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Bastardy Proceedings - A Proposal

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"MATERNITY, a British writer once said, is a matter of fact, paternity is a matter of opinion." [1] In 1966 the estimated number of illegitimate births in the United States was 302,600 or 23.6% of all births.[2] This influx of illegitimate children has caused an increase in the number of bastardy complaints. In 1967 the Juvenile Court of Cuyahoga County (Metropolitan Cleveland), Ohio, received 849 bastardy complaints.[3] This figure increased to 877 in 1968.[4] The problems to the community of illegitimacy are manifested on the court dockets, the welfare rolls, and in the adoption agencies. Mother and father alike suffer during the pendency of a paternity suit.

Over the years the courts have attempted to solve this growing problem by diverse methods. Most courts have taken the position that while they have an "inherent empathy" with the parents, their major concern is the child.[5] Other courts feel that the statutory remedy prevents placing a burden on the public which ought to rest upon the father.[6]

Sydney B. Schatkin, an active city attorney, estimates that in twenty-three years of practice he has handled 5000 bastardy cases, winning about 3700 convictions. Of this number Mr. Schatkin feels that at least 750 of these men were not the fathers of the children involved.[7] Are the ostensibly faulty convictions of these men a matter of improper procedure, or does the fault lie elsewhere?

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1 Pett, "Court Suits in Paternity Favor Women," New Haven Register, October 29, 1951, reprinted in Harper, Problems of the Family 43 (2d ed 1962).

2 U.S. Department of Commerce, 1968 Statistical Abstract of the United States 51. Includes estimates for states in which legitimacy data was not reported. No estimates included for misstatements on birth records or failure to register births. Rate per thousand unmarried (never married, widowed, and divorced) women aged 15 to 44 years estimated as of July 1, 1966.

3 1967 Annual Report of The Juvenile Court of Cuyahoga County (Cleveland, Ohio) 27.

4 1968 Annual Report of The Juvenile Court of Cuyahoga County (Cleveland, Ohio) 27.

5 District of Columbia v. Turner, 154 A. 2d 925 (D.C. App., 1959).

6 Perkins v. Mobley, 4 Ohio St. 668 (1855).

7 Pett, *supra* n. 1. Sydney Schatkin, for twenty-three years preceding the newspaper article, was an Assistant Corporation counsel of New York City. One of his assigned tasks was to prosecute bastardy complaints.

Civil or Criminal?

Bastardy proceedings have been categorized as criminal,[8] civil,[9] or quasi-criminal.[10] The classification of the action varies with the jurisdiction. The controversy stems from the unusual combination of criminal and civil aspects of the action. For example in Ohio to institute a bastardy action, an unmarried woman[11] must swear out a complaint in a county or juvenile court.[12] A warrant for the arrest of the putative father is then issued, and any sheriff, police officer, or constable of that county is dispatched to place the defendant in custody.[13] The defendant is then brought before a judge to answer the complaint.[14]

After its inception, with criminal characteristics, a bastardy action assumes a civil nature at the time of trial. The complainant's testimony does not have to be corroborated by other witnesses.[15] The defendant may not only be called for cross-examination,[16] but also is prohibited from providing character witnesses unless his testimony is impeached.[17] A verdict of guilty may be rendered on a preponderance of the evidence[18] by a vote of fewer than twelve jurors.[19] After an unfavorable ruling[20] a complainant may appeal without placing the defendant in double jeopardy if a new trial is ordered.[21] Furthermore, a contempt charge stemming from non-payment of ordered maintenance payments

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[8] State v. Brewer, 38 S.C. 263, 16 S.E. 1001 (1893); Kisner v. State, 209 Md. 524, 122 A. 2d 674 (1959).

[9] State ex rel. Gresham v. Wright, 140 Kan. 679, 38 P. 2d 135 (1934); Kline v. State ex rel. St. Clair, 20 Ohio App. 191, 151 N.E. 802 (1925); Bielowski v. Burke, 121 Vt. 62, 147 A. 2d 674 (1959).

[10] State ex rel. Rarick v. Baughman, 4 Ohio App. 251 (1915); Perkins v. Mobley, *supra* n. 6.

[11] Ohio Rev. Code, § 3111.01; Beam v. Ray, 111 Ohio App. 341, 170 N.E. 2d 844 (1960); Kirkbride v. Eshbaugh, 77 Ohio L. Abs. 33, 147 N.E. 2d 676 (1957); Yuin v. Hilton, 16 Ohio St. 164, 134 N.E. 2d 719 (1956); State ex rel. Hoerres v. Wilkoff, 157 Ohio St. 286, 105 N.E. 2d 39 (1952).

[12] Ohio Rev. Code, § 3111.01.

[13] *Ibid.*; and Ohio Rev. Code, § 3111.19.

[14] Ohio Rev. Code, § 3111.01.

[15] Pratt v. Brickey, 7 Ohio L. Abs. 19 (1928); Snyder v. State, 12 Ohio L. Abs. 1 (1932).

[16] State ex rel. Simmons v. Kiser, 59 Ohio L. Abs. 113, 98 N.E. 2d 322 (1950); State ex rel. Hetzler v. Snyder, 63 Ohio L. Abs. 42, 109 N.E. 2d 54 (1950); *contra* State ex rel. Steiger v. Gray, 76 Ohio L. Abs. 393, 145 N.E. 2d 162 (1957).

[17] Kline v. State ex rel. Simmons, *supra* n. 9.

[18] Reams v. State ex rel. Favors, 53 Ohio App. 19, 4 N.E. 2d 151 (1936); Pratt v. Brickey, *supra* n. 15; State ex rel. Gauvey v. Lofton, 12 Ohio L. Abs. 415 (1932).

[19] Durst v. Griffith, 43 Ohio App. 44, 182 N.E. 519 (1932); Reams v. State ex rel. Favors, *supra* n. 18; Schneider v. State ex rel. Shorf, 33 Ohio App. 125, 168 N.E. 568 (1929). In Ohio a vote of three quarters of the jury is sufficient for a conviction.

[20] Schneider v. State ex rel. Shorf, *supra* n. 19.

[21] State ex rel. Gill v. Volz, 156 Ohio St. 60, 100 N.E. 2d 203 (1951).

is a civil contempt proceeding.[22] In 1871, the Ohio Supreme Court held that a bastardy action is in the nature of a police regulation with an objective of furnishing maintenance for the child and indemnity to the public for the child's support.[23] Thus the primary objective of a bastardy action as defined by that court is to grant financial redress to the mother of the child.

"The difference between civil and criminal law turns on the difference between two objects which the law seeks to pursue—redress or punishment." [24] Since the primary function of a bastardy proceeding being redress it is apparent that these suits are basically civil in nature. But there is more to this particular action than simple redress of grievances. There is also the problem of a man being arrested, incarcerated, and brought before a judge to answer a complaint—all without the constitutional protections granted in a criminal case.

In *In re Gault,* the Supreme Court of the United States decided that criminal constitutional protections extend beyond the arbitrary distinctions of civil and criminal procedure, and should extend to all proceedings which may result in commitment. "It is incarceration against one's will, whether it is called 'criminal' or 'civil.'" [25] Even though the court was ruling on a juvenile conviction, the decision in *Gault* should alter bastardy proceedings. Both juvenile actions and bastardy actions are considered quasi-criminal in many jurisdictions.

The *Gault* decision further complicates the already confused area of bastardy, but, as yet, no State courts have ruled whether the *Gault* case will apply to bastardy actions. The question remains open. Traditionally the courts have held almost unanimously that a bastardy proceeding is civil in nature.[26] However, the problem is not totally resolved. An Ohio court in *Schneider v. State ex rel. Shorf,* held that "in many respects it [bastardy] is more criminal than civil." [27] Other states have had some difficulty in obtaining a uniformity of ruling.[28]

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[22] State ex rel. Merrill v. Moore, 83 Ohio App. 525, 82 N.E. 2d 323 (1948).

[23] Musser v. Stewart, 21 Ohio St. 353 (1871).

[24] Geldart, Elements of English Law, 8-9 (1911).

[25] 387 U.S. 1, 50, 87 S. Ct. 1428, 1455, 18 L. Ed. 2d 527, 558 (1966).

[26] Duncan v. State ex rel. Williams, 119 Ohio St. 453, 164 N.E. 527 (1928); Crawford v. Hasberry, 90 Ohio L. Abs. 205, 186 N.E. 2d 522 (1962); Reams v. State ex rel. Favors, *supra* n. 18; Taylor v. Scott, 168 Ohio St. 391, 155 N.E. 2d 884 (1957); Kline v. State ex rel. St. Clair, *supra* n. 9; See also State v. Tieman, 32 Wash. 294, 73 P. 375 (1903); State v. Longwell, 135 Minn. 65, 160 N.W. 189 (1916).

[27] *Supra* n. 19.

[28] People v. Bowers, 9 Misc. 2d 873, 170 N.Y.S. 2d 546 (1958); Anonymous v. Anonymous, 13 Misc. 2d 718, 180 N.Y.S. 2d 183 (1958); Matter of Clausi, 296 N.Y. 354, 73 N.E. 2d 548 (1947). As recently as 1958 the New York courts were confused as to which procedure should be used. At that time some of the courts in New York decided that the proceeding was civil, while the courts in New York City held that the proceeding was criminal.

The criminal nature of a bastardy action extends beyond the trial. Even though the proceeding is considered civil, a convicted defendant may be jailed for contempt of court if he fails to make his maintenance payments.[29] Hence there is another anomaly in the ostensibly civil nature of a bastardy proceeding. Article I, Section 15 of the Ohio Constitution reads, "No person shall be imprisoned for debt in any civil action, or mesne, or final process, unless in case of fraud." [30] An explanation is that, like alimony, maintenance payments are not debts in the constitutional sense, but moral obligations.[31] The defendant is free to choose between incarceration or compliance with the order.[32] Nevertheless, the defendant is being incarcerated against his will in the event of non-compliance.

State ex rel. Chand v. Wise

A look at a particular case may reveal the equities and inequities of the present system. In *State ex rel. Chand v. Wise,*[33] plaintiff's attorney used the present procedure to its fullest benefit. On May 12, 1967, plaintiff registered her complaint in the Juvenile Court of Summit County, Ohio. The case came to trial before a jury on March 11, 1968. For her first witness, the prosecutrix called the defendant. Under the rules of civil procedure of Ohio calling a defendant for cross-examination is proper,[34] but under the rules of criminal procedure it is a violation of both the Ohio and United States Constitutions.[35]

Over his counsel's objection, defendant was placed on the witness stand. Not only was he asked about his relationship with the plaintiff, but also was asked about his relationship with plaintiff's family and friends. Defendant admitted having intercourse with the plaintiff, but denied having seen her, her family, or her friends during the possible

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29 Ohio Rev. Code, § 2705.02; Catrow v. Columbus, Delaware, and Marion Railway Co., 11 Ohio N.P. (n.s.) 561, 22 Ohio Dec. 79 (1911); State ex rel. Maple v. Hamilton, 19 Ohio C.C.R. (n.s.) 229, 27 Ohio C. Dec. 147 (1912); State ex rel. Merrill v. Moore, *supra* n. 22.

30 See also Calif., Const. Art. 1, § 15; Fla. Const., Decl. of Rights, § 17; Ill. Const., Art. 2, § 12; Mich. Const., Art. 1, § 21.

31 Kirkbridge v. Eschbaugh, *supra* n. 11, Acker v. Adamson, 67 S. Dak. 341, 293 N.W. 83 (1940).

32 In re Nevitt, 117 F. 448 (8th Cir., 1902).

33 Ohio Supreme Court, No. 69-175. This case is currently before the Ohio Supreme Court.

34 Ohio Rev. Code, § 2317.07. "At the instance of the adverse party, a party may be examined as if under cross-examination, orally, by way of deposition, like any other witness, by way of written interrogatories filed in the action or proceeding pertinent to previous pleadings of such party, or by any one or more of such methods."

35 U.S. Const., Amend. V; Ohio Const., Art. I, Sec. 10; Ohio Rev. Code, § 2945.43. "On the trial of a criminal cause, a person charged with an offense may, at his own request, be a witness, but not otherwise. . . ."

interim of conception. Defendant's attorney should have objected to the question concerning the sexual relations of the two parties,[36] but an objection to the question concerning plaintiff's family and friends would not have been sustained.[37] He could have claimed his rights against self-incrimination since defendant conceivably could be found guilty of some crime dealing with moral turpitude and thus would be incriminating himself. However, to claim that all the answers to the proposed questions would be self-incriminating would not be valid. One cannot capriciously refuse to answer a question unless he has reason to believe that his testimony could possibly expose him to punishment.[38]

After prosecuting counsel had questioned the defendant, she produced five witnesses for the purpose of impeaching the testimony of the defendant. Again, this would not have happened under criminal procedure as the defendant would not have been forced to take the stand. During the presentation of plaintiff's case, not one witness was called to corroborate the plaintiff's testimony.

The jury, after hearing the evidence, returned a 9 to 3 decision—enough to sustain a civil decision,[39] but not the required number for a criminal conviction.[40]

In summary, a man was forced to reveal his entire case. The plaintiff was permitted to impeach his testimony and to have uncorroborated testimony. Despite these disadvantages, the defendant convinced three jurors that he was innocent.

Proposal

Since the landmark case of *Escobedo v. Illinois,*[41] the United States Supreme Court has been the watchdog of an accused criminal's constitutional rights. The court in *In re Gault* held that regardless of the procedure, if the posture of defendant's case is such that the possibility of incarceration exists, he should be afforded the protection of his constitutional safeguards.[42] Since the *Gault* ruling the court has had occasion to apply this ruling to non-juvenile cases. In *In re Ruffalo,* the court examined the nature of a disbarment proceeding. The defendant had several charges to answer, but not until he had given sufficient testimony

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[36] Taylor v. Mosley, 87 Ohio L. Abs. 335, 178 N.E. 2d 55 (1961).

[37] *Ibid.*

[38] *Id.* "The privilege [against self-incrimination] must be limited to instances where there is reasonable cause for the witness to apprehend danger that his testimony would possibly expose him to punishment in the courts." [at p. 343, 60]

[39] Ohio Const., Art. I, Sec. 5; Ohio Rev. Code, § 2315.09; Schneider v. State ex rel. Shorf, *supra* n. 19; Durst v. Griffith, *supra* n. 19; Reams v. State ex rel. Favors, *supra* n. 18.

[40] Ohio Const., Art. I, Sec. 5.

[41] 378 U.S. 478, 12 L. Ed. 2d 977, 84 S. Ct. 1758 (1964).

[42] In re Gault, *supra* n. 25.

to sustain a different charge were the charges amended. The court held that he could not be disbarred since he did not know the charges when he was giving his original testimony.[43] A putative father is under a similar handicap. He is called on cross-examination to testify, and after he has given his testimony he can be charged with adultery or fornication.[44]

There have been several suggested changes that would place the defendant under the protection of the Constitution. One of these suggestions is to separate the civil aspects of a bastardy action from the criminal, and apply the appropriate rules of procedure in each.[45] Another suggestion is to use criminal procedure only where the proceedings are appropriate to the father alone and not the child.[46] Still another suggestion is to use criminal procedure only.[47]

The protection of one's constitutional rights should be founded on a sturdier base than merely a distinction between civil and criminal procedure. The overwhelming difference between a debt and support payments underscores this point. A judgment on a debt may be effective for five years[48] with the right to revive.[49] A maintenance order is valid until the child reaches the age of 18.[50] Judgments may be discharged in bankruptcy,[51] but this is not so with maintenance payments.[52] One may not be imprisoned for failure to pay his debts,[53] but the Ohio code makes it a crime for one chargeable with maintenance to fail to support an illegitimate child under 18 years of age.[54]

Despite the possibilities of such harsh punishment a defendant is tried under the rules of civil and not criminal procedure. The provisions of the act or the judicial interpretations should be altered to give a defendant in a bastardy case his constitutional privileges of a criminal

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[43] In re Ruffalo, 390 U.S. 544, 88 S. Ct. 1222, 20 L. Ed. 2d 117 (1968).

[44] Ohio Rev. Code, § 2905.08.

[45] Wysong, The Jurisprudence of Labels, 39 Neb. L. Rev. 671 (1960).

[46] District of Columbia v. Turner, *supra* n. 5, at 926.

[47] The Right to Counsel in Civil Litigation, 66 Col. L. Rev. 1333; Lank v. State, 219 Md. 433, 149 A. 2d 367 (1959); Kisner v. State, *supra* n. 8.

[48] Ohio Rev. Code, § 2329.07.

[49] *Ibid.* § 2325.15.

[50] *Id.* § 3113.99.

[51] Bankruptcy Act, § 14, U.S.C.; Title 11, Chap. 3, § 32; 1 Collier on Bankruptcy 1241, 1628 (14th ed. with current suppl.); Bankruptcy Act, § 17; 14 U.S.C. Title 11, Chap. 3, § 35. Except those debts which are incurred by false pretenses, or by willful and malicious injury.

[52] Bankruptcy Act, § 17, 14 U.S.C. Title 11, Chap. 3, Sec. 35; 1 Collier on Bankruptcy 1668 (14th ed., with current suppl.).

[53] Ohio Const., Art. I, § 15.

[54] Ohio Rev. Code, § 3113.99.

action.[55] Those bastardy actions in which the defendant may be imprisoned should be governed by criminal procedure, e.g., cases where maintenance payments are prayed for by the plaintiff. As this form of bastardy action has many characteristics of a criminal action,[56] it would seem apparent that it is necessary to employ criminal procedure. This will not encompass all bastardy complaints, however, since the child is placed with an adoption agency in many instances and the only damages are the medical expenses of childbirth, loss of plaintiff's wages, etc. These cases should be governed by civil procedure, as this form of bastardy action resembles an action for debt.

Conclusion

The putative father's rights are in need of protection. It is true that many a defendant is indeed the father of the child; however, the rights of the defendant, be he guilty or innocent, must be upheld. The father may face jail anytime he cannot adequately explain to the court why he had not been making his support payments.[57]

Over the years the courts have allowed civil procedure to govern quasi-criminal cases in this area of law. The courts have rationalized their position by emphasizing that the purpose of a bastardy action is solely financial redress. There is a need for the courts to break from their traditional holding and balance the protection of the mother, child, and state with the rights of the father.

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55 Schneider v. State ex rel. Shorf, *supra* n. 19. There it was held that it is contrary to the constitutional right of the defendant to require him to give testimony against himself. For views in other jurisdictions, see N.Y.C. Criminal Courts Act, 864, Subdivision 3, "A paternity proceeding is not a civil action governed by the Civil Practice Act and Rules of Civil Procedure. . . ." Kisner v. State, *supra* n. 8; State ex rel. Steiger v. Gray, *supra* n. 16.

56 State (F) v. M, 95 N.J. Super. 335, 233 A. 2d 65 (1967).

57 Ohio Rev. Code, § 3113.02. "Upon the trial for any offense, defined in section 3113.01 of the Revised Code, the defendant shall be acquitted if it appears that he was, because of, lack of property or earnings, inability to secure employment, or physical incapacity to perform labor, unable to provide the minor or handicapped child or pregnant woman with the necessary or proper home, food, and clothing."