Civil Commitment of Pregnant Women as a Means of Protecting Fetuses from Maternal Drug and Alcohol Abuse

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I. Introduction

During recent years, courts and legislatures have expanded the legal rights of fetuses, which historically were treated as part of the woman carrying them.¹ This expansion of fetal rights has often resulted in conflict between the rights of the fetus and the rights of the woman carrying it. While concern for the health of fetuses is important to the health of our society, the maternal-fetal conflict is often unnecessary, as the health interests of fetuses could be more effectively promoted in ways that would not conflict with the interests of the mother. In this paper I will specifically address whether civil commitment statutes should be used to prevent pregnant women from using drugs and alcohol during pregnancy. Because the use of civil commitment statutes for this purpose would exacerbate the maternal-fetal conflict, and fetal health could be better promoted in other ways, I conclude that they should not.

II. Statement of the Problem
Over the past decade, a great deal of national attention has been focused on the problems caused by maternal drug use during pregnancy. Indeed, the number of infants who are exposed to illegal drugs in utero is staggering. In some areas of the country, the rate of newborn addiction has quadrupled since 1985. Hospitals in these areas estimate that over twenty percent of the babies born in their facilities have been exposed to drugs in utero. Drug use during pregnancy causes numerous problems for exposed newborns, including low birthweight, low IQ scores, and physical abnormalities.

While the problems caused by illegal drug use during pregnancy are tremendous, use of legal drugs can cause even greater problems. Fetal alcohol syndrome is one of the top three known causes of mental retardation, affecting nearly 5000 infants each year. Fetal alcohol effects, a less severe version of fetal alcohol syndrome, affects

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3 Id.
5 See David F. Chavkin, "For Their Own Good": Civil Commitment of Alcohol and Drug-Dependant Pregnant Women, 37 S.D. L. Rev. 224, 234 (1992), stating that fetal alcohol syndrome is one of the top three causes of birth defects accompanying mental retardation.
approximately 36,000 babies each year. The American Medical Association has determined that there is no safe dose of alcohol during pregnancy, and that total abstinence is the only way to ensure that a fetus will not be harmed by exposure to alcohol. Tobacco use during pregnancy and consumption of certain prescription and over the counter drugs can also cause problems for fetuses.

Children who were exposed to drugs or alcohol in utero create tremendous costs for society. They often need additional medical attention, and they frequently require special education because they suffer from learning disabilities. Several solutions have been proposed to limit drug or alcohol abuse during pregnancy. Some courts have allowed children to bring civil suits against their mother for her behavior during pregnancy. In some states prosecutors have charged women with abusing a fetus under child abuse and neglect laws, and in others women have been

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6 Id.
8 See Chavkin supra note 5 at 230-31. Smoking during pregnancy often causes low birthweight, and many other drugs can have a teratogenic affect if they cross the placenta.
9 See Linden, supra note 1 at 106, stating that neonatal care for an infant exposed to cocaine costs an average of $5,000 more than neonatal care for an infant who was not exposed to drugs in utero. Linden also states that special education for one Boston student who was exposed to drugs cost $13,000 per year, while education for a non-exposed child cost $5,000 per year. Id. at 109.
10 A Michigan court has held that a child could sue his mother for taking tetracycline, an antibiotic, during pregnancy. The tetracycline
civilly committed during pregnancy.\(^1\) Civil commitment poses important and interesting issues for both women and their children because in theory it provides treatment for the mother while protecting the fetus.

III. Overview: Different Types of Commitment Statutes

Historically, civil commitment statutes have been used to involuntarily hospitalize people who are dangerous to themselves or others.\(^2\) The statutes are designed to protect society from people who are ill while simultaneously providing treatment for those individuals.\(^3\) Civil Commitment statutes are justified by the parens patrie power, which permits state action to protect people who are unable to care for themselves, and by a state’s police power, which permits state action to protect society from dangerous individuals.\(^4\) Civil commitment has generated ongoing controversy because of the uncertainty about the effectiveness of forced treatment, the question of whether a person should have the right to refuse


\(^{13}\) Linden, *supra* note 1 at 120.

\(^{14}\) *Id.*
treatment, and because of the deprivation of freedom involved.\textsuperscript{15} While most civil commitment statutes originally applied only to people with mental health problems, a majority of states now allow civil commitment of drug and alcohol dependant individuals.\textsuperscript{16}

While civil commitment is a long accepted practice in the mental health arena, in the last decade it has been increasingly advocated as a means of treatment for drug abuse.\textsuperscript{17} As concern for the rights of women and their fetuses escalates,\textsuperscript{18} it is likely that civil commitment statutes will be applied to pregnant women more frequently in the future. There are three types of civil commitment statutes in use today, and arguably, any of them could be used to commit pregnant women.\textsuperscript{19} The first type expressly applies only to people with mental disabilities. States that apply this type of statute generally recognize drug

\textsuperscript{16} See id., stating that civil commitment statutes in approximately 34 states specifically allow commitment of alcoholics, and statutes in 37 states expressly allow commitment of drug addicts.
\textsuperscript{17} See id., discussing the White House's September 1989 National Drug Control Strategy, which advocated exploration of ways to increase the use of civil commitment for drug treatment.
\textsuperscript{18} See Johnsen, supra note 11 at 569, stating that "a new strand of legal and public policy issues recently has emerged that . . . threatens American women's reproductive freedom and other fundamental liberties." Johnsen argues that the government has increasingly imposed restrictions on pregnant women to promote the health of the fetuses that they carry.
\textsuperscript{19} See Chavkin, supra note 5 at 250.
and alcohol abuse as mental disabilities. The second type of statute expressly applies to people who abuse drugs or alcohol. The third type applies specifically to the commitment of pregnant women who abuse drugs or alcohol. Currently only one state, Minnesota, has a civil commitment statute that explicitly authorizes commitment of drug-dependent pregnant women.

IV. A fetus as an “Other Person”

While theoretically civil commitment statutes could be used to commit pregnant women who abuse drugs or alcohol, they have been used infrequently for this purpose. There may be several explanations for the fact that civil commitment statutes have been used infrequently for this purpose. It is possible that society has not wanted to create a conflict between the rights of a fetus and the rights of the woman who carries it. This makes sense in light of the fact that it would be detrimental to a fetus to create a conflict between a fetus and its mother, when

20 See id.
21 See id.
22 See id.
23 See Linden, supra note 1 at 122. Minnesota also requires physicians to test pregnant women for drug use when drug use is suspected. A physician is required to report a positive toxicology test to the local welfare agency. Id.
24 While civil commitment statutes have been widely used to commit the mentally ill, and for drug and alcohol dependent individuals in recent
the fetus is completely dependent on its mother for its care. It is also possible that until recently, society has not wanted to acknowledge that women could inadequately care for their unborn children. Women have traditionally been expected to nurture their children, protect virtue, and instill values in their offspring, and society may not have wanted to acknowledge that women were not meeting these expectations. It is also likely that the drastic improvement in medical technology has caused society to rethink its definition of "personhood."  

Whatever the reason behind society's failure to use civil commitment statutes to regulate pregnancy, the practical explanation seems to be that it is unclear whether a fetus may be defined as an "other" for purposes of civil commitment statutes, which usually allow commitment only when a person is dangerous to herself or others. Determining whether a fetus is an "other" is a complex task with tremendous implications. Historically, a fetus was considered to be part of the women who carried decades, there is very little discussion of their specific application to pregnant women. See generally Chavkin, supra note 4.

25 See Lisa C. Ikemoto, The Code of Perfect Pregnancy: At the Intersection of the Ideology of Motherhood, the Practice of Defaulting to Science, and the Interventionist Mindset of Law, 53 Ohio St. L.J. 1205, 1211 (1992), stating that social problems have been blamed on women because they have failed to instill virtue in their families.

26 See Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992), holding that viability, not trimesters, should be used to determine when a woman has the right to terminate a pregnancy.
it, and it had no legal rights as a separate entity.\textsuperscript{27} Recently, however, courts and legislatures have granted fetuses rights that were traditionally enjoyed only by born human beings.\textsuperscript{28}

Both criminal law and tort law have expanded fetal rights in recent years.\textsuperscript{29} Traditionally, any rights that a fetus did have were contingent upon live birth. For example, a born child that was injured in utero could assert a tort action for prenatal injuries.\textsuperscript{30} The live birth requirement has been increasingly eroded. Many states now recognize wrongful death actions when a fetus dies in utero.\textsuperscript{31} State legislatures have also defined a fetus as a person for purposes of homicide and assault statutes.\textsuperscript{32} In these states, live birth is not a requirement for a person to be sued under tort law or charged under criminal law for injuring a fetus.

Courts have also begun to decide that fetuses are people for purposes of statutes that traditionally applied only to born human beings even when there is no indication that the legislature intended for the statutes to apply to

\textsuperscript{27} Johnson, \textit{supra} note 1 at 599. \textit{See also} \textit{Roe v. Wade}, 410 U.S. 113, 162 (1973), stating that "the unborn have never been recognized in the law as persons in the whole sense."

\textsuperscript{28} \textit{See} Johnson, \textit{supra} note 1 at 599.

\textsuperscript{29} \textit{See} id. at 602.

\textsuperscript{30} \textit{Id.} at 603.

\textsuperscript{31} \textit{See} id.

\textsuperscript{32} \textit{See} Linden, \textit{supra} note 2 at 110.
fetuses. In *ex. rel. Angela v. Kruzicki*, the Wisconsin Court of Appeals decided that a fetus was a child for purposes of the child protective custody statute. Similarly, the Supreme Court of South Carolina has also held that a fetus should be considered a person under the state’s child abuse statutes. Given the recent expansion of fetal rights under child abuse statutes, it seems likely that courts and legislatures will increasingly begin to define a fetus as an “other” for purposes of civil commitment statutes. Changing the historical definition of an “other” under the statutes may facilitate the use of civil commitment for the protection of fetuses.

V. Constitutional Rights of the Mother

A. The Right to Privacy

There are numerous legal concerns involved in using civil commitment statutes to protect fetuses from their mother’s drug and alcohol use. Critics of civil commitment argue that it violates the Fourteenth Amendment right to privacy. The Supreme Court has determined that the

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33 541 N.W.2d 482 (Wis. Ct. App. 1995). The Wisconsin Supreme Court overturned Kruzicki on appeal, 561 N.W.2d 729 (Wis. 1997), but the Court of Appeal’s decision is indicative of the current trend in recognizing fetal rights.

34 See *State v. Whitner*, 492 S.E.2d 777 (S.C. 1997), holding that a pregnant woman could be charged under child abuse statute for substance abuse during pregnancy.
Fourteenth Amendment prohibits a state from interfering with fundamental rights that are "implicit in the concept of ordered liberty." The Court has stated that the right to privacy is founded on the Fourteenth Amendment's protection of liberty interests.

In Roe v. Wade, the Supreme Court held that the Fourteenth Amendment right to privacy prohibited a state from criminalizing abortion during the first trimester. The Court recognized that a woman does not have an absolute right to an abortion, stating that at some point during a pregnancy the state's interest in protecting health and life outweighs a woman's interest in terminating a pregnancy. The Court determined that the state could regulate abortion subsequent to the first trimester, and that a state could prohibit abortion after viability.

It is arguable whether civil commitment, like state prohibition of abortion during the first trimester, violates a woman's Fourteenth Amendment right to privacy. Privacy rights generally prohibit the government from interfering with a person's independence to make certain decisions.

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36 See id. at 153.
37 Id.
38 Id. at 152.
39 Id. at 154.
40 Id. at 163.
41 See, e.g. Johnson, supra note 1 at 614.
types of decisions that affect the course of one’s life.\textsuperscript{42} Decisions relating to procreation and pregnancy are undoubtedly protected by the right to privacy. The Supreme Court has stated that the right to privacy protects “the right of the individual . . . to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child.”\textsuperscript{43} Laws that interfere with the right to privacy must be narrowly tailored to advance a compelling state interest.\textsuperscript{44}

While it is clear that the right to privacy protects decisions relating to a woman’s choice to use contraception or terminate a pregnancy, it does not seem that this right would prohibit the state from using civil commitment to protect a fetus.\textsuperscript{45} Drug or alcohol abuse during pregnancy is fundamentally different from a woman’s right to choose whether or not to have a child. The state’s interest in ensuring that infants who are born are born healthy may be

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\textsuperscript{42} Id. at 581.
\textsuperscript{43} Eisenstad v. Baird, 405 U.S. 438, 453 (1972). In Griswold v. Connecticut, 381 U.S. 479 (1965), the court held that the Fourteenth Amendment right to privacy prohibited a state infringing upon a woman’s right to contraception.
\textsuperscript{44} See San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16 (1973), stating that a law that infringes upon a fundamental liberty must be justified by a compelling state interest.
\textsuperscript{45} See Wilton, supra note 12 at 156, stating that a woman’s constitutional right to make reproductive choices should not prohibit the state from intervening to prevent drug and alcohol abuse during pregnancy.
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much more compelling than ensuring that every fetus is born.\textsuperscript{46} This is especially true in light of the fact that in \textit{Roe}, the Court recognized the state's interest in protecting potential life.\textsuperscript{47}

**B. The Liberty Interest of the Mother**

In \textit{Planned Parenthood v. Casey},\textsuperscript{48} the Supreme Court refined its holding in \textit{Roe} by deciding that viability, rather than trimesters, should be used to determine when a woman has a right to terminate a pregnancy.\textsuperscript{49} One reason that the court determined that the trimester framework should not be followed was that it "undervalued the state's interest in potential life."\textsuperscript{50} In \textit{Casey} the Court repeatedly emphasized the state's interest in protecting life.\textsuperscript{51} The Court held that a state can regulate the right to an abortion prior to viability as long as the regulation does not impose an "undue burden" on the woman.\textsuperscript{52}

**C. The Right to Bodily Integrity**

\textsuperscript{46} \textit{See id.}
\textsuperscript{47} \textit{Id.} at 162.
\textsuperscript{49} \textit{Id.} at 870.
\textsuperscript{50} \textit{Id.} at 873.
\textsuperscript{51} \textit{See id.} at 873-875.
\textsuperscript{52} \textit{See id.} at 873. The court stated that an "undue burden" is a "substantial obstacle" in the path of a woman seeking an abortion. The court determined that the Pennsylvania statute's parental consent provision, a 24 hour waiting period requirement, and a provision for the dissemination of information about the condition of the fetus did not impose an undue burden upon a woman. The court found that the statute's spousal notification requirement did constitute an undue burden.
Critics of civil commitment have also alleged that it violates a woman’s Fourteenth Amendment right to bodily integrity. The Supreme Court has stated that “no right is held more sacred, or is more carefully guarded under the common law, than the right of every individual to the possession and control of his own person.” Like the right of privacy, the right to bodily integrity is not absolute. Rather, the state’s interest in infringing upon the right must be balanced against the individual’s interest in remaining free from intrusion. Factors that are considered when balancing the state’s interest against the individual’s interest include 1) the connection between the intervention sought and the state interest invoked to justify it; 2) the existence of less restrictive alternatives; 3) the intrusiveness of the intervention; 4) whether the individual benefits from the intervention, and 5) whether the intervention is necessary to protect third persons. Courts have held that the public interest in

53 See Johnson, supra note 11 at 582.
54 Union Pacific Railroad v. Botsford, 141 U.S. 250, 251 (1891), holding that a trial court could not order a plaintiff to submit to surgical examination to determine the extent of his injuries.
55 See Wilton, supra note 12 at 158.
56 Id. at 158-159.
protecting life and public health can outweigh an individual’s liberty interest.57

In many cases, using civil commitment statutes to protect fetuses from drug and alcohol abuse would meet this test. Arguably, the state has a compelling interest in protecting fetuses from drug and alcohol exposure, in some cases there may not be any less restrictive alternatives available, and theoretically the mother would benefit from the commitment. There is no doubt that involuntary drug testing and hospitalization are major intrusions upon a person’s bodily integrity, but in actuality they may be less intrusive than intervention that has been authorized in other cases for the protection of fetuses.58 Given that many of the factors weigh in the state’s favor, it does not seem that the right to bodily integrity would prohibit a state from using civil commitment to protect a fetus from maternal drug or alcohol abuse.59

D. Equal Protection Concerns

57 See Jacobson v. Massachusetts, 197 U.S. 11, 38 (1905), holding that a state could require vaccinations for smallpox over religious objections.
58 Courts have increasingly required women to undergo surgical procedures for the benefit of the fetus against their will. See e.g. Jefferson v. Griffin Spalding County Hosp. v. Anderson, 274 S.E.2d 457 (1981), holding that a woman could be required to submit to a cesarean section for the health of the fetus even when she objected to surgery for religious reasons.
59 See Wilton, supra note 12 at 160, stating that civil commitment of pregnant women would not violate the right to bodily integrity if it is used correctly.
Precedent also indicates that the use of civil commitment statutes to protect fetuses from maternal drug or alcohol abuse would not violate the Equal Protection clause of the Fourteenth Amendment. Even though only women can become pregnant, and therefore, pregnancy based legal distinctions would apply only to women, the Supreme Court held in *Geduldig v. Aiello*\(^\text{60}\) that pregnancy based distinctions do not necessarily amount to sex discrimination.\(^\text{61}\) The Court stated that “while it is true that only women can become pregnant it does not follow that every legislative classification concerning pregnancy is a sex-based classification . . .”\(^\text{62}\)

Because “pregnancy discrimination” does not automatically constitute sex discrimination under the Fourteenth Amendment, laws that discriminate on the basis of pregnancy are subject only to rational basis scrutiny.\(^\text{63}\)

\(^{60}\) 417 U.S. 484 (1974).

\(^{61}\) See *id.* at 2492. In *Geduldig*, a woman challenged California’s disability insurance program, which excluded benefits for pregnant women, under the Equal Protection Clause. The court found that the statute discriminated against pregnant people, not against women in general. See *id.* at 2491, stating that under the program “there is no risk from which men are protected and women are not.” Justice Brennan, joined by Justices Douglas, and Marshall, wrote a dissenting opinion in which he argued that pregnancy-based discrimination did amount to sex discrimination under the Fourteenth Amendment, and that it should be subject to strict scrutiny. See *id.* at 2494 (Brennan, J., dissenting).


\(^{62}\) *Id.* at 2492 n. 20.

\(^{63}\) See *id.* at 2491, stating that unless a law creates a suspect class, it must only be rationally supportable.
Given the state's interest in protecting fetuses from harm, it would be rather simple for the government to argue that pregnancy-based civil commitment for the protection of fetuses is rationally supportable. This is especially the case where it is clear that commitment would protect the fetus from further harm.

If Geduldig was overruled, and pregnancy-based discrimination was found to constitute sex discrimination under the Fourteenth Amendment, civil commitment of pregnant women would be subject to intermediate scrutiny. In order to show that a law that creates sex-based classifications is justified under intermediate scrutiny, the government must show that the classifications serve important governmental objectives, and that the law is substantially related to the achievement of those objectives. It is not clear that pregnancy-based civil commitment would be invalid under this test. The state has a major financial interest in protecting fetuses from drug and alcohol exposure, and civil commitment of pregnant women would be substantially related to this goal.

Whether civil commitment of pregnant women is subject to rational basis or intermediate scrutiny, it would most
likely be valid under the Equal Protection Clause. Given the Court's refusal to apply strict scrutiny to sex-based classifications, it is extremely unlikely that it would ever apply strict scrutiny to pregnancy-based classifications. As one critic of civil commitment has stated, "absent the protection of strict scrutiny, there is no logical stopping point to the kinds of personal decisions by women that could be second guessed by zealous prosecutors or . . . judges."*

VI. Balancing the Constitutional Rights of the Mother with the Interests of the Fetus

It is not clear whether the Fourteenth Amendment rights to privacy, liberty, or bodily integrity provide different protections, or whether the protections are in actuality the same. It seems that both the rights to privacy and bodily integrity are couched in the general Fourteenth Amendment right to liberty. Despite the Court's discussions of the rights as though they are distinct, the

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67 It is unclear why the Court has declined to apply strict scrutiny to sex-based classifications. In a decision that applied intermediate scrutiny to a sex-based classification, the Court stated, "we need not decide whether classifications based upon gender are inherently suspect." Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 724 n.9 (1982).

68 Johnson, supra note 11 at 586.

69 See Roe v. Wade, 410 U.S. at 153, stating that the right to privacy is based on the Fourteenth Amendment's protection of liberty interests, and Wilton, supra note 11 at 156, stating that the right to bodily integrity is part of the right to privacy.
general test seems to be that the state’s interest in protecting the fetus must be weighed against the mother’s rights interests. Proponents of civil commitment argue that the state’s interests outweigh the mother’s, and critics argue that the mother’s interests outweigh the state’s.

Despite the decisions in Roe and Casey that a woman does have the right to terminate her pregnancy prior to viability, the cases also recognize that the state has a "profound interest" in protecting life. See Casey, 505 U.S. at 876, stating that the state has a substantial interest in protecting human life, and that not all regulations are unwarranted. Given this interest, it does not seem that the mother’s constitutional rights would impose limits on a state’s ability to civilly commit women for drug or alcohol use during pregnancy, especially subsequent to viability. It is not clear under Roe or Casey whether the state could commit a woman prior to viability, although language in Casey indicates that this may be a possibility.

Considering the cost to society of caring for children who were exposed to drugs and alcohol in utero, the state has a tremendous interest in protecting fetuses that will

70 See Casey, 505 U.S. at 873.
71 See Casey, 505 U.S. at 876, stating that the state has a substantial interest in protecting human life, and that not all regulations are unwarranted.
be carried to term. Under Roe it seems that civil commitment subsequent to viability would not violate the Fourteenth Amendment right to privacy because at viability, the state's interest outweighs even a woman's interest in choosing to terminate a pregnancy. Because drug and alcohol damage to a fetus can be caused before viability, the government could even have a compelling interest in protecting fetuses through civil commitment prior to viability. In many instances, especially in cases of alcohol abuse, intervention prior to viability may be even more necessary than intervention after viability.

Considering all of these factors, it is not clear that the constitutional rights of the mother would preclude the state from using civil commitment to protect fetuses from maternal drug or alcohol abuse. Drug and alcohol abuse during pregnancy may not be protected by any constitutional right, and even if they are, the state may have a compelling interest in protecting fetuses from such exposure.

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72 See id., stating that the balance between the interests of the state and the mother in the context of "fetal health legislation" will be different from the balance struck in the context of abortion statutes.  
73 See id.  
74 See id. at 151, stating that there is conflicting medical evidence as to the stage of pregnancy when alcohol exposure is the most dangerous for a fetus. Some evidence shows that the time of conception is the most critical. Id.
VIII. Policy Arguments

In spite of the fact that there may be no constitutional bar against using civil commitment for the protection of fetuses, it would be unwise as a policy matter to use it for this purpose. Several organizations, including the American Medical Association, have officially opposed the use of civil commitment for the protection of fetuses from maternal drug or alcohol abuse.\(^{75}\) There are many reasons why civil commitment should not be used for the protection of fetuses.

Proponents of the use of civil commitment for the protection of fetuses argue that it is the best way for the state to protect a fetus while also protecting the interests of the mother.\(^{76}\) This argument is based on the idea that civil commitment provides treatment for the mother while simultaneously protecting the fetus.\(^{77}\) This argument has merit, as civil commitment may be a more humane way to deal with maternal drug or alcohol abuse than prosecution under child abuse laws. Unlike prosecution for maternal drug or alcohol abuse under child abuse laws, civil commitment is designed to treat the person committed,

\(^{75}\) See Johnson, supra note 11 at 603.

\(^{76}\) See Wilton, supra note 12 at 167.

\(^{77}\) See generally id.
not to punish them.\textsuperscript{78} Thus, theoretically it could help both the mother and the fetus at the same time. In spite of the fact that civil commitment may be a more appropriate way to address maternal drug and alcohol abuse than criminal prosecution, policy arguments against its use outweigh the arguments in its favor.

Involuntarily committing pregnant women in order to protect fetuses is inappropriate given that voluntary treatment for drug and alcohol abuse is often not available to pregnant women.\textsuperscript{79} One survey found that in 1989, government funded treatment centers turned away 250,000 pregnant women who were voluntarily seeking treatment.\textsuperscript{80} In fact, one woman who was criminally prosecuted for “delivering” drugs to her infant through the umbilical cord attempted to find treatment during her pregnancy and was turned away.\textsuperscript{81} Many treatment centers do not accept pregnant women because of the high risk involved in drug affected pregnancies.\textsuperscript{82}

It does not make sense to allow women to be involuntarily committed when there are very few facilities

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\item[78] See id.
\item[79] See Linden, supra note 2 at 131.
\item[81] See id. at 132.
\item[82] See id. n. 198.
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that offer voluntary treatment. Involuntary commitment would be unnecessary in many cases if women were able to seek voluntary treatment. Subjecting women who would seek voluntary treatment to involuntary commitment is unfair to them, and it unnecessarily increases the maternal-fetal conflict.

Another problem with the use of involuntary civil commitment is that women may avoid seeking prenatal care if they fear that their drug or alcohol use will be detected and they will be committed as a result.\footnote{See e.g. id. at 134. See also Johnson, supra note 11 at 603, stating that the AMA is concerned with special prosecutions of pregnant women because it will discourage them from seeking prenatal care.} Undoubtedly, civil commitment would serve as a tremendous threat to pregnant women. Commitment would take away a woman's liberty, and it would also affect her ability to take care of her other children if she has them. The few commitment facilities that do accept pregnant women generally do not provide any type of child care.\footnote{See id. at 133, stating that treatment facilities cater to males rather than females, and that they rarely provide child care.} For a single, working mother, the threat of commitment could be enough to deter her from seeking prenatal care altogether. Surely it is not in the interest of fetuses for their mothers to avoid prenatal care.
Civil Commitment of pregnant women is also inappropriate because commitment facilities are generally not equipped to deal with pregnancies at all, let alone the high-risk pregnancies that often result from drug or alcohol abuse.\(^{85}\) The reality of an involuntary civil commitment system may consist of confinement in a prison with little or no access to prenatal care.\(^{86}\) Such confinement would be likely to result in an inadequate diet, improper nutrition, and insufficient exercise.\(^{87}\) It is difficult to discern how this would promote the health of children. It seems unlikely that involuntary treatment centers would provide adequate facilities when society has refused to fund adequate voluntary treatment centers for pregnant women.

Yet another difficulty with using civil commitment to protect fetuses is that women may choose abortion over civil commitment. Legally, under Roe and Casey, the government may intervene in a pregnancy to protect the fetus. Given the interest that the government has in protecting the health of a fetus that will be carried to term, the state could have a compelling interest in commitment prior to viability. Commitment prior to

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\(^{85}\) See Chavkin, *supra* note at 263.

\(^{86}\) Id.
viability may be necessary because drug and alcohol exposure can cause a great deal of damage to a fetus before the fetus is viable.\textsuperscript{88} Under Casey, the government cannot prohibit a woman from terminating a pregnancy prior to viability.\textsuperscript{89} It seems logical that a woman threatened with civil commitment could choose to have an abortion in order to avoid losing her freedom or her ability to care for other children.

If the state’s interest in protecting a fetus was found to be sufficient to allow commitment only subsequent to viability, commitment would often be useless. Because a great deal of damage to a fetus can be caused prior to viability, commitment after a fetus is viable could be only marginally helpful.\textsuperscript{90} In some cases it may not be beneficial at all. It does not make sense to commit women prior to viability, when they may choose abortion over commitment, and it may not protect the health of the fetus to commit them after viability. Thus, involuntary commitment at any point during a pregnancy may not be an effective way to promote fetal health.

\textsuperscript{87} See id., stating that prison health experts warn that prisons are extremely deficient in meeting the needs of pregnant women.
\textsuperscript{88} See Chavkin, supra note at 149-153.
\textsuperscript{89} See Casey at 870.
\textsuperscript{90} See Chavkin, supra note at 234, stating that there is no safe time to drink during pregnancy.
Another argument against civil commitment is that it may result in extensive government regulation of the choices that pregnant women make. Almost any action that a pregnant woman takes has some impact on the fetus that she carries.\textsuperscript{91} A great deal of legal conduct may be dangerous to a fetus. For example, smoking, eating an inadequate diet, taking prescription medication, and exposure to infectious diseases can have an adverse impact on a fetus.\textsuperscript{92} It is not clear that civil commitment for the protection of fetuses would be used only in cases of drug or alcohol abuse. This is especially the case when certain legal activities may pose even more risk to a fetus than drug or alcohol abuse.\textsuperscript{93} Such regulation of women’s choices would in effect result in “pregnancy police,” and it would substantially infringe upon the freedom and dignity of women.

IX. Conclusion

\textsuperscript{91} See Johnson, supra note 1 at 606.
\textsuperscript{92} See id. at 606. Johnson states that “If the current trend in fetal rights continues, pregnant women would live in constant fear that any accident or ‘error’ in judgment could be deemed ‘unacceptable’ and become the basis for a criminal prosecution by the state or a civil suit by a disenchanted husband or relative.” Id. at 607.
\textsuperscript{93} For example, maternal negligence that results in a car accident could cause far more damage to a fetus than drug or alcohol abuse. Also, fetal exposure to certain prescription drugs is extremely dangerous. See, e.g., id. at 606. See also Garcia, supra note 15 at 134, stating that certain legal drugs can cause as much damage to a fetus as illegal drugs.
In conclusion, the policy arguments against using civil commitment for the protection of fetuses are stronger than the arguments in its favor. Civil commitment is not an effective way to promote fetal health or the interests of women. It may discourage women from seeking prenatal care, and it may even encourage them to terminate their pregnancies. It is also likely that civil commitment facilities will not be equipped to meet the needs of pregnant women. Involuntary civil commitment is especially unjust in light of the fact that voluntary commitment is generally unavailable for pregnant women.

Rather than focusing on solutions that exacerbate the fetal-maternal conflict, like involuntary civil commitment, both fetal health and the interests of women would be better served by focusing on cooperative solutions. Many women who are abusers of drugs or alcohol want to have healthy pregnancies. They face obstacles such as poor information, lack of health insurance, poverty, and the failure of treatment programs to accept pregnant women at all. It would be more beneficial for women and their children for society to fund voluntary commitment programs, prenatal care, and education programs than to fund

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94 See Johnson, supra note 11 at 574.
95 See id.
involuntary civil commitment. These types of programs would be more effective than involuntary civil commitment, and they would promote fetal health while protecting the interests of women.

96 See Linden, supra note 2 at 137, discussing successful and cost effective voluntary treatment programs for pregnant women.