

American Civil Liberties Union
of Montana Foundation
P.O. Box 9138
Missoula, MT 59807
406-443-8590
www.aclumontana.org

January 17, 2018

Jay Harris
Big Horn County Attorney
Big Horn County
P.O. Box 908
Hardin, MT 59034
jharris@bighorncountymt.gov

Re: Big Horn County "Crackdown" on expectant mothers for drug and alcohol use

Dear Mr. Harris:

This office was recently contacted regarding the extremely troubling new policy you have adopted in Big Horn County. While I have not been able to locate the press release your office issued, according to press reports I understand that it will now be your office's policy to "seek an order of protection restraining a pregnant female from any non-medically prescribed use of drugs or alcohol," and, if the expectant mother is found to be in violation of the order, prosecutors will "further prosecute on a contempt basis" and file an order seeking incarceration.

If these reports are accurate, then Big Horn County's "crackdown" on pregnant women is not only counterproductive, paternalistic and cruel, it is also illegal. If your office actively attempts to enforce such a policy, ACLU is prepared to challenge those actions in Court.

First, this policy is an egregious abuse of power. Our system of laws does not permit a County Attorney to invoke so-called "Natural Law" as a justification for restraining or incarcerating pregnant women based on alleged harm to the fetus. As you may know, in 2014, a prosecutor in Ravalli County similarly attempted to abuse his position by charging a pregnant defendant who tested positive for drugs with an additional criminal endangerment charge, only to have the charges thrown out by the court.

It appears that you seek to sidestep the nearly identical issues that arose in Ravalli County by engaging in "civil prosecutions" rather than adding new criminal charges. This is a distinction without a difference that does not pass constitutional muster. In either event, the ultimate outcome is identical – pregnant women will wind up in jail, rather than in treatment. Education, prenatal care and treatment, not prosecution, is most effective in assisting expecting mothers who struggle with alcohol and drug issues. Your policy endorses the profoundly discriminatory principle that women who become pregnant may be subject to separate, unequal and harsher

penalties than other persons. This violates the fundamental principles of constitutional law, human rights and reproductive justice.

Indeed, far from being authorized by any recognized law, your policy violates it: It violates, at a minimum, Montana's constitutional protections for privacy, equal protection, dignity and due process (Mont. Const. art. II, Sections 4, 10 & 17) as well as the Montana Human Rights Act's prohibitions on discrimination based on sex and pregnancy. Mont. Code Ann. § 49-2-101 *et seq.*; *see also United Automobile Workers v. Johnson Controls, Inc.*, 499 U.S. 187 (1991) (fetal policy prohibiting pregnant women from knowingly working in potentially hazardous occupations constitutes discrimination on the basis of sex); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (warrantless drug testing of pregnant woman to protect fetus violates Fourth Amendment). Furthermore, "Natural Law" seeks to create binding rules of moral behavior based on religious principles. The use of so-called "Natural Law" in this manner blatantly violates the Establishment Clause of the U.S. and Montana Constitutions.

Other states have rejected similar attempts to use civil or criminal measures to punish or control expecting mothers. For example, in *State of Wisconsin ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 769 (Wis. 1997), the Wisconsin Supreme Court rejected an attempt to take an "unborn child" to a hospital for inpatient treatment, noting that "such detention will by necessity result in the detention of the unborn child's mother." The Court determined that "the detention of a pregnant woman for acts harming her fetus is a policy issue best addressed initially by our legislature... [T]he sensitive social policy issues raised in this case weigh strongly in favor of refraining from exercising CHIPS jurisdiction over a fetus until the legislature has spoken definitively on the matter."¹

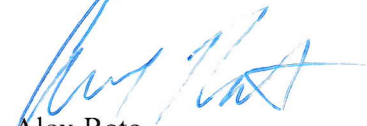
Second, this policy will actually endanger the health and wellbeing of expectant mothers and unborn children. It is unsurprising, but no less troubling, that, by your own admission, you "don't have any statistics" supporting the adoption of this policy. This is because virtually every leading medical organization explicitly opposes policies such as these. As the American Academy of Pediatrics has concluded: "Punitive measures taken toward pregnant women, such as criminal prosecution and incarceration, *have no proven benefits for infant health.*" Am. Acad. of Pediatrics, Comm. on Substance Abuse, 1994 to 1995, *Drug Exposed Infants*, 96 Pediatrics 365-66 (1995) (emphasis added). The American College of Obstetricians and Gynecologists ("ACOG") likewise opposes prosecuting pregnant women who suffer substance use disorders

¹ *See also Cochran v. Commonwealth of Kentucky*, 315 S.W.3d 325 (Ky. 2010); *State v. Martinez*, 137 P.3d 1195, 1197-98 (N.M. Ct. App. 2006), cert. granted, 141 P.3d 1280, and cert. quashed, 161 P.3d 260 (2007) (refusing to apply child abuse statutes to punish woman dependent on cocaine for continuing pregnancy to term); *Reinesto v. Superior Court*, 894 P.2d 733, 735-36 (Ariz. Ct. App. 1995) (dismissing child abuse charges filed against woman for heroin use during pregnancy because the ordinary meaning of "child" excludes fetuses, and because concluding otherwise would offend due process notions of fairness and render statute impermissibly vague); *State v. Gethers*, 585 So.2d 1140, 1142 (Fla. Dist. Ct. App. 1991) (dismissing child abuse charges brought for continuing to term in spite of a drug problem on ground that such application misconstrues the purpose of the law); *Kilmon v. State*, 905 A.2d 306, 314 & n.3 (Md. 2006) (collecting cases) (reasoning "courts must attempt to construe statutes in a common sense manner," *id.* at 311, and reversing conviction for reckless endangerment based on ingestion of drugs during pregnancy); *Sheriff v. Encoe*, 885 P.2d 596, 598 (Nev. 1994) (holding that application of child endangerment statute to a pregnant woman dependent on illegal substances would violate plain meaning of statute, deprive woman of constitutionally mandated due process notice, and render statute unconstitutionally vague).

because “punitive approaches threaten to dissuade pregnant women from seeking health care and ultimately undermine the health of pregnant women and their fetuses.” ACOG, Comm. Op. No. 321, *Maternal Decision Making, Ethics, and the Law* 9 (Nov. 2005).² Nor is this policy likely to result in increased access to treatment.

In sum, we all want women and babies to be safe. However, coercive and punitive treatment of pregnant women violates the civil liberties of individual women, fosters distrust of health care providers, and ultimately undermines maternal and fetal health. We would welcome the opportunity to speak with your office about this policy, and to work with you towards solutions that actually protect the health and wellbeing of expectant mothers and unborn children. If, however, you persist in implementing this “crackdown,” the ACLU is prepared to challenge any punitive actions you undertake against expectant mothers.

Sincerely,



Alex Rate
Legal Director
ACLU of Montana

cc: Office of the Public Defender
Tim Fox, Montana Attorney General
Big Horn County Commission

² See also ACOG, Comm. on Health Care for Underserved Women, Comm. Op. No. 473, *Substance Abuse Reporting and Pregnancy: The Role of the Obstetrician-Gynecologist*, 117 OBSTETRICS & GYNECOLOGY 200 (Jan. 2011); ACOG, Comm. Op. No. 422, *At Risk Drinking and Illicit Drug Use: Ethical Issues in Obstetric and Gynecologic Practice* 6 (Dec. 2008) (“Putting women in jail, where drugs may be available but treatment is not, jeopardizes the health of pregnant women and that of their existing and future children.”); Am. Med. Ass’n (“AMA”), *Legal Intervention During Pregnancy*, 264 JAMA 2663, 2670 (1990) (reporting AMA resolution that “[c]riminal sanctions or civil liability for harmful behavior by the pregnant woman toward her fetus are inappropriate.”).