconsin's law distinctively harsh is its low bar for confinement: To initially hold an expectant mother in custody, Wisconsin courts only need probable cause to believe that there is a substantial risk to the fetus's health "due to the mother's habitual lack of self-control in the use of alcohol or drugs, exhibited to a severe degree," and the expectant mother is not making a good faith effort to participate in treatment.¹¹¹

All four of the other civil commitment states use the clear and convincing evidence standard, which is a much higher bar than probable cause.¹¹² Indeed, there is reason to doubt the constitutionality of Wisconsin's standard. Supreme Court precedent generally requires a higher standard of proof for civil confinement, although those cases involve facts distinguishable from the temporary detention at issue in Act 292.¹¹³

Additionally, Act 292 allows a very broad range of initial enforcers. As described in Part One, Act 292 gives "any person authorized to provide or providing intake or dispositional services for the court... the power of [law enforcement]" in the context of taking an expectant mother into custody.¹¹⁴ This gives a very broad range of individuals the power to take an expectant mother into custody.

Finally, Act 292 contains uncommonly vague language—so vague that, as noted, the district court held the Act unconstitutional. While almost all states use somewhat subjective language, such as "withdrawal symptoms" or "affected by substance use," none are as vague as Act 292.¹¹⁵

2. When the Law Can Be Invoked

Act 292 is unconventional in that it defines an "unborn child" as a human being from the time of fertilization,¹¹⁶ which means the law may be used early in pregnancy, and that a fetus may have additional legal rights—including the right to counsel, described below, and potential rights beyond the scope of this brief.¹¹⁷ Although other state laws treat prenatal substance use as a form of child abuse, no other state statutes expressly define an "unborn child" as a child, and only 11 other state laws on this subject can be triggered before birth.¹¹⁸ Alabama, Oklahoma, and South Carolina also consider a fetus a person, although this occurred through case law rather than through legislation.¹¹⁹

Also, as explained above, it is conceivable that Act 292 could be invoked based on conduct prior to pregnancy.¹²⁰ Only three other state laws contain language that suggest conduct prior to pregnancy may set off the law;¹²¹ for example, Minnesota uses "habitual excessive use."¹²² No law explicitly says that a mother's use prior to pregnancy is grounds for invoking a prenatal substance use law.

3. The Transparency or Secrecy of the Proceedings

Proceedings under the Wisconsin Children's Code are confidential, and Act 292 is under the Wisconsin Children's Code.¹²³ Therefore, any related proceedings are confidential. While the secrecy of Act 292 proceedings may seem strange, Wisconsin is one of 26 states that have confidentiality provisions related to their prenatal substance use laws.¹²⁴ The confidentiality of these proceedings impedes research into laws like Act 292, as it is difficult to identify and obtain documentation of related cases.¹²⁵

4. Right to Counsel

Wisconsin is unique in that the pregnant person who may be civilly committed does not have a complete right to counsel, while their fetus does.

For a court to place an expectant mother outside of her home in Wisconsin, the mother must be represented by counsel unless the mother “knowingly and voluntarily” waives counsel.¹²⁶ This right to counsel does not apply to other proceedings under the Act. This limitation is not uncommon: The other four civil commitment states provide a mother with a right to counsel in proceedings to civilly commit them outside of her home,¹²⁷ but only a few states provide a right to counsel for a mother during abuse or neglect proceedings involving consequences less severe than civil confinement.¹²⁸

Wisconsin is the only state, however, that provides counsel for a fetus.¹²⁹ Wisconsin defines an “unborn child” as a human being from the time of fertilization and assigns a guardian to advocate for its best interests in prenatal substance use proceedings.¹³⁰ This means that while the fetus has guaranteed representation in Wisconsin, the pregnant person does not.¹³¹

5. Legal Consequences for Pregnant People

Wisconsin is among the most punitive states in terms of the legal consequences it imposes for prenatal substance use. While Wisconsin is not one of the two states that criminalizes prenatal substance use, it is one of only five states that authorizes civil confinement.¹³² Most other states only require reporting or the creation of a POSC and do not subject a mother to custody or confinement for prenatal substance use.¹³³

Wisconsin, South Dakota, North Dakota, Oklahoma, and Minnesota are the only five states that consider prenatal substance use grounds for civil commitment.¹³⁴ In Wisconsin, the state may involuntarily place a mother in a treatment facility, residential facility, friend’s home, or relative’s home for up to one year.¹³⁵ The maximum lengths of civil confinement in the other four states range from three months to one year.¹³⁶ Wisconsin is the only state that allows civil confinement in a friend or relative’s home,¹³⁷ the other four states only use treatment programs or hospitals.¹³⁸

Wisconsin is not one of the two states in which prenatal drug use is a crime.¹³⁹ In Alabama, prenatal drug use can constitute criminal chemical endangerment of a child because of two Alabama Supreme Court cases.¹⁴⁰ Similarly, the South Carolina Supreme Court in 1997 held that a viable fetus constituted a person under the criminal child neglect statute, effectively criminalizing prenatal drug use.¹⁴¹ Tennessee is the only state that has passed a law criminalizing prenatal drug use (in 2014), but the Tennessee General Assembly found that the law had a deterring effect on women seeking medical care and consequently did not extend the law after its expiration in 2016.¹⁴²

Still, the line between civil and criminal confinement can sometimes blur. Similar to laws in the other civil confinement states,¹⁴³ Act 292 allows state actors to take an expectant mother into brief protective custody,¹⁴⁴ and the Act has been used to hold a pregnant person in county jail to await their court hearing.¹⁴⁵ As described, at least one pregnant person in Wisconsin has been jailed after being held in contempt of court when they would not comply with an order to attend treatment.¹⁴⁶ Moreover, a court may hold a mother outside of her home involuntarily for up to one year.¹⁴⁷

Conclusion

Even though a federal court deemed Act 292 unconstitutional, and even though its substance has not changed, the law is still part of Wisconsin's statutory law due to the Seventh Circuit's mootness holding. Our research indicates that counties continue to enforce the law today. As seen in Part Two of this brief, the law's provisions go well beyond most other prenatal substance use laws throughout the United States in several respects and allow significant state control over pregnant people.

One challenge this research presented is that the state and counties provide incomplete information regarding how the law is implemented at the county level and what range of legal consequences are imposed. Future research and advocacy regarding this likely unconstitutional law would be aided by greater transparency.

Suggested citation

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Notes and References

¹ Wis. Stat. § 48.133 (2019-20).

² *Beltran v. Strachota*, No. 13-C-1101, U.S. Dist. LEXIS 138604, 1 (E.D. Wis. Sept. 30, 2014); *Loertscher v. Anderson*, 259 F. Supp. 3d 902, 918-923 (W.D. Wis. 2017), vacated as moot by *Loertscher v. Anderson*, 893 F.3d 386, 388 (7th Cir. 2018).

³ *Loertscher*, 259 F. Supp. 3d at 918-923.

⁴ *Beltran*, No. 13-C-1101; *Loertscher*, 893 F.3d.

⁵ The District of Columbia also has such a law. See D.C. Code § 4-1301.06a.

⁶ [Appendix A](#) compares state statutes that are analogous to Act 292. In addition to identifying key attributes of each state's law, the Appendix provides links to the underlying statutes.

⁷ 1997 Wisconsin Act 292, Wis. State Legislature, <https://docs.legis.wisconsin.gov/1997/related/acts/292>.

⁸ See *Wisconsin ex rel. Angela M.W. v. Kruzicki*, 209 Wis. 2d 112, 561 N.W.2d 729, 740 (Wis. 1997).

⁹ See Wis. Stat. § 48.01 (stating one purpose of the law as “[t]o recognize the compelling need to reduce the harmful financial, societal and emotional impacts that arise and the tremendous burdens that are placed on families and the community and on health care, social services, educational and criminal justice systems as a result of the habitual lack of self-control of expectant mothers in the use of alcohol beverages, controlled substances or controlled substance analogs, exhibited to a severe degree, during all stages of pregnancy”). For background, see, for example, Kathryn Hayes, *The Cocaine Mom Law: How Wisconsin’s Civil Commitment of Pregnant Women Violates the Fourteenth Amendment*, 35 Wis. J. L. GENDER & SOC’Y 171 (2020). On the myths surrounding cocaine use and pregnancy, see, for example, Deborah Frank, et al., *Growth Development, and Behavior in Early Childhood Following Prenatal Cocaine Exposure: A Systematic Review*, 295 JAMA 1613 (2001); NAT’L INSTITUTE ON DRUG ABUSE, RESEARCH REPORT, COCAINE: ABUSE AND ADDICTION (May 2009), <http://www.drugabuse.gov/PDF/RRCocaine.pdf>

¹⁰ See note 7 above.

¹¹ Wis. Stat. § 48.02(19).

¹² See David Stute, *Constitutionality of Extending 1997 Assembly Bill 463 to Unborn Children From the Point of Conception*, Wis. Legislative Council Staff Memorandum (Oct. 28, 1997).

¹³ See Testimony of Senator Joanne Huelsman in Support of Assembly Bill 463, The Assembly Comm. on Child. and Fams. (Oct. 30, 1997). The version of the law that ultimately passed states that “it is the intent of the legislature that the provisions of this chapter... shall be construed to apply ...to the extent that the application of those provisions throughout an expectant mother’s pregnancy is constitutionally permissible...” Wis. Stat. § 48.01(1)(bm). Although the plaintiff in one of the cases discussed below raised a substantive due process claim, the court did not address that claim, deciding the case on other constitutional grounds. See Part One, History, Text, and Structure, 3. Case Law History.

¹⁴ See Testimony of Representative Bonnie Ladwig in Support of Assembly Bill 463, Assembly Comm. on Child. and Fams. (Oct. 30, 1997).

¹⁵ See Comm’r Paul Nannis, Letter from City of Milwaukee Health Dep’t to Representative Michael Huebsch, Milwaukee Health Dep’t Bureau of Admin. (Oct. 27, 1997). The Wisconsin Division of Children and Family Services (now called the Wisconsin Department of Children and Families or “DCF”) also opposed the bill. See *Loertscher*, 259 F. Supp. At 907; Plaintiff’s Proposed Findings of Fact in Support of Plaintiff’s Motion for Summary Judgment. Case: 3:14-cv-00870-jdp Document #178 Filed 11/10/16 #13-25.

¹⁶ *Ibid.*

¹⁷ See, for example, Danielle N. Atkins and Christine Piette Durrance, *State Policies that Treat Prenatal Substance Use as Child Abuse or Neglect Fail to Achieve Their Intended Goals*, 39 HEALTH AFFAIRS 5 (May 2020), <https://www.healthaffairs.org/doi/abs/10.1377/hlthaff.2019.00785>; Darla Bishop et al., *Pregnant Women and Substance Use: Overview of Research & Policy in the United States*, Jacobs Inst. of Women’s Health (Feb. 2017); Cortney E. Lollar, *Criminalizing Pregnancy*, 92 IND. L. J. 947 (2017).

¹⁸ Assembly Bill 463, Wis. State Legislature, <https://docs.legis.wisconsin.gov/1997/proposals/ab463>.

¹⁹ See note 7 above.

²⁰ Wis. Stat. § 48.01(1)(a).

²¹ Wis. Stat. § 48.01(1)(am).

²² See note 9 above.

²³ Wis. Stat. § 48.133.

- ²⁴ Wis. Stat. §§ 48.981(2)(c).
- ²⁵ Wis. Stat. §§ 48.981(2)(a), (3)(a)(1).
- ²⁶ Wis. Stat. § 48.981 (3)(c)(1)(a).
- ²⁷ Wis. Stat. § 48.981 (3)(c)(2m)(a).
- ²⁸ See Wis. Stat. § 48.981 (3)(c)(3).
- ²⁹ *Ibid.*
- ³⁰ Wis. Stat. § 48.193; 48.08(3).
- ³¹ Wis. Stat. § 48.193.
- ³² Wis. Stat. § 48.08(3).
- ³³ See Wis. Stat. §§ 48.193(1)(c); 48.207(1m).
- ³⁴ See Wis. Stat. § 48.193(1)(d).
- ³⁵ See Wis. Stat. § 48.203(1).
- ³⁶ See Wis. Stat. § 48.203(7); Wis. Stat. § 48.213(1)(a).
- ³⁷ See Wis. Stat. §§ 48.213(1), 48.25(1).
- ³⁸ See Wis. Stat. §§ 48.205(1m), 48.207(1m).
- ³⁹ See Wis. Stat. §§ 48.347, 48.355.
- ⁴⁰ See Wis. Stat. §§ 48.355(2)(b)(3), 48.355(4)(c).
- ⁴¹ See Wis. Stat. §§ 48.203(4). Chapter 51 is titled “State Alcohol, Drug Abuse, Developmental Disabilities and Mental Health Act. See Wis. Stat. § 51.
- ⁴² Beltran, No. 13-C-1101.
- ⁴³ Beltran, No. 13-C-1101, 2.
- ⁴⁴ *Ibid.*
- ⁴⁵ *Ibid.*, 3.
- ⁴⁶ *Ibid.*
- ⁴⁷ *Ibid.*
- ⁴⁸ *Ibid.*, 3-4.
- ⁴⁹ *Ibid.*, 8-10, 18.
- ⁵⁰ *Ibid.*, 18.
- ⁵¹ Loertscher, 893 F.3d.
- ⁵² See Loertscher, 893 F.3d, 389-390; Plaintiffs Brief in Support of Summary Judgment, 13.
- ⁵³ *Ibid.*, 390.
- ⁵⁴ See Loertscher, Plaintiffs Brief in Support of Summary Judgment, 13.
- ⁵⁵ See *ibid.*
- ⁵⁶ Loertscher, 893 F.3d, 390-391.
- ⁵⁷ *Ibid.*, 391.
- ⁵⁸ See Loertscher, Plaintiffs Brief in Support of Summary Judgment, 17.
- ⁵⁹ *Ibid.*
- ⁶⁰ Loertscher, 893 F.3d, 391.
- ⁶¹ See note 58 above.

⁶² Loertscher, 893 F.3d, 391.

⁶³ See Loertscher, Plaintiffs Brief in Support of Summary Judgment, 18.

⁶⁴ See, for example, Grayned v. City of Rockford, 408 U.S. 104 (1972).

⁶⁵ Loertscher, 259 F. Supp. 3d, 918-923.

⁶⁶ Ibid, 920.

⁶⁷ Ibid, 921.

⁶⁸ See *ibid*.

⁶⁹ Anderson v. Loertscher, 137 S. Ct. 2328, 198 L. Ed. 2d 756 (2017).

⁷⁰ Ibid.

⁷¹ Loertscher, 893 F.3d, 396. Loertscher argued that her case fell within an exception to mootness doctrine for cases are “capable of repetition, yet evading review,” but the Seventh Circuit rejected that argument. See *ibid*, 395-96.

⁷² See Loertscher, 893 F.3d, 396.

⁷³ See Part One, Implementation of Act 292, 2. Current Use.

⁷⁴ Child Protective Services Access and Initial Assessment Standards, Wis. Dep’t of Child. and Fams. (Apr. 2021), <https://dcf.wisconsin.gov/files/cwportal/policy/pdf/access-ia-standards.pdf>.

⁷⁵ Ibid.

⁷⁶ Ibid.

⁷⁷ This is phrased as “reasonable cause to suspect that a child seen by the person in the course of professional duties has been abused or neglected or...reason to believe that a child...has been threatened with abuse or neglect and that abuse or neglect of the child will occur.” Wis. Stat. § 48.981(2).

⁷⁸ See Access and Initial Assessment Standards, note 74 above, 15.

⁷⁹ Ibid, 16-17.

⁸⁰ Ibid, 17.

⁸¹ Ibid, 24-25.

⁸² Ibid, 25.

⁸³ Ibid, 61.

⁸⁴ Ibid, 25.

⁸⁵ Ibid, 26.

⁸⁶ Ibid, 16.

⁸⁷ Ibid, 30.

⁸⁸ Ibid.

⁸⁹ Ibid, 70-71.

⁹⁰ Ibid, 70.

⁹¹ Ibid, 71.

⁹² Wis. Stat. § 48.981 (3)(c)(3).

⁹³ Child Protective Services Access and Initial Assessment Standards, Wis. Dep’t of Child. and Fams., 15 (Nov. 20, 2015).

⁹⁴ See note 74 above, 16. Specifically, for a report “to rise to the level of an allegation of unborn child abuse,” it “must identify all of the following”: an expectant mother; that the expectant mother is using either alcohol beverages, controlled substances or controlled substance analogs; that the expectant mother is exhibiting a habitual lack of self-control in her use of at least one of these controlled substances or controlled substance analogs; that the habitual lack of self-control is being exhibited to a severe degree; that the expectant mothers use is creating serious physical harm to the unborn child; that the expectant mothers use is creating a risk that the child, once born, will be seriously harmed as a result of the exposure to the mother’s use prior to birth.

- ⁹⁵ See, for example, Wisconsin Child Abuse and Neglect Report: Annual Report for Calendar Year 2020 to the Governor and Legislature Wis. Stat. s. 48.47(8), Wis. Dep't of Child. and Fams. (Dec. 2021), <https://dcf.wisconsin.gov/files/cwportal/reports/pdf/can.pdf>.
- ⁹⁶ The annual reports do identify how many "children were placed in out-of-home care within 60 days of an allegation of unborn child abuse." Ibid, Appendix B, 11.1 (specifying 30 children in 2020).
- ⁹⁷ See [Appendix A](#).
- ⁹⁸ See Guttmacher Inst note 6 above.
- ⁹⁹ See Plans of Safe Care for Infants With Prenatal Substance Exposure and Their Families, Child Welfare Info. Gateway, 1, 3, (July 11, 2016), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safecare/>.
- ¹⁰⁰ Ibid, 4.
- ¹⁰¹ See [Appendix A](#).
- ¹⁰² See 42 U.S.C. § 5106a(b)(2)(B)(ii)-(iii), as amended by the Comprehensive Addiction and Recovery Act of 2016 (P.L. 114-198).
- ¹⁰³ See 42 U.S.C. § 5106a(a).
- ¹⁰⁴ See Wis. Stat. Ann. §§ 146.0255, 146.0257, 46.238; note 74 above.
- ¹⁰⁵ See [Appendix A](#).
- ¹⁰⁶ See *ibid*.
- ¹⁰⁷ See Plans of Safe Care for Infants With Prenatal Substance Exposure and Their Families, Child Welfare Info. Gateway, 1, 3, (July 11, 2016), <https://www.childwelfare.gov/topics/systemwide/laws-policies/statutes/safecare/>.
- ¹⁰⁸ See Guttmacher Inst, Miranda note 6 above.
- ¹⁰⁹ See Wis. Stat. §§ 48.193, 48.205(1m), 48.213(3).
- ¹¹⁰ See S.D. Codified Laws §§ 34-20A-55, 34-20A-63(3), 34-20A-70(3); Minn. Stat. §§ 253B.051, 253B.09; N.D. Cent. Code §§ 25-03.1-25, 25-03.1-20.
- ¹¹¹ Wis. Stat. §§ 48.205(1m).
- ¹¹² See S.D. Codified Laws § 34-20A-77; N.D. Cent. Code § 25-03.1-19(3); Okla. Stat. § 43A 5-415; Minn. Stat. §§ 253B.02(2), 253B.09(1).
- ¹¹³ See generally *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418, 432-33 (1979).
- ¹¹⁴ Wis. Stat. § 48.08(3).
- ¹¹⁵ See [Appendix A](#); see, for example, New Mexico Ann. Stat. § 32A-3A-13(B)(2); Maine Rev. Stat. Tit. 22, § 4011-B.
- ¹¹⁶ See Wis. Stat. § 48.02(19).
- ¹¹⁷ Kathryn Hayes, Comment: The Cocaine Mom Law: How Wisconsin's Civil Commitment of Pregnant Women Violates the Fourteenth Amendment, 35 Wis. J.L. GENDER & SOC'Y 171, 187 (2020).
- ¹¹⁸ See [Appendix A](#).
- ¹¹⁹ *Ibid*.
- ¹²⁰ See *Loertscher*, 295 F.3d 902, 921.
- ¹²¹ See [Appendix A](#).
- ¹²² Minn. Stat. §§ 253B.02(2), 253B.09(1).
- ¹²³ See Wis. Stat. § 48.396(2); see also Guide to Confidentiality Laws Applicable to CHIPS Proceedings, Wis. Dir. of State Cts. Off., (Aug. 2021), <https://www.wicourts.gov/courts/programs/docs/ccipwcpconf guide.pdf>.
- ¹²⁴ See [Appendix A](#).
- ¹²⁵ See Lynn Paltrow, Jeanne Flavin, The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 38 J. HEALTH POL., POL'Y & L., No. 2, 299, 304-305 (2013).
- ¹²⁶ Wis. Stat. § 48.23(2m)(b).
- ¹²⁷ See S.D. Codified Laws § 34-20A-67; N.D. Cent. Code §§ 25-03.1-13; Okla. Stat. § 43A-5-411; Minn. Stat. § 253B.07(2c).

¹²⁸ See [Appendix A](#).

¹²⁹ *Ibid.*

¹³⁰ See Wis. Stat. § 48.235(1)(f), 48.02(19); see also Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. Times (Oct. 24, 2013), <https://www.nytimes.com/2013/10/24/us/case-explores-rights-of-fetus-versus-mother.html>.

¹³¹ See Hayes, note 117 above, 188.

¹³² See [Appendix A](#).

¹³³ *Ibid.*

¹³⁴ See Wis. Stat. § 48.135; S.D. Codified Laws §§ 34-20A-63(3), 34-20A-70(3) (2021); N.D. Cent. Code §§ 50-25.1-16(3), 50-25.1-18, 25-03.1-01, 25-03.1-02(13), 25-03.1-07; Okla. Stat. § 63-1-546.5 (2019); Minn. Stat. §§ 253B.02(2), 253B.09.

¹³⁵ See Wis. Stat. §§ 48.347, 48.355(4)(c).

¹³⁶ See S.D. Codified Laws § 34-20A-81; N.D. Cent. Code § 25-03.1-22; Okla. Stat. § 43A 5-420; Minn. Stat. §§ 253B.09, 253B.13.

¹³⁷ See Wis. Stat. §§ 48.347, 48.207(1m).

¹³⁸ See S.D. Codified Laws §§ 34-20A-77, 34-20A-82, 34-20A-83; N.D. Cent. Code § 25-03.1-21; Minn. Stat. § 253B.09; Okla. Stat. § 43A 5-415.

¹³⁹ See [Appendix A](#).

¹⁴⁰ See Ala. Code § 26-15-3.2; In 2013, the Court ruled that the term “child” as used in the chemical endangerment of a child statute included an unborn child, regardless of the child’s viability. In 2014, it ruled that the same statute was not void for vagueness; *Ex parte Hope Elisabeth Ankrom* Petition for Writ of Certiorari, 152 So. 3d 397; *Ex parte Hicks*, 153 So. 3d 53.

¹⁴¹ See *Whitner v. State*, 328 S.C. 1, 492 S.E.2d 777 (1997).

¹⁴² See Tenn. Code Ann. § 39-13-107 (2015); *Drug Use and Pregnancy in Tennessee: What You Should Know if You Use Drugs & Become Pregnant*, ACLU Tenn., <https://www.aclu-tn.org/wp-content/uploads/2016/09/Fetal-Assault-Direct-Impact.pdf>.

¹⁴³ See, for example, S.D. Codified Laws § 34-20A-55.

¹⁴⁴ See Wis. Stat. § 48.193.

¹⁴⁵ *Beltran*, No. 13-C-1101.

¹⁴⁶ *Loertscher*, 893 F.3d, 912.

¹⁴⁷ See Wis. Stat. §§ 48.347, 48.355(4)(c).