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## Dangerous or Just Pregnant? How Sanism & Biases Infect the Dangerousness Determination in the Civil Commitment Context of Pregnant Women

Note by Alyson R. Schwartz\*

*There is no such thing as a single-issue struggle because we do not live single-issue lives.*<sup>1</sup>

### INTRODUCTION

Alicia Beltran encountered the harsh realities of a legislature that treats women as environments for pregnancy, rather than as persons with constitutional rights. Fourteen weeks into her pregnancy, Alicia attended a routine prenatal visit and disclosed a previous medical condition (painkiller addiction) and her successful efforts to end that addiction.<sup>2</sup> Alicia subsequently declined her doctor's recommendation to use Suboxone, an anti-addiction drug, because she was unable to afford the prescription on her salary as a waitress.<sup>3</sup> Alicia soon learned that a Wisconsin statute<sup>4</sup> empowers medical professionals to police their patients, rather than offer recommendations of care. As a result, the doctor Alicia trusted with her medical information became empowered by the State to utilize his personal beliefs to determine that she lacks "self-control" with drugs.

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\* Indiana University Maurer School of Law, J.D. expected 2015; State University of New York at Stony Brook University B.A., MBA 2011. I would like to extend my gratitude to Professor Dawn Johnsen for her support and guidance throughout this process. I am also immensely grateful to the Indiana Journal of Law and Social Equality associates and editorial team for their careful review and editing of my work. Last, but not least, I am thankful to my Mother for her unwavering inspiration and support.

1. Audre Lorde, Learning from the 60s, Address at Harvard University (Feb. 1982), in AUDRE LORDE, *SISTER OUTSIDER: ESSAYS AND SPEECHES* 138 (1984).
2. Erik Eckholm, *Case Explores Rights of Fetus Versus Mother*, N.Y. TIMES (Oct. 23, 2013), <http://www.nytimes.com/2013/10/24/us/case-explores-rights-of-fetus-versus-mother.html>.
3. *Id.*
4. WIS. STAT. ANN. § 48.133, .193 (West 2011).

Despite never testing positive for substance use, Alicia was arrested and forced to appear in shackles before a family court commissioner.<sup>5</sup> Although she was not afforded representation at her hearing, a lawyer had already been appointed as guardian ad litem for her fetus.<sup>6</sup> Seemingly ignoring Wisconsin precedent that a civilly committed individual must be presumed competent,<sup>7</sup> the commissioner ordered the civil commitment of Alicia at an inpatient drug treatment program without hearing a single word of medical expert testimony.<sup>8</sup>

The circumstances surrounding Alicia's civil commitment pose great concerns. Alicia was shackled and detained absent any medical testimony—not in 1853, as one would expect,<sup>9</sup> but in 2013. Since the Wisconsin legislature authorized forcible commitment of pregnant women with alleged substance use under the guise of protectionist arguments in 1997, it is unclear how many women have been harmed due to the confidential nature of the proceedings.<sup>10</sup>

Alicia's case represented the first constitutional challenge to state statutes that explicitly allow civil commitment for pregnant women with alleged substance use.<sup>11</sup> Unfortunately, Wisconsin is not the only state in which stories like Alicia's can

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5. Eckholm, *supra* note 2; Application for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2241 by a Person in Custody at 9, *Beltran v. Loenish*, No. 2:13-cv-01101 (E.D. Wis. filed Sept. 30, 2013).

6. Jessica Mason Pieklo, *Advocacy Group Seeks Immediate Release of Involuntarily Detained Pregnant Woman*, RH REALITY CHECK (Oct. 3, 2013, 12:17 PM), <http://rhrealitycheck.org/article/2013/10/03/advocacy-group-seeks-immediate-release-of-pregnant-woman-detained-involuntarily-for-drug-treatment/>.

7. *Lessard v. Schmidt*, 413 F. Supp. 1318 (E.D. Wis. 1976), *reinstating* 349 F. Supp. 1078, 1088 (E.D. Wis. 1972) (invalidating Wisconsin statute presuming civilly committed individuals incompetent).

8. Pieklo, *supra* note 6.

9. Historians have found that from 1850 to 1900 women were committed to mental institutions “for behaving in ways male society did not agree with,” including use of unacceptable “abusive” language, irregular mensuration, abortion, nymphomania, and “domestic troubles.” Katherine Pouba & Ashley Tianen, *Lunacy in the 19th Century: Women's Admission to Asylums in United States of America*, 1 OSHKOSH SCHOLAR 95 (2006).

10. Pieklo, *supra* note 6. For an example of one of the more recent cases reported, see Jessica Mason Pieklo, *Pregnant Wisconsin Woman Jailed Under State's 'Personhood'-Like Law*, RH REALITY CHECK (Dec. 12, 2014, 11:15 AM), <http://rhrealitycheck.org/article/2014/12/12/pregnant-wisconsin-woman-jailed-states-personhood-like-law/>.

11. Press Release, Nat'l Advocates for Pregnant Women, First Federal Challenge to Arrest of Pregnant Woman Under “Personhood”-Like Measure Filed in Wisconsin (Oct. 2, 2013), <http://advocatesforpregnantwomen.org/blog/Beltran-NAPW%20-%20Press%20Release%20-%202010.2.13.pdf>. Subsequently, on September 30, 2014, U.S. District Court Judge C.N. Cleveland, Jr. dismissed as moot Alicia Beltran's claim under 28 U.S.C. § 2241, following the State's withdrawal of its petition. *Beltran v. Strachota*, No. 2:13-cv-01101, 2014 WL 4924668 (E.D. Wis. Sept. 30, 2014). The Court declined to take a position regarding the possibility of a 42 U.S.C. § 1983 claim. *Id.* at \*7; Press Release, Nat'l Advocates for Pregnant Women, Wisconsin Alicia Beltran Case Federal District Court Avoids Ruling on Constitutionality (Sept. 30,

occur. Four states—Minnesota,<sup>12</sup> Oklahoma,<sup>13</sup> South Dakota,<sup>14</sup> and Wisconsin<sup>15</sup>—currently authorize civil commitment for pregnant women suspected of substance use. Additionally, at least thirty-four states have attempted to use existing criminal statutes—such as crimes of child abuse, child neglect, and delivery of drugs to a minor—to prosecute pregnant women.<sup>16</sup> The outcome of these cases, including Alicia’s, could have serious implications for the millions of women who become pregnant every year in the United States.<sup>17</sup>

“Childbearing is a major life passage for over 4.3 million mothers, newborns, and families annually in the United States. . . . Only three reasons for outpatient visits involve more visits annually than maternity care (prenatal and postpartum visits combined): general medical examination, progress visit, and cough.”<sup>18</sup> As a result, pregnancy and state intervention has naturally been a topic of debate amongst many legal scholars.<sup>19</sup> Our nation’s history is plagued with limits uniquely applicable to

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2014), [http://advocatesforpregnantwomen.org/blog/2014/09/wisconsin\\_alicia\\_beltran\\_case.php](http://advocatesforpregnantwomen.org/blog/2014/09/wisconsin_alicia_beltran_case.php) (“The Court suggested, however, that another civil rights action, potentially representing a class of women brought within the ambit of the law, might not present the same mootness issues.”).

12. MINN. STAT. ANN. § 253B.02(2) (West 2007 & Supp. 2015).

13. OKLA. STAT. ANN. tit. 63, § 1-546.5 (West 2000); OKLA. STAT. ANN. tit. 43A, § 5-410 (West 2014).

14. S.D. CODIFIED LAWS § 34-20A-63 (2011).

15. WIS. STAT. ANN. § 48.133, .193 (West 2011).

16. Jean Reith Schroedel & Pamela Fiber, *Punitive Versus Public Health Oriented Response to Drug Use by Pregnant Women*, 1 YALE J. HEALTH POL’Y L. & ETHICS 217, 218 (2001). Most recently, Tennessee passed a law that would allow prosecutors to bring criminal charges against pregnant women who struggle with drug dependency. Emily Crockett, *Tennessee Governor Signs Bill Criminalizing Pregnant Women*, RH REALITY CHECK (Apr. 29, 2014, 5:17 PM), <http://rhrealitycheck.org/article/2014/04/29/tennessee-governor-signs-bill-criminalizing-pregnant-women/>.

17. See, e.g., SALLY C. CURTIN, JOYCE C. ABMA & STEPHANIE J. VENTURA, NAT’L CTR. FOR HEALTH STATISTICS, PREGNANCY RATES FOR U.S. WOMEN CONTINUE TO DROP 1 (2013), <http://www.cdc.gov/nchs/data/databriefs/db136.pdf>.

18. CAROL SAKALA & MAUREEN P. CORRY, EVIDENCE-BASED MATERNITY CARE: WHAT IT IS AND WHAT IT CAN ACHIEVE 2 (2008), <http://www.milbank.org/uploads/documents/0809MaternityCare/0809MaternityCare.pdf>.

19. See, e.g., April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM. J. GENDER & L. 147 (2007); Lynn M. Paltrow, *Governmental Responses to Pregnant Women Who Use Alcohol or Other Drugs*, 8 DEPAUL J. HEALTH CARE L. 461 (2005); Schroedel & Fiber, *supra* note 16. For arguments that civil commitment of pregnant women for drug use violates equal protection and due process rights guaranteed by the Fourteenth Amendment, see Julie B. Ehrlich, *Breaking the Law by Giving Birth: The War on Drugs, the War on Reproductive Rights, and the War on Women*, 32 N.Y.U. REV. L. & SOC. CHANGE 381 (2008). For constitutional arguments examining the criminalization approach towards women who use drugs while pregnant, see Barrie L. Becker, *Order in the Court: Challenging Judges Who Incarcerate Pregnant, Substance-Dependent Defendants to Protect Fetal Health*, 19 HASTINGS CONST. L.Q. 235 (1991); Molly McNulty, *Pregnancy Police: The Health Policy and Legal Implications of Punishing Pregnant Women for Harm to Their Fetuses*, 16 N.Y.U. REV. L. & SOC. CHANGE 277 (1987–88).

women due to their reproductive capacity.<sup>20</sup> Yet, in today's environment where many limits have been found to be constitutionally impermissible,<sup>21</sup> at least one loophole remains open: civil commitment for pregnant women with alleged substance use.

There has been great scholarly inquiry into whether civil commitment of pregnant women on the basis of fetal protection violates constitutional rights.<sup>22</sup> Some legal scholars have argued that such confinement is a clear violation of due process, equal protection, privacy rights, and reproductive rights.<sup>23</sup> While in agreement with those scholars, this Note will focus on how sanism and additional biases diminish the legal standards of civil commitment when applied to pregnant women.

Civil commitment determinations are already infiltrated by sanism: an irrational prejudice against those with mental disabilities and illnesses expressed through stereotyping and stigmatization, similar to that of other prejudices such as racism and sexism.<sup>24</sup> Yet, deficiencies in civil commitment safeguards for pregnant women cannot be explained simply as an issue of sanism, gender oppression, wealth inequality, or racism. Rather, each of these components must be combined to reveal how the interaction of each erodes the constitutional protections of civil commitment, thereby preventing the law from being applied in a way that would avoid these problems. States should refrain from manipulating their civil commitment laws to extend to pregnant women with alleged substance use.

Part I of this Note will discuss civil commitment through an examination of the history of state powers, current constitutional doctrine, and the difficulties in quantifying dangerousness. Part II of this Note will explore how sanism, pregnancy, race, and socioeconomic status interact to diminish civil commitment safeguards. This Note will conclude by applying the issues discussed to Alicia's case and urging states to recognize that application of the civil commitment standard to pregnant women, absent other safeguards, will inevitably engender wrongful deprivations of liberty.

## I. CIVIL COMMITMENT

Involuntary civil commitment is the legal, medical, and psychosocial process—operating at the confluence of the public safety, justice,

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20. See, e.g., *Muller v. Oregon*, 208 U.S. 412, 422 (1908); *Bradwell v. Illinois*, 83 U.S. 130, 132 (1872).

21. *Contra Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

22. E.g., Erin N. Linder, Note, *Punishing Prenatal Alcohol Abuse: The Problems Inherent in Utilizing Civil Commitment to Address Addiction*, 2005 U. ILL. L. REV. 873 (2005) (arguing that civil commitment laws to prevent fetal alcohol syndrome violate due process and equal protection).

23. See sources cited *supra* note 19.

24. Michael L. Perlin, "What's Good is Bad, What's Bad is Good, You'll Find Out When You Reach the Top, You're on the Bottom": *Are the Americans with Disabilities Act (and Olmstead v. L.C.) Anything More than "Idiot Wind?"*, 35 U. MICH. J.L. REFORM 235, 235 (2001–02).

and social service systems—whereby an individual alleged to be harmful to self or others as a result of some physical or mental impairment or disability (drug dependency, mental illness, mental retardation, alcoholism, or some combination), is forced to undergo some type of involuntary treatment or care.<sup>25</sup>

A. *The Roots of Civil Commitment and Constitutional Developments*

Involuntary civil commitment traces back to English law in 1714, which permitted justices of the peace to restrain and confine the poor who posed a danger as “furiously Mad.”<sup>26</sup> As early as 1891, Supreme Court jurisprudence recognized that “[n]o right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless *by clear and unquestionable* authority of law.”<sup>27</sup> Yet, courts still grapple with the difficulty in balancing civil commitment rationales with individual liberty rights.

Great debate arises from the tendency of civil commitment to run afoul of constitutional rights: against unreasonable search and seizure, to due process, against restraints on liberty, and to refuse medical treatment. When a civil commitment is premised solely upon dual status of pregnancy and substance use, additional implications arise regarding equal protection under the Fourteenth Amendment and the right to reproductive decision making.<sup>28</sup> Policy issues also arise regarding the effectiveness of treatment under involuntary detention, profit gouging by for-profit institutions,<sup>29</sup> and deterrence of those seeking medical care.<sup>30</sup> The U.S. Supreme Court arguably addressed these concerns in *Addington v. Texas*, holding that “civil commitment for *any purpose* constitutes a significant deprivation of liberty that requires due process protection.”<sup>31</sup>

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25. Sandra Anderson Garcia, *Drug Addiction and Mother/Child Welfare: Rights, Laws, and Discretionary Decisionmaking*, 13 J. LEGAL MED. 129, 176 (1992).

26. Adam Klein & Benjamin Wittes, *Preventive Detention in American Theory and Practice*, 2 HARV. NAT’L SEC. J. 85, 156–57 (2011).

27. *Union Pac. Ry. Co. v. Botsford*, 141 U.S. 250, 251 (1891) (emphasis added).

28. See sources cited *supra* note 19.

29. Garcia, *supra* note 25, at 176.

30. At least in the pregnancy context, many legal scholars and health professionals have argued that involuntary commitment can serve as a deterrent for pregnant women to voluntarily seek substance abuse care. See, e.g., COMM. ON HEALTH CARE FOR UNDERSERVED WOMEN, AM. COLL. OF OBSTETRICIANS & GYNECOLOGISTS, COMMITTEE OPINION NO. 473, SUBSTANCE ABUSE REPORTING AND PREGNANCY: THE ROLE OF THE OBSTETRICIAN-GYNECOLOGIST (2011) [hereinafter ACOG No. 473] (reaffirmed 2014); Lynn M. Paltrow, *Pregnant Drug Users, Fetal Persons, and the Threat to Roe v. Wade*, 62 ALB. L. REV. 999, 1044 (1999).

31. 441 U.S. 418, 425 (1979) (emphasis added).

Two traditional state powers provide the basis for civil commitment: (1) police power, and (2) *parens patriae* power.<sup>32</sup> Police power justifies civil commitment when it implicates a state's right to protect itself against breaches of peace caused by a dangerous person.<sup>33</sup> *Parens patriae* power justifies civil commitment when it implicates a state's right to act on behalf of an individual with a mental disease or defect that prevents care for his or her own welfare.<sup>34</sup> Although both powers potentially allow for restraint on an individual's physical liberty, the U.S. Constitution imposes severe limits. For example, police power cannot be used broadly to protect a community from *all* possible dangers.<sup>35</sup> Likewise, *parens patriae* power cannot be used sweepingly to protect an individual from *all* imprudent acts.<sup>36</sup>

Up until at least the 1960s, state courts did not afford a guarantee of due process under the Fourteenth Amendment in involuntary civil commitment proceedings.<sup>37</sup> As a result of demands from the medical community, pressure grew to implement unambiguous grounds for involuntary civil commitment.<sup>38</sup> This push was reflected in a shift in U.S. Supreme Court doctrine during the 1970s when the Court took steps to refine the basis for civil commitment. First, the U.S. Supreme Court held in *Jackson v. Indiana* that Due Process Clause protections should be afforded to those in civil commitment proceedings, despite traditional deference to states to exercise "broad power to commit persons found to be mentally ill."<sup>39</sup>

Three years later, in *O'Connor v. Donaldson*, the U.S. Supreme Court formulated the minimum constitutional requirement for civil commitment:

A finding of "mental illness" alone cannot justify a State's locking a person up against his will and keeping him indefinitely in simple custodial confinement. Assuming that that term can be given a reasonably precise content and that the "mentally ill" can be

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32. Carol Gosain, Case Note, *Protective Custody for Fetuses: A Solution to the Problem of Maternal Drug Use? Casenote on Wisconsin ex rel. Angela v. Kruzicki*, 5 GEO. MASON L. REV. 799, 828 (1997).

33. *Jacobson v. Massachusetts*, 197 U.S. 11, 25 (1905) (holding that the police power of a State includes "such reasonable regulations established directly by legislative enactment as will protect the public health and the public safety"); Cherry, *supra* note 19, at 177; Hugh Alan Ross, *Commitment of the Mentally Ill: Problems of Law and Policy*, 57 MICH. L. REV. 945, 955 (1959).

34. Cherry, *supra* note 19, at 177; John Q. La Fond, *An Examination of the Purposes of Involuntary Civil Commitment*, 30 BUFF. L. REV. 499, 504 (1981); *Developments in the Law—Civil Commitment of the Mentally Ill*, 87 HARV. L. REV. 1190, 1207–22 (1974).

35. Cherry, *supra* note 19, at 177.

36. *Id.*

37. *E.g.*, *Prochaska v. Brinegar*, 102 N.W.2d 870, 872 (Iowa 1960).

38. *See, e.g.*, NAT'L INST. OF MENTAL HEALTH, FED. SEC. AGENCY, PUB. HEALTH SERV. PUB. NO. 51, A DRAFT ACT GOVERNING HOSPITALIZATION OF THE MENTALLY ILL (1951).

39. 406 U.S. 715, 736 (1972).

identified with reasonable accuracy, *there is still no constitutional basis for confining such persons involuntarily if they are dangerous to no one and can live safely in freedom*. . . . In short, a State cannot constitutionally confine without more a nondangerous individual who is capable of surviving safely in freedom by himself or with the help of willing and responsible family members or friends.<sup>40</sup>

In declaring a right to liberty in *O'Connor v. Donaldson*, the U.S. Supreme Court set the groundwork for substantive constitutional limits for civil commitment.<sup>41</sup> Four years later, the U.S. Supreme Court decided in *Addington v. Texas* that “clear and convincing evidence” was the appropriate minimum standard of proof for civil commitment proceedings.<sup>42</sup> *Black’s Law Dictionary* has historically defined the clear and convincing evidence standard to require proof that “will produce in the mind of the trier of facts a firm belief or conviction as to the allegations sought to be established.”<sup>43</sup> States are still free, however, to require a higher level of proof for civil commitments.<sup>44</sup> For instance, in recognizing the risk for erroneous loss of liberty, the Supreme Judicial Court of Massachusetts exceeded *Addington’s* “clear and convincing” standard in requiring proof beyond a reasonable doubt.<sup>45</sup>

Today, depending on the jurisdiction, there are two permissible categories for civil commitment if shown by clear and convincing evidence: (1) mental illness *and* danger to self or others; and (2) detention when one needs treatment *and* is incapable of procuring care.<sup>46</sup> As a result, states are prohibited from committing a person on the sole basis of mental illness status absent a showing of danger or inability to care for oneself.

States have authorized civil commitment for drug and alcohol abuse<sup>47</sup> by: specific statutory reference to involuntary commitment for drug use with a

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40. 422 U.S. 563, 575, 576 (1975) (emphasis added).

41. *See id.* at 573 n.8, 576.

42. 441 U.S. 418, 425–33 (1979).

43. BLACK’S LAW DICTIONARY 227 (5th ed. 1979). *See also* PAUL S. APPELBAUM & THOMAS G. GUTHEIL, CLINICAL HANDBOOK OF PSYCHIATRY AND THE LAW 50–51 (2d ed. 1991).

44. *Addington*, 441 U.S. at 433.

45. *Commonwealth v. Nassar*, 406 N.E.2d 1286, 1290 (Mass. 1980); *Superintendent of Worcester State Hosp. v. Hagberg*, 372 N.E.2d 242, 245–46 (Mass. 1978).

46. Klein & Wittes, *supra* note 26, at 153.

47. The U.S. Supreme Court, in dicta in *Robinson v. California*, has arguably left the door wide open for states to use involuntary commitment to mandate alcohol or drug treatment for substance-dependent individuals. *See* David F. Chavkin, “*For Their Own Good*”: *Civil Commitment of Alcohol and Drug-Dependent Pregnant Women*, 37 S.D. L. REV. 224, 246 (1992) (citing *Robinson v. California*, 370 U.S. 660, 665 n.7 (1962) (holding criminalization of alcohol or drug addiction status as unconstitutional, yet civil commitment and mandatory treatment as a constitutionally permissible alternative route)); Thomas L. Hafemeister & Ali John Amirshahi, *Civil Commitment for Drug Dependency: The Judicial Response*, 26 LOY. L.A. L. REV. 39, 43 (1992).

showing of danger to self or others; inclusion of drug or alcohol addiction under general references to “mental illness” with a showing of dependence and risk of danger to self or others; or temporary emergency commitment for detoxification.<sup>48</sup> These categories present a mix of police and *parens patriae* powers. Regardless of whether a state elects to use police or *parens patriae* powers, courts encounter great difficulties in determining whether requisite dangerousness is present to justify involuntary civil commitment.

### B. *Inherent Difficulties in Determining Dangerousness*

Despite the risk of serious deprivation of liberty that can result from a finding of dangerousness, no precise or uniform definition of dangerousness exists.<sup>49</sup> The burden of proof falls upon the state requesting civil commitment to demonstrate danger to self or others by a minimum of clear and convincing evidence.<sup>50</sup> Dangerousness can typically be shown by harm or attempted harm, inability to care for oneself, or failure to remedy immediate and dangerous medical problems resulting from substance abuse.<sup>51</sup>

Although the evidentiary standard of “clear and convincing” is the constitutional minimum required by the U.S. Supreme Court, legislators and lower courts have yet to clearly define what precise level of dangerousness is required for civil commitment.<sup>52</sup> While this Note argues that dangerousness should be defined with true legal and medical concepts, alternative approaches include viewing dangerousness as a socially defined condition<sup>53</sup> or in the classic statement of Justice Stewart, “I know it when I see it.”<sup>54</sup>

The U.S. Supreme Court’s attempt to explain dangerousness fell short in its dicta in *Humphrey v. Cady*.<sup>55</sup> There the Court defined dangerousness as the point at which a person’s “potential for doing harm, to himself or to others, is great enough to justify such a massive curtailment of liberty.”<sup>56</sup> Following this dicta in *Humphrey*, a three-judge federal district court panel in *Lessard v. Schmidt* interpreted “great enough” to imply use of a balancing test, which required “an extreme likelihood

48. Klein & Wittes, *supra* note 26, at 181–83.

49. Alexander D. Brooks, *Notes on Defining the “Dangerousness” of the Mentally Ill*, in *DANGEROUS BEHAVIOR: A PROBLEM IN LAW AND MENTAL HEALTH* 37, 39 (Calvin J. Frederick ed., 1978).

50. Chavkin, *supra* note 47, at 267.

51. Hafemeister & Amirshahi, *supra* note 47, at 52.

52. Brooks, *supra* note 49, at 48.

53. *E.g.*, Donald H. J. Hermann, *Preventive Detention, a Scientific View of Man, and State Power*, 1973 U. ILL. L.F. 673, 685 (1973).

54. *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (explaining the difficulty in defining obscenity).

55. 405 U.S. 504, 509 (1972).

56. *Id.*

that if the person is not confined he will do immediate harm to himself or others.”<sup>57</sup> Several courts have since incorporated the *Lessard* approach to require an overt act signifying a real and present danger of significant harm.<sup>58</sup> Yet, all courts do not follow the overt act standard.<sup>59</sup> For instance, the U.S. Court of Appeals for the Second Circuit adopted an alternative approach in which a mere finding of substantial risk of harm, as opposed to recent overt acts and threat of imminent danger, is sufficient for a civil commitment.<sup>60</sup>

With a lack of legislative guidance, courts have traditionally received broad discretion to interpret civil commitment statutes sweepingly; the U.S. Court of Appeals for the District of Columbia previously found that writing a bad check<sup>61</sup> or emotional injury<sup>62</sup> satisfied the requirement of “dangerousness” for civil commitment. In addition to implementing its own judgment, courts have historically “rubber stamped” any health professional’s subjective determination of dangerousness despite the lack of any generally accepted meaning of the term among the legal, psychiatric, or medical community.<sup>63</sup>

It is troublesome to rely on predictions of future dangerousness because predictions are often wrong.<sup>64</sup> False positive rates (that is, an incorrect finding of future dangerousness) are far more likely than false negative rates (that is, an incorrect finding of no future dangerousness).<sup>65</sup> In fact, the American Psychiatric Association filed an amicus brief strongly urging the U.S. Supreme Court to reject psychiatric testimony of future dangerousness prognoses; future dangerousness determinations are wrong in at least two out of every three predictions.<sup>66</sup>

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57. 349 F. Supp. 1078, 1093 (E.D. Wis. 1972).

58. See, e.g., *Suzuki v. Yuen*, 617 F.2d 173, 178 (9th Cir. 1980) (adopting the *Lessard* overt act standard); *Goldy v. Beal*, 429 F. Supp. 640 (M.D. Pa. 1976); *Doremus v. Farrell*, 407 F. Supp. 509, 514–15 (D. Neb. 1975); *In re Fasi*, 567 A.2d 178, 183 (N.H. 1989).

59. See, e.g., *Colyar v. Third Judicial Dist. Court*, 469 F. Supp. 424, 434 (D. Utah 1979); *United States ex rel. Mathew v. Nelson*, 461 F. Supp. 707 (N.D. Ill. 1978); *In re Snowden*, 423 A.2d 188, 191–92 & nn.3–4 (D.C. 1980); see also Michael J. Leiber & Sean Anderson, *A Comparison of Pre-Reform and Post-Reform Civil Commitment Decisionmaking in Dane County, Wisconsin*, 20 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 1, 3 (1993).

60. *Project Release v. Prevost*, 722 F.2d 960 (2d Cir. 1983).

61. *Brooks*, *supra* note 49, at 41 & 58 n.24 (citing *Overholser v. Russell*, 283 F.2d 195 (D.C. Cir. 1960)).

62. *Id.* at 41 & 58 n.27 (citing *Overholser v. Lynch*, 288 F.2d 399 (D.C. Cir. 1961)).

63. See *id.* at 41.

64. “[P]sychiatric predictions of future violent behavior by the mentally ill are inaccurate.” *Heller v. Doe*, 509 U.S. 312, 324 (1993) (emphasis added).

65. See Ernst A. Wenk, James O. Robison & Gerald W. Smith, *Can Violence Be Predicted?*, 18 CRIME & DELINQ. 393, 394 (1972); Leslie T. Wilkins, *The Case for Prediction*, in 3 CRIME AND JUSTICE: THE CRIMINAL IN CONFINEMENT 375 (Leon Radzinowicz & Marvin E. Wolfgang eds., 3d ed. 1971).

66. Brief Amicus Curiae for the American Psychiatric Association at 3, *Barefoot v. Estelle*, 463 U.S. 880 (1983) (No. 82-6080).

## II. INCORPORATION OF SANISM

“Sanism” has also been defined as the belief that all persons with perceived or actual mental illnesses or disabilities possess characteristics or abilities specific to that category of illness, as to distinguish that condition as inferior to other mental states.<sup>67</sup> Sanism is both unique to mental disability law and analogous to other “isms,” such as racism and sexism, which are fueled by stereotypes, myths, and generalizations.<sup>68</sup> Since the American Psychiatric Association recognized substance-related and addictive disorders as mental disorders,<sup>69</sup> such conditions are also subject to the same irrational prejudices that manifest as sanism. Sanism is especially problematic because it is often socially acceptable in ways other “isms” may not be, and is a prejudice held by those who ordinarily would reject similar biases in other contexts.<sup>70</sup>

There is a long history of the prejudicial effects of sanism on involuntary civil commitments.<sup>71</sup> In 1927, the U.S. Supreme Court upheld the practice of forced sterilization for women deemed mentally retarded because such persons were “menace[s]” who “sap the strength of the state,” and it was necessary to “prevent our being swamped with incompetence.”<sup>72</sup> Today, a lack of set criteria for medical evaluations and clear legal definitions provides the opportunity for the roots of sanism to infiltrate medical and legal discretionary decision making. As Michael Perlin notes:

The entire legal system makes assumptions about persons with mental disabilities—who they are, how they got that way, what makes them different, what there is about them that lets us treat them differently, and whether their conditions are immutable. These assumptions reflect our fears and apprehensions about mental disability, persons with mental disability, and the possibility that we ourselves may become mentally disabled.<sup>73</sup>

Assumptions and biases have an even greater tendency to infiltrate civil commitment proceedings due to the nature of many of the procedural issues. Many

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67. See generally Michael L. Perlin, “*Things Have Changed: Looking at Non-Institutional Mental Disability Law Through the Sanism Filter*,” 46 N.Y.L. SCH. L. REV. 535, 536 (2003).

68. Michael L. Perlin, “*You Have Discussed Lepers and Crooks*”: *Sanism in Clinical Teaching*, 9 CLINICAL L. REV. 683, 683 (2003).

69. AM. PSYCHIATRIC ASS’N, SUBSTANCE-RELATED & ADDICTIVE DISORDERS (2013). The term “substance dependent” was first included in the third edition of the APA’s Diagnostic and Statistical Manual of Mental Disorders in 1987. Henry R. Kranzler & Ting-Kai Li, *What is Addiction?*, 31 ALCOHOL RES. & HEALTH 93, 93 (2008).

70. Perlin, *supra* note 68, at 686.

71. See generally *id.*; Michael L. Perlin, *On “Sanism,”* 46 SMU L. REV. 373 (1992).

72. *Buck v. Bell*, 274 U.S. 200, 206, 207 (1927).

73. Perlin, *supra* note 68, at 688.

of these procedural issues, unlike those of criminal cases, are rarely litigated.<sup>74</sup> As a result, most hearings become a matter of first impression,<sup>75</sup> thereby granting judges greater discretion. In cases regarding the right to refuse medical care, some judges have been found to simply “rubber stamp” hospital treatment recommendations without further investigation.<sup>76</sup>

While sanism itself presents concerns, additional biases can lead to further diminishment of the protections of traditional civil commitment procedures, thereby rendering established safeguards inadequate. Additional statuses—such as pregnant drug user, minority background, and/or low socioeconomic class—carry an even greater likelihood of inaccurate determinations of dangerousness.<sup>77</sup> When a woman deviates from society’s expectations, she can be seen as dangerous, irrespective of any threat of harm posed to herself or to others. And, as Alexander Brooks explains, “[s]ince very few mentally ill persons are presented for commitment unless their behavior is perceived as somewhat deviant, the extent to which deviance is equated with dangerousness tends to render the dangerousness standard meaningless.”<sup>78</sup>

*A. Crossroads: Where Pregnancy, Substance Use, Socioeconomic Status, and Race Intersect*

Constitutional limits require that civil commitments be justified by at least clear and convincing evidence of mental illness and a danger to oneself or others.<sup>79</sup> There are currently four states with statutes that explicitly authorize civil commitment of pregnant women when drug or alcohol use poses a risk to the fetus.<sup>80</sup> In response to a state supreme court decision,<sup>81</sup> Wisconsin amended its state child abuse law to include “unborn child” in order to subject a pregnant woman to civil commitment when a habitual lack of self-control with drugs or alcohol poses a risk to her unborn child’s health.<sup>82</sup> Similar to Wisconsin’s approach, Oklahoma created a separate section in its public health code, entitled the “Oklahoma Prenatal Addiction Act,” permitting a district attorney to seek an “appropriate disposition,” including

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74. *Id.* at 704–05.

75. *Id.* at 704.

76. Michael L. Perlin, “*Half-Wracked Prejudice Leaped Forth*”: *Sanism, Pretexuality, and Why and How Mental Disability Law Developed as It Did*, 10 J. CONTEMP. LEGAL ISSUES 3, 16 (1999).

77. While this Note does not ignore the role of immigration status, language barriers, age, and LGBTQ status amongst other biases, discussion will be limited to biases surrounding gender, pregnancy, socioeconomic status, and race.

78. Brooks, *supra* note 49, at 42–43.

79. *See supra* note 42 and accompanying text; *see also* Paltrow, *supra* note 19, at 469.

80. *See supra* notes 12–15.

81. *State ex rel. Angela M.W. v. Kruzicki*, 561 N.W.2d 729 (Wis. 1997) (holding the Wisconsin state legislature did not intend for term “child” in child abuse law to include fetus).

82. WIS. STAT. ANN. § 48.133, .193 (West 2011).

involuntary commitment, for “a pregnant woman who is abusing or is addicted to drugs or alcohol to the extent that the unborn child is at risk of harm.”<sup>83</sup> Minnesota took an alternative approach and included pregnant women who use drugs under its preexisting statutory definition of “chemically dependent person[s]” subject to civil commitment.<sup>84</sup> Similarly, South Dakota added the status of “pregnant and abusing alcohol or drugs” to its general civil commitment statute.<sup>85</sup>

Whether detention of pregnant women is pursued through general civil commitment statutes<sup>86</sup> or amended child protection statutes,<sup>87</sup> problems arise. April Cherry, a lawyer and legal scholar, stated:

Any determination that a woman had violated the [civil commitment] statute would necessarily be speculative since scientific research in this area is inconclusive; not all pregnant mothers who drink alcohol or consume illicit drugs will bear children with injuries. Nor are those who are injured by their mother’s prenatal alcohol or drug use injured in the same manner or to the same extent. As a result, any commitment made pursuant to the statute is based *not* on the ordinary standard of clear and convincing evidence of harm, but rather on *inconclusive scientific research and often-speculative beliefs regarding harm to the fetus*.<sup>88</sup>

When inconclusive scientific evidence is paired with “a potentially perilous degree of discretion”<sup>89</sup> a prime opportunity is created for personal biases to infiltrate any determination of dangerousness.

#### i. Pregnancy and Substance Use

From the perspective of radical feminists, societal views of motherhood, including pregnancy, are shaped by patriarchal norms.<sup>90</sup> In other words, the social

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83. OKLA. STAT. ANN. tit. 63, § 1-546.5 (West 2000).

84. MINN. STAT. ANN. § 253B.02(2) (West 2007 & Supp. 2015).

85. S.D. CODIFIED LAWS § 34-20A-63 (2011).

86. *See, e.g.*, MINN. STAT. ANN. § 253B (West 2007 & Supp. 2015).

87. For specific reference to pregnant women in child welfare statutes see, for example, WIS. STAT. ANN. §§ 48.01–02, 48.133–135, 48.193, 48.203–207, 48.213, 48.235, 48.305, 48.345, 48.347 (West 2014); *cf.* *State v. Ayala*, 991 P.2d 1100, 1103 (Or. Ct. App. 1999) (interpreting civil commitment statute to allow for commitment of pregnant women for protection of their fetuses).

88. Cherry, *supra* note 19, at 165 (emphasis added).

89. Kenneth A. De Ville & Loretta M. Kopelman, *Fetal Protection in Wisconsin’s Revised Child Abuse Law: Right Goal, Wrong Remedy*, 27 J.L. MED. & ETHICS 332, 337 (1999).

90. April L. Cherry, *Nurturing in the Service of White Culture: Racial Subordination, Gestational Surrogacy, and the Ideology of Motherhood*, 10 TEX. J. WOMEN & L. 83, 91 (2001).

institution of motherhood is “usually understood as the work that women are culturally *required* to perform as childrearsers.”<sup>91</sup> Therefore, it is not surprising that pregnant women encounter biases on the sole basis of being pregnant. Although pregnancy can be a visible reminder to society of femininity and sexuality, pregnant women are often perceived as “childlike.”<sup>92</sup> Research showing societal discomfort and disdain for pregnant women who are featured provocatively in the media arguably demonstrates that nontraditional actions of pregnant women, such as display of sexual appeal, is too “dangerous.”<sup>93</sup>

Research in the field of psychology yields additional implications. Young adults have been found to “perceive pregnant women as irritable, emotional, and suffering from physical maladies.”<sup>94</sup> Other studies have shown that people hold negative perceptions of and attitudes towards women who are pregnant in the workplace.<sup>95</sup> Yet additional psychological research finds that individuals are more likely to provide assistance to a pregnant woman going about her daily activities than to a nonpregnant woman in a similar situation.<sup>96</sup> Therefore, the view of pregnant women as both needing and deserving help due to their pregnant status can simultaneously result in resentment and criticism for perceived dependence.<sup>97</sup>

These biases regarding pregnant women are intensified by the presence of other factors, including substance use. A retired Wisconsin state representative who helped write the state’s child welfare statute argued that civil commitment of pregnant women was necessary because “[i]f the mother isn’t *smart* enough not to do drugs, we’ve got to step in.”<sup>98</sup> Perceptions of drug users as lacking self-control and responsibility are intensified during pregnancy, since the woman is not just seen as acting upon herself, but also upon her future child. As April Cherry notes, a pregnant woman who uses drugs falls outside of society’s belief that good mothers should be self-sacrificing, and is instead viewed as “self-indulgent, placing her desire to get ‘high’ ahead of the need of her offspring to be born healthy.”<sup>99</sup> This preconceived notion of the personal qualities of pregnant drug users is reflected in statutory language allowing for commitment when an expectant mother “habitually lacks self-control.”<sup>100</sup>

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91. *Id.* at 92 (emphasis added).

92. Marci Lobel, *Pregnancy and Mental Health*, in 3 ENCYCLOPEDIA OF MENTAL HEALTH 229, 232 (Howard Friedman ed., 1998).

93. *Id.*

94. CLAIRE A. ETAUGH & JUDITH S. BRIDGES, *WOMEN’S LIVES: A TOPICAL APPROACH* 206 (2006) (citing research by Hilary Lips).

95. *Id.*

96. Lobel, *supra* note 92, at 232.

97. *Id.*

98. Eckholm, *supra* note 2 (emphasis added) (quoting Bonnie Ladwig).

99. Cherry, *supra* note 19, at 153 (quoting JEAN REITH SCHROEDEL, *IS THE FETUS A REAL PERSON? A COMPARISON OF POLICIES ACROSS THE FIFTY STATES* 103 (2002)).

100. *See, e.g.*, WIS. STAT. ANN. § 48.133 (West 2011).

Societal perceptions of pregnant women—with the additional layers of race, socioeconomic status, and addiction—affect how providers and decision makers respond to women more than knowledge of women’s rights and the laws that may be used to control perinatal behavior.<sup>101</sup> Decision makers may have already formed an internal value determination as to whether addiction is a result of physiological causes or free will. Should a decision maker hold a preconceived belief that addiction is based solely on free will, and thus based on moral culpability, he or she may be more likely to find a drug addict dangerous, rather than forming an individualized determination.

Given the medical uncertainty of predicting outcomes in individual cases of fetal exposure to drugs and alcohol, any medical evidence presented to meet the “clear and convincing” standard is likely insufficient.<sup>102</sup> Therefore, court-ordered civil commitments have a greater likelihood of being based on myths of drug use and whether the pregnant woman is conforming to societal standards, rather than an individualized determination of actual dangerousness.

## ii. Pregnancy, Low Socioeconomic Status, and Substance Use

Public perceptions of pregnant women also fluctuate depending on the pregnant woman’s socioeconomic status. Studies comparing the strategic placement of clothing in department stores revealed that higher-status stores were more likely to place maternity clothing near lingerie sections than lower-status stores.<sup>103</sup> In contrast, lower-status stores were more likely to place maternity clothing near uniforms or plus-size clothing.<sup>104</sup> Since profit-driven department stores arrange their products according to consumer preferences, it can be inferred that product placement studies reflect societal views of pregnant women that differ based on the woman’s socioeconomic class.<sup>105</sup>

The lower a woman’s socioeconomic class, the more likely she will be viewed negatively when she becomes pregnant and is suspected of drug use. Federal statutes already target low-income persons with a history of alcohol and drug use, thereby reinforcing the stigma of addiction. For instance, the Temporary Assistance for Needy Families program (TANF)<sup>106</sup> creates a default rule prohibiting receipt of benefits through TANF and the Supplemental Nutrition Assistance Program (SNAP) if the applicant has a prior felony drug conviction.<sup>107</sup> Conditioning receipt of needed benefits on previous substance use reflects the

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101. Garcia, *supra* note 25, at 133.

102. De Ville & Kopelman, *supra* note 89, at 336.

103. Lobel, *supra* note 92, at 232.

104. *Id.*

105. *Id.*

106. 42 U.S.C. §§ 601–619 (2012) (creating block grants for states to provide assistance for families in need).

107. 21 U.S.C. § 862 (2012).

societal view that addiction is a matter of free will and representative of a poor work ethic.<sup>108</sup>

Once pregnancy status is taken into consideration, the view of the “welfare crack mother” is exasperated.<sup>109</sup> Review of the political climate during the 1980s shows the popular characterization of *all* mothers receiving government benefits as “unfit mothers selling their children’s food stamps to buy their next crack rock.”<sup>110</sup> This generalized public image is reflective of conservative legislators’ underlying motivations to reduce government spending for all pregnant women of low socioeconomic status, regardless of whether or not drug use is present.<sup>111</sup>

The desire to eliminate government spending for pregnant women of low socioeconomic status could easily translate into the perception that government intervention is necessary to avoid future costs. In light of prior extensive press coverage predicting the enormous costs of care for drug-addicted newborns and the burdens that would fall on society from their disabilities,<sup>112</sup> a decision maker may be motivated to avoid such future societal costs rather than prevent an immediate, actual danger.<sup>113</sup> This trigger-happy approach may become more likely when the decision maker believes the pregnant woman’s low socioeconomic status will

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108. As of February 19, 2015, “[a]t least twelve states have passed legislation regarding drug testing or screening for public assistance applicants or recipients.” *Drug Testing for Welfare Recipients and Public Assistance*, NAT’L CONF. ST. LEGISLATURES (Feb. 19, 2015), <http://www.ncsl.org/research/human-services/drug-testing-and-public-assistance.aspx>. Conservative lawmakers have also proposed that states drug test unemployment applicants. Alex M. Parker, *GOP: Drug Tests for Unemployment Applicants*, U.S. NEWS & WORLD REP. (Dec. 9, 2011, 4:30 PM), <http://www.usnews.com/news/articles/2011/12/09/gop-drug-tests-for-unemployment-applicants>.

109. SHEIGLA MURPHY & MARSHA ROSENBAUM, *PREGNANT WOMEN ON DRUGS: COMBATING STEREOTYPES AND STIGMA* 140 (1999) (“The image of poor inner-city African Americans, whose mothering instincts had been destroyed by crack, was highly publicized and widely accepted.”).

110. *Id.* at 142.

111. *Id.*

112. See, e.g., Karen Dukess, *Children Born to Drug Users Need New Kind of Teaching*, ST. PETERSBURG TIMES, Sept. 11, 1989, at 1A; Karen Dukess & Karl Vick, *Cocaine’s Most Innocent Victims*, ST. PETERSBURG TIMES, Sept. 10, 1981, at 1, col. 1; *The Crack Children*, NEWSWEEK, Feb. 12, 1990, at 62; *Study of Addicted Babies Hints Vast Cost*, N.Y. TIMES (Mar. 17, 1990), <http://www.nytimes.com/1990/03/17/us/study-of-addicted-babies-hints-vast-cost.html>. Based on 1990 figures, neonatal cost of health care for infants exposed to cocaine *in utero* was estimated to reach an average of \$5200 more than costs for an unexposed infant. During the 1990s, special education was predicted to be needed by all drug-exposed children at an estimated cost of 2.6 times the amount of regular schooling. Page McGuire Linden, *Drug Addiction During Pregnancy: A Call for Increased Social Responsibility*, 4 AM. U. J. GENDER SOC. POL’Y & L. 105, 109 (1995).

113. Garcia, *supra* note 25, at 137 (“[O]nce individuals have come to terms with their views on the social/community aspects of responsibility, they are also likely to take a position on legal responsibility and accountability within both the criminal and civil law contexts.”).

prevent her from paying for care once the child is born.

### iii. Pregnancy, Race and Substance Use

The historical devaluation of black women as mothers results in biases surrounding black women during their pregnancies.<sup>114</sup> Dorothy Roberts examines the social phenomena of devaluing black women as mothers, from reproductive oppression of black women during slavery to coerced sterilization and the unwarranted removal of black children from family households.<sup>115</sup>

The history of slavery and reproductive oppression of black women produced long-lasting notions that black women are sexually promiscuous and outside of the traditional ideology of femininity and motherhood.<sup>116</sup> These longstanding prejudices continue to establish white middle-class motherhood as the norm, supporting the belief that black mothers are incapable of caring for their children.<sup>117</sup> Not only do black families tend to diverge from the traditional white nuclear family structure, but black families are also more likely to be welfare recipients, which results in government supervision through the welfare system and a greater likelihood of neglect reports.<sup>118</sup> Perceived neglect by black families who receive such government assistance is more likely to be reported to government agencies than alleged neglect by white, affluent families who are not subject to such government supervision.<sup>119</sup>

Resulting popular notions denigrate black mothers as incompetent and lazy, only “breed[ing] children at the expense of taxpayers in order to increase the amount of her welfare check.”<sup>120</sup> When the patient is a woman of color or from a lower socioeconomic class, medical professionals are more likely to perceive the woman as incompetent and weigh the interests of the fetus as superior.<sup>121</sup> In these instances, doctors are more likely to seek court-ordered obstetrical intervention,

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114. See generally Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1436–44 (1991).

115. *Id.*

116. *Id.* at 1437–40.

117. *Id.* at 1441. The belief that black mothers are incapable traces back to the days of slavery, as evidenced by the census record in which a black child’s death from sudden infant death syndrome was attributed to the entire “negro population” as “clearly . . . prov[ing] their great carelessness & total inability to take care of themselves.” Michael P. Johnson, *Smothered Slave Infants: Were Slave Mothers at Fault?*, 47 J.S. HIST. 493, 495 (1981); see also Todd L. Savitt, *Smothering and Overlaying of Virginia Slave Children: A Suggested Explanation*, 49 BULL. HIST. MED. 400, 400 (1975).

118. Roberts, *supra* note 114, at 1440–41.

119. *Id.*

120. *Id.* at 1444.

121. Cheryl E. Amana, *Drugs, AIDS and Reproductive Choice: Maternal-State Conflict Continues into the Millennium*, 28 N.C. CENT. L.J. 32, 34 (2005).

which courts overwhelmingly grant.<sup>122</sup> Similarly, the perception that black mothers are incompetent to make childrearing decisions overflows to all areas of reproductive decisions. For instance, in 2011, a billboard of a young black girl in a pretty pink dress was erected in a largely white community in New York City with the message: “The most dangerous place for an African American is in the womb.”<sup>123</sup> Such public messages convey the idea that black women are not to be trusted during pregnancy or motherhood, and provide an improper rationalization for a decision maker’s belief that government intervention during pregnancy is necessary before a black woman even steps foot in a civil commitment proceeding.

Individual biases and assumptions about race in the context of pregnancy are exacerbated by targeted drug policies with a history of racial discrimination. The first commission to assess drug use in the United States was established in 1908, arguably setting precedent for inflating statistics to promote racism under the guise of drug policy.<sup>124</sup> Heading the first commission, Dr. Wright associated opium addiction with the Chinese and reported to Congress that “[c]ocaine is often the direct incentive to the crime of rape by the Negroes.”<sup>125</sup> It is not surprising, then, that media coverage, beginning in the 1980s, reported the “War on Drugs” in great depth with alarming language.<sup>126</sup> The 1986 Anti-Drug Abuse Act was the start of a crack cocaine sentencing disparity that continued for over two decades.<sup>127</sup> “[P]ossession of crack—a drug predominantly found in communities of color—was punished up to 100 times more harshly than powder cocaine, which is more expensive and use of which is concentrated in white communities.”<sup>128</sup>

Interestingly, black communities located in inner cities have the highest concentration of crack cocaine users.<sup>129</sup> Traditional primary focus on “crack babies” has resulted in disproportionate, highly publicized prosecutions of black women alleged to use crack cocaine during pregnancy.<sup>130</sup> Yet, studies now show that the crack epidemic of the 1980s and 1990s did not result in the anticipated medical consequences for children exposed to cocaine *in utero* that had motivated

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122. *Id.* (“[W]hen court-ordered obstetrical intervention was sought, 81% of the women involved were [women of color]. . . . Intervention was ordered in 86% of the cases . . .”).

123. Liz Robbins, *Billboard Opposing Abortion Stirs Debate*, N.Y. TIMES (Feb. 23, 2011, 12:08 PM), <http://cityroom.blogs.nytimes.com/2011/02/23/billboard-opposing-abortion-stirs-debate/>. Although the billboard’s creators had anti-abortion motivations, such messages demonstrate a greater distrust of black women in health care decision making during all stages of pregnancy.

124. See MIKE GRAY, *DRUG CRAZY: HOW WE GOT INTO THIS MESS AND HOW WE CAN GET OUT* 41–43 (1998).

125. *Id.* at 46–47.

126. Paltrow, *supra* note 19, at 461 (quoting news reports describing crack as “a plague that was eating away at the fabric of America” (internal quotation marks omitted)).

127. Ehrlich, *supra* note 19, at 385–86.

128. *Id.* at 385.

129. Roberts, *supra* note 114, at 1435.

130. *Id.*

government intervention.<sup>131</sup> Rather, researchers attribute poor fetal outcomes to poverty and “challenging environments” common to those receiving government-funded medical assistance.<sup>132</sup>

Additional studies help to further explain the over-policing of minority women who use drugs during pregnancy, and the under-policing of white women who use drugs during pregnancy. Despite similar rates of overall substance abuse, medical professionals are more likely to report drug use of minority women during pregnancy than drug use of white women during pregnancy.<sup>133</sup> A study showed that amongst pregnant drug users, black women used cocaine more frequently, while white women used marijuana more frequently.<sup>134</sup> Yet, fetal rights supporters continue to focus almost exclusively on crack cocaine despite the fact that rates of alcohol and tobacco use amongst pregnant women are far greater, and while “the effects of cocaine use may have been overstated in the past,” the harmful effects of alcohol and tobacco use during pregnancy are better documented.<sup>135</sup> Placing emphasis on substances that are more likely to be used by minority women strongly suggests that stereotypes and biases are at play.<sup>136</sup>

The likelihood of reporting is also greatly affected by what type of provider a woman receives her prenatal care from. Black women are more likely to be reported to government agencies for drug use.<sup>137</sup> Poor women—who are disproportionately black in the United States—are more likely to receive services from government agencies, and, therefore, are subjected to greater government monitoring.<sup>138</sup> Due to discriminatory testing procedures and racial biases held by medical professionals, government agencies providing prenatal services exert greater efforts to detect and report substance use by black women.<sup>139</sup> On the other hand, affluent women—who are disproportionately white—are more likely to receive services from private medical facilities that are less motivated to screen for drugs because of the

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131. *Decades Later, Drugs Didn't Hold 'Crack Babies' Back*, NPR (July 31, 2013, 12:00 PM), <http://www.npr.org/templates/story/story.php?storyId=207292639>.

132. *Id.*

133. *See, e.g.*, Ira J. Chasnoff, Harvey J. Landress & Mark E. Barrett, *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 332 *NEW ENG. J. MED.* 1202 (1990) (describing a study showing controlled substance abuse during pregnancy is ten times more likely to be reported to authorities for black women, despite white women having slightly higher rates of drug usage at first prenatal visit).

134. *Id.* at 1204.

135. CYNTHIA DAILARD & ELIZABETH NASH, *STATE RESPONSES TO SUBSTANCE ABUSE AMONG PREGNANT WOMEN* 6 (2000), <http://www.guttmacher.org/pubs/tgr/03/6/gr030603.pdf>.

136. “Although the type of drug may differ, individuals from all races and socioeconomic strata have similar rates of substance abuse and addiction.” ACOG No. 473, *supra* note 30, at 1.

137. Roberts, *supra* note 114, at 1422, 1432.

138. *Id.*

139. *Id.* at 1422, 1432–34.

financial incentive to retain business and receive referrals.<sup>140</sup> In private medical facility settings, medical professionals are more socially similar to their patients, and, therefore, their biases surrounding pregnant drug users are less likely to be implicated.<sup>141</sup> Studies have demonstrated that doctors are inclined to communicate with private white patients when there is a disagreement regarding treatment, but are more likely to seek court assistance when there is treatment disagreement with patients of color, of low socioeconomic class, with language barriers, or some combination thereof.<sup>142</sup>

Medical professionals and government agency workers often hold strong biases that result in higher rates of reporting from their interactions with black and low-income pregnant women.<sup>143</sup> As a result, the majority of women facing criminal or civil proceedings are minorities and low-income.<sup>144</sup> Such realities exist even when taking into account that alcohol and drug use occurs across racial and socioeconomic lines.<sup>145</sup> These startling statistics perpetuate biases originating from stereotypes and skewed media reports,<sup>146</sup> biases already held by decision makers in the civil commitment context. When the majority of women before a judge or jury are minority, low-income women,<sup>147</sup> the decision maker's preconceived biases are reaffirmed. Additionally, when the substance alleged is crack cocaine, a decision maker may believe there is a greater presence of danger based on his or her exposure to prior widespread coverage of predicted effects of crack cocaine on fetal development.<sup>148</sup>

The reaffirmation of previously held biases founded and supported by the news (for example, "black women have crack babies") will then influence

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140. *Id.* at 1433.

141. *Id.*

142. *See, e.g.,* Amana, *supra* note 121, at 34 (citing Veronika E.B. Kolder, Janet Gallagher & Michael T. Parsons, *Court Ordered Obstetrical Intervention*, 316 *NEW ENG. J. MED.* 1192, 1193–94 (1987)).

143. *See, e.g.,* Lynn M. Paltrow & Jeanne Flavin, *The Policy and Politics of Reproductive Health: Arrests of and Forced Interventions on Pregnant Women in the United States, 1973–2005: Implications for Women's Legal Status and Public Health*, 38 *J. HEALTH POL. POL'Y & L.* 299, 326–27 (2013).

144. Chavkin, *supra* note 47, at 249; Paltrow & Flavin, *supra* note 143, at 310 (summarizing study results showing that of those prosecuted, fifty-two percent were black and seventy-one percent had low socioeconomic status (as represented by indigent defense)).

145. Chavkin, *supra* note 47, at 249.

146. *See, e.g.,* Drew Humphries, *Crack Mothers at 6: Prime-Time News, Crack/Cocaine, and Women*, 4 *VIOLENCE AGAINST WOMEN* 45 (1998) (performing a qualitative analysis of the news' presentation of black women and determining that black women are portrayed differently and more negatively than white women).

147. *See* Chavkin, *supra* note 47, at 249.

148. *See* DOROTHY ROBERTS, *KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY* 154–59 (1997) (discussing the great extent of news coverage of maternal drug abuse).

the decision maker's determination of dangerousness, rather than an individual determination of the facts presented. In turn, minority and low-income women will continue to be civilly committed and, as a result, continue to be the subjects of news reports. Through this perilous cycle, overrepresentation of women of color in criminal and civil proceedings continues to both create and reaffirm biases that influence decision making.

### *B. The Multiplication Effect upon the Civil Commitment Standard*

Biases infiltrating decision making multiply in the civil commitment context when there are alleged threats to fetuses. Thus, traditional purposes and safeguards of civil commitment are diminished when civil commitment is used to police pregnant women. Prenatal and maternity care are already generalized, with variations among categories of providers and geographic regions, rather than based on the individual needs of each mother and her newborn.<sup>149</sup> A Milbank Report finds that evidence-based care is often disregarded in favor of disapproved and intrusive health care practices for childbearing women.<sup>150</sup>

With a medical field that commonly utilizes a generalized care regimen and holds particularized expectations of pregnant women, it is likely that medical professionals and decision makers will exercise a strong bias towards a statistician's "type 2 error."<sup>151</sup> In other words, a medical professional or decision maker will be more likely to classify a non-dangerous person as dangerous (false positive, type 2) than to classify a dangerous person as non-dangerous (false negative, type 1).<sup>152</sup> Decision makers are motivated to favor type 2 errors because there is greater potential for harm and repercussions to the decision maker when misdiagnosing dangerousness as opposed to misdiagnosing non-dangerousness.<sup>153</sup> This tendency is especially problematic when the decision maker already incorporates biases into his or her exercise of broad discretion.

For example, South Dakota's emergency commitment statute allows for a woman who is pregnant and abusing drugs to be detained, yet fails to provide a clear standard as to what constitutes "abusing alcohol or drugs."<sup>154</sup> Likewise, when

149. See, e.g., SAKALA & CORRY, *supra* note 18, at 1.

150. *Id.* at 4 ("Although most childbearing women and newborns in the United States are healthy and at low risk for complications, national surveys reveal that essentially all women who give birth in U.S. hospitals experience high rates of interventions with risks of adverse effects.").

151. D.L. Rosenhan, *On Being Sane in Insane Places*, 13 SANTA CLARA LAW. 379, 385 (1973).

152. *Id.*; see also Brooks, *supra* note 49, at 44.

153. Brooks, *supra* note 49, at 44 (describing self-protectiveness as motivation for psychiatrists to refrain from providing "false negative" testimony).

154. Cherry, *supra* note 19, at 168–69; Paltrow, *supra* note 19, at 493–94 (citing S.D. CODIFIED LAWS § 34-20A-63(3) (1998)).

the Wisconsin legislature amended its child welfare statute to explicitly include “expectant mothers,” it declined to include a single interpretive guideline.<sup>155</sup> When decision makers cannot turn to the text of the relevant law or state procedure manuals for clarification, the opportunity exists for personal determinations of dispositive issues such as what level of use qualifies as “abusing.”<sup>156</sup> Such broad discretion allows judges and juries, who are already prone to false positives, to rely on improper biases and misperceptions, especially when great uncertainty lies in determining harm from exposure to drugs or alcohol *in utero*.<sup>157</sup>

The difficulty in using only medical evidence to predict dangerousness lies in the uncertainty surrounding the magnitude and probability of harm to a fetus.<sup>158</sup> Damage to fetuses dramatically varies from case to case, from instances of no damage to instances of devastating damage.<sup>159</sup> Yet, the public and media’s assumption that “[a]ll drug-exposed children are seriously damaged at birth” is reflected in legislative intent and statutory language.<sup>160</sup> Contrary to public perception, Lynn Paltrow, Executive Director of National Advocates for Pregnant Women, explains:

It is certainly true that some newborns exposed prenatally to some drugs do suffer adverse short- or long-term consequences—as do infants whose mothers lacked access to quality prenatal care and adequate nutrition, smoked or drank while pregnant, or used fertility-enhancing medications that cause multiple births associated with prematurity and other life-threatening hazards. But as experts in the field have noted, “the public outcry for the punishment of substance-using mothers and the disenfranchisement of their children as [an] unsalvageable almost demonic ‘biologic underclass’ rests *not on scientific findings but upon media hysteria fueled by selected anecdotes.*”<sup>161</sup>

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155. Cherry, *supra* note 19, at 166.

156. Paltrow, *supra* note 19, at 493–94.

157. See, e.g., De Ville & Kopelman, *supra* note 89, at 332 (“Even though substance abuse poses a risk of harm to the child who will be born, its magnitude and probability is highly uncertain.”).

158. *Id.*; see also Caroline S. Palmer, *The Risks of State Intervention in Preventing Prenatal Alcohol Abuse and the Viability of an Inclusive Approach: Arguments for Limiting Punitive and Coercive Prenatal Alcohol Abuse Legislation in Minnesota*, 10 HASTINGS WOMEN’S L.J. 287, 298 (1999).

159. De Ville & Kopelman, *supra* note 89, at 332.

160. Paltrow, *supra* note 19, at 474–75.

161. *Id.* at 475 (emphasis added) (quoting Deborah A. Frank et al., *Maternal Cocaine Use: Impact on Child Health & Development*, 40 ADVANCES IN PEDIATRICS 65 (1993)).

Such media hysteria<sup>162</sup> can serve as a primary source of knowledge about particular scientific issues for many people, including medical professionals.<sup>163</sup> As a result, despite numerous well-founded studies concluding that the predicted “crack baby” epidemic was grossly exaggerated and that other factors are likely the contributing causes of prenatal harm,<sup>164</sup> decision makers may still continue to base determinations of dangerousness on prior unsubstantiated media reports. Holding on to one’s primary source of knowledge can result from a lack of awareness of subsequent studies,<sup>165</sup> or tendencies of the human psyche. The belief perseverance paradigm, developed in psychology studies, demonstrates that people maintain incorrect beliefs even after subsequently learning that their beliefs are based on false information.<sup>166</sup> Studies have not only shown that correcting widely held misinformed beliefs result in little effect on peoples’ attitudes;<sup>167</sup> they have shown that a backfire effect can occur, as well. People can actually become more adamant after receiving information that is contrary to their beliefs.<sup>168</sup> Furthermore, if the decision maker already holds ideological beliefs that reflect general biases against women, minorities, and those of low socioeconomic status, he or she is more likely to adhere to such misperceptions, rather than change his or her beliefs to attune to correct information.<sup>169</sup>

Dr. Hallam Hurt, the lead investigator in the “A Thousand Babies” study, agreed in an interview that previous media reports “created an aura of suspicion around pregnant women of a certain background that was not deserved.”<sup>170</sup> He attributed this aura of suspicion to previous faulty beliefs of *in utero* cocaine

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162. “Between 1985 and 2000, major U.S. newspapers featured 197 stories about pregnant women and cocaine addiction . . .” Ehrlich, *supra* note 19, at 390.

163. EMMA CUNLIFFE, MURDER, MEDICINE AND MOTHERHOOD 157 (2011).

164. Paltrow, *supra* note 19, at 461–62.

165. Emma Cunliffe explains lack of awareness:

Court records and medical research are neither readily accessible to nor commonly accessed by the public. While judgments are now widely available through free online services, it is relatively rare for a person to find and read a judgment unless he or she has a personal or professional interest in the case.

CUNLIFFE, *supra* note 163, at 157.

166. Lee Ross & Mark R. Lepper, *The Perseverance of Beliefs: Empirical and Normative Considerations*, in 4 FALLIBLE JUDGMENT IN BEHAVIORAL RESEARCH: NEW DIRECTIONS FOR METHODOLOGY OF SOCIAL AND BEHAVIORAL SCIENCE 17, 17–36 (Richard A. Shweder ed., 1980).

167. See, e.g., John Sides & Jack Citrin, *How Large the Huddled Masses? The Causes and Consequences of Public Misperceptions About Immigrant Populations* (2007) (paper presented at 2007 annual meeting of Midwest Political Science Association), <http://home.gwu.edu/~jsides/huddled.pdf>.

168. Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 POL. BEHAV. 303, 323 (2010).

169. See *id.* at 323 (“[D]irect factual contradictions can actually *strengthen* ideologically grounded factual beliefs . . .”).

170. *Decades Later, Drugs Didn’t Hold ‘Crack Babies’ Back*, *supra* note 131.

exposure, and to the discrepancies in testing of middle- and upper-middle-class drug users.<sup>171</sup> Furthermore, he stated that in retrospect, “[i]t was really, I think, relatively easy to be *more condemning* regarding the moms who used drugs.”<sup>172</sup>

In the criminal justice context, a nationwide study endorses the theory that judges often base sentences on perceptions of appropriate gender roles, and whether the convicted crime supports or contradicts such roles.<sup>173</sup> For instance, women receive more lenient sentences than their male counterparts for many crimes.<sup>174</sup> However, when gender roles are violated—for instance, in convictions for child abandonment—judges give women harsher sentences than their male counterparts.<sup>175</sup> It is logical to suspect that in the civil commitment context where discretionary power is as great as—if not greater than—criminal sentencing, judges are just as likely to base determinations of dangerousness on perceptions of conformity to or violation of gender roles.

Use of emotionally charged language in statutes policing pregnant women invokes gender roles and affects how a statute is interpreted during a court proceeding.<sup>176</sup> For instance, De Ville and Kopelman argue that the use of statutory language such as “expectant mother” (rather than “pregnant woman”) in describing a person to be reviewed for commitment “highlights their social role and presumptive duties to their fetuses and society, that is, their status as expectant mothers.”<sup>177</sup> They argue that “such an approach might be expected to focus on maternal duty and devalue individual rights.”<sup>178</sup> As a result, when a court reviews a pregnant woman’s case under a dangerousness standard, it inevitably focuses on maternal duty, which can unnecessarily stigmatize a woman as threatening and unmotherly, rather than simply in need of treatment.<sup>179</sup>

When legislatures elect to use terms such as “unborn child” rather than “fetus,” the language shifts “the legal calculus from one that balances a woman’s rights against state interests, to one that balances a woman’s rights against a

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171. *Id.*

172. *Id.* (emphasis added); *see also* Brooks, *supra* note 49, at 44 (arguing that experts might formulate medical opinions on perceived societal expectations).

173. Becker, *supra* note 19, at 238 (discussing Matthew Zingraff & Randall Thomson, *Differential Sentencing of Women and Men in the U.S.A.*, 12 INT’L J. SOC. L. 401, 410 (1984)).

174. *Id.*

175. *Id.*

176. De Ville & Kopelman, *supra* note 89, at 334 (“A statute’s language, the legislators’ choice of terms, can reflect the underlying ideology that inspired the law and have a practical impact on how the policy is implemented.”).

177. *Id.*

178. *Id.*

179. Brooks, *supra* note 49, at 39.

child's rights."<sup>180</sup> This shift, in particular, removes pregnant persons from the traditional civil commitment analysis, and increases the likelihood that biases outside of traditional dangerousness analyses will improperly influence judges and jurors.<sup>181</sup>

Although the American Medical Association has found “that addiction is not simply the product of a failure of individual willpower,”<sup>182</sup> statutes that form the basis for civil commitment with terminology such as “habitually lacks self-control”<sup>183</sup> reinforce the notion that addiction is due to individual culpability. The American College of Obstetricians and Gynecologists—arguably in the best position to develop prenatal care policy—recognizes that involuntary civil commitment approaches “treat addiction as a moral failing.”<sup>184</sup>

Invoking one's constitutional right to refuse medical treatment<sup>185</sup> can lead to involuntary commitment.<sup>186</sup> Similarly, in the pregnancy context, Wisconsin's child welfare statute allows for commitment on the basis that an “adult expectant mother *is refusing or has refused* to accept any alcohol or drug abuse services offered to her or is not making or has *not made a good faith effort* to participate in any alcohol or other drug abuse services offered to her.”<sup>187</sup> These statutes, in effect, force pregnant women to succumb to their physicians' “personal values and preferences regarding treatment.”<sup>188</sup> For example, a pregnant woman like Alicia could fall under the statute by refusing her physician's “offer” for alcohol or drug abuse services, even when such services are not medically necessary, but are insisted upon merely because she had previously used drugs or alcohol. Additionally, an open definition of “good faith effort” invites decision makers to rely upon their beliefs of what mothers generally should be doing, rather than considering the individual woman's attempts that would be sufficient in her specific circumstances.

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180. De Ville & Kopelman, *supra* note 89, at 334; *see also* Dawn Johnsen, *Shared Interests: Promoting Healthy Births Without Sacrificing Women's Liberty*, 43 HASTINGS L.J. 569 (1992).

181. Current academic scholarship explores in-depth the attempts of fetal right supporters to promote the legal myth that a mother and unborn child are separate legal persons. This becomes especially problematic in the civil commitment context where determinations of dangerousness can improperly include an unborn child in the equation. *See, e.g.*, Cherry, *supra* note 19, at 178–79; Lynn Paltrow, *Punishment and Prejudice: Judging Drug Using Pregnant Women*, in MOTHER TROUBLES 73–78 (Julia Hanigsberg & Sara Ruddick eds., 1999).

182. Brief Amicus Curiae of the American Medical Association in Support of Neither Party at 7, *Ferguson v. City of Charleston*, 532 U.S. 67 (2001) (No. 99-936).

183. WIS. STAT. ANN. § 48.133 (West 2011).

184. ACOG No. 473, *supra* note 30, at 1.

185. *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261 (1990).

186. Several statutes incorporate refusal of medical treatment as grounds for involuntary commitment. *See, e.g.*, ARK. CODE ANN. § 20-47-104 (2014); TEX. HEALTH & SAFETY CODE ANN. §§ 572.003, 572.005 (West 2010). As applied in case law *see, for example*, *Wessel v. Pryor*, 461 F. Supp. 1144, 1148 (E.D. Ark. 1978), *In re Melas*, 371 N.W.2d 653, 655 (Minn. Ct. App. 1985); *In re J.B.*, 705 P.2d 598, 602 (Mont. 1985).

187. WIS. STAT. ANN. § 48.347 (West 2011) (emphasis added).

188. Cherry, *supra* note 19, at 170.

Furthermore, this approach ignores other factors aside from ongoing drug use that may explain a failure to complete recommended treatment. Failure of recommended services by itself, as stated in the Minnesota statute,<sup>189</sup> does not necessarily reflect dangerousness. Instead, failure of recommended treatment could be due to a host of factors wholly unrelated to whether or not there is current substance use or abuse. A pregnant woman could “fail” a recommended treatment not for a positive drug test, but for missed sessions. The few available treatment programs for pregnant women have been historically male-centered<sup>190</sup> and unable to provide services necessary for many women.<sup>191</sup> The barriers that result from the lack of childcare, accessibility to transportation, and affordable treatment options rebut the notion that “failure” to receive recommended treatment is equivalent to refusal of treatment because of ongoing use.<sup>192</sup>

Where state statutes afford or require a guardian ad litem to represent a fetus,<sup>193</sup> the physical presence of a legal representative for the fetus can lead to greater weight allocated to fetal interests to the detriment of a woman’s rights. In Wisconsin, the guardian ad litem is required to meet with the expectant mother to “assess the appropriateness and safety of the environment of the . . . unborn child.”<sup>194</sup> Not only does such statutory language reduce a woman to an “environment” for a fetus,<sup>195</sup> but it also encourages the guardian ad litem to make a determination based on his or her opinion of the woman rather than based on medical evidence.

Decisions surrounding whether commitment criteria are met, hearing dates, and the location of the assigned treatment center can also have special implications for pregnant women. Since the dangerousness standard is arguably satisfied on the basis of the possible future harm to the fetus, the commitment process can be “intentionally prolonged so that her detention and release coincide with the duration of her gestational period,” despite state laws setting time limitations.<sup>196</sup> This abuse of discretionary power ignores that the alleged threat of danger may cease well before the woman’s due date. When the duration of

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189. MINN. STAT. ANN. § 626.5561(2) (West 2009).

190. Linden, *supra* note 112, at 138.

191. DAILARD & NASH, *supra* note 135, at 6.

192. ACOG No. 473, *supra* note 30.

193. See, e.g., WIS. STAT. ANN. § 48.213, .235 (West 2011 & Supp. 2014).

194. WIS. STAT. ANN. § 48.235(3)(b)(1) (West 2011).

195. Paltrow, *supra* note 19, at 493.

196. Garcia, *supra* note 25, at 178. This would not be the first time a judge inappropriately based the length of detention on the length of the woman’s pregnancy, instead of factors traditionally considered. *Id.* at 198 (describing a D.C. Superior Court case where a judge disregarded applicable guidelines in order to sentence a pregnant drug user with jail time in efforts to protect the fetus); Cherry, *supra* note 19, at 147–48 (citing Cleveland Bar Ass’n v. Cleary, 754 N.E.2d 235 (Ohio 2001) (conditioning length of sentencing term to prevent a woman from accessing an abortion)).

involuntary civil commitment is based solely on a woman's gestational period, it violates U.S. Supreme Court jurisprudence: commitment must end once the danger ceases to exist.<sup>197</sup>

## CONCLUSION

The U.S. Supreme Court firmly stated, in *O'Connor v. Donaldson*, that “[m]ere public intolerance or animosity cannot constitutionally justify the deprivation of a person's physical liberty.”<sup>198</sup> Yet, in the context of civil commitment, women with alleged substance use are often committed due to intolerance and animosity, rather than demonstrated dangerousness shown by clear and convincing evidence.

Alicia's case demonstrates these inherent problems and the substantial loss of liberty that can result from the multiplication effect of biases concerning pregnant women. First, one can argue that the physical appearance of Alicia shackled in the courtroom, with only her fetus receiving counsel, encourages the decision maker to interpret Wisconsin's emotionally charged statutory language to render Alicia “an environment” for the fetus, rather than a person with constitutional rights.<sup>199</sup> Furthermore, a dangerousness determination based solely on the refusal of medical treatment ignores research that shows cost as the leading reason people (including Alicia) forgo mental health treatment.<sup>200</sup> As seen in Alicia's case, when dangerousness remains undefined and medical testimony is not required,<sup>201</sup> unsubstantiated beliefs can result in a finding of dangerousness absent any expert testimony traditionally relied upon in civil commitment settings. A determination based solely on a medical professional's referral, as in Alicia's case, can be unreliable; some medical professionals rationalize exaggerating “dangerousness” if they firmly believe that an individual is too “sick” to know that he or she needs treatment.<sup>202</sup>

In effect, involuntary civil commitment of pregnant women suspected of substance use is both under- and over-inclusive. It is under-inclusive in that it targets women who are vulnerable to biases—women of racial minorities and low socioeconomic status—and ignores other populations of women who may use substances during pregnancy. It is over-inclusive in that it results in a deprivation of liberty for women who do not satisfy the traditional dangerousness requirement, as

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197. *O'Connor v. Donaldson*, 422 U.S. 563, 575 (1975) (“[E]ven if his involuntary confinement was initially permissible, it could not constitutionally continue after that basis no longer existed.”).

198. *Id.* at 575.

199. *See* Paltrow, *supra* note 19, at 493.

200. SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., U.S. DEP'T OF HEALTH & HUMAN SERVS., REASONS FOR NOT RECEIVING TREATMENT AMONG ADULTS WITH SERIOUS MENTAL ILLNESS (2003), <http://www.oas.samhsa.gov/2k3/MHnoTX/MHnoTX.pdf>.

201. De Ville & Kopelman, *supra* note 89, at 337.

202. Brooks, *supra* note 49, at 44.

in Alicia's case. Instead of finding clear and convincing evidence of dangerousness to self or others, civil commitment decisions continue to depend upon whether the pregnant woman supports or violates gender norms and whether she falls into a racial and socioeconomic category that supports the decision maker's preconceived beliefs.<sup>203</sup> As written, statutes policing pregnant women by forcible civil commitment cannot be applied in a manner that would avoid the problems arising from sanism, sexism, racism, and socioeconomic biases.

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203. "The legislation may allow decision-makers to base their judgments of 'substantial' and 'risk,' not on the complicated and sometimes unequivocal medical and science evidence regarding maternal substance abuse, but rather on their view of what constitutes appropriate behavior for an 'expectant mother.'" De Ville & Kopelman, *supra* note 89, at 337.