University of Dayton Law Review

Volume 17
Number 3 *Copyright Symposium, Part II*

Article 22

4-1-1992

Maternal Substance Abuse: Does Ohio Have an Answer?

Deborah Ann Bailey
University of Dayton

COMMENTS

MATERNAL SUBSTANCE ABUSE: DOES OHIO HAVE AN ANSWER?

I. INTRODUCTION

A crisis of increasing magnitude is currently facing the American public. Maternal substance abuse[1] endangers the lives of many American women of childbearing age, as well as the lives of their unborn children.[2] Recent studies have shown that the rate of substance abuse among pregnant women ranges from 7.5 percent to 11 percent.[3] Further, an estimated 385,000 cocaine-affected babies were born in 1988 alone.[4] The appropriate response to this crisis is currently a topic of heated debate.[5] The central issue of the debate is whether to address the problem of maternal substance abuse through existing legal channels[6] or to amend current statutes specifically to criminalize such

---

1. The term "maternal substance abuse" in this note refers to the use of illicit controlled substances by a woman during pregnancy. This note focuses on women who abuse cocaine and "crack" cocaine and not upon women who abuse other illicit substances or alcohol. For a thorough discussion on women and alcohol abuse, see Sam J. Balisy, Note, *Maternal Substance Abuse: The Need to Provide Legal Protection For the Fetus*, 60 S. CAL. L. REV. 1209 (1987).

2. *See* Douglas J. Besharov, *Whose Life Is It Anyway?*, NAT'L L.J., Mar. 4, 1991, at 15 (discussing effects of prenatal drug exposure on the fetus); Wendy Chavkin & Stephen R. Kandall, *Between A "Rock" and a Hard Place: Perinatal Drug Abuse*, 85 PEDIATRICS 223 (1990) (suggesting that the incidence of substance abuse in pregnancy is on the rise).

3. Terry A. Adirim & Nandini Sen Gupta, *A National Survey of State Maternal and Newborn Drug Testing and Reporting Policies*, 106 DEP'T OF HEALTH & HUMAN SERVS. PUB. HEALTH REP. 292 (May-June 1991).

4. *See* Mark Curriden, *Holding Mom Accountable*, 76 A.B.A.J. 50, 51 (Mar. 1990) (noting that the "number of cocaine-exposed babies has more than tripled since 1985").

5. *See* 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); Joyce L. Terres, *Prenatal Cocaine Exposure: How Should the Government Intervene?*, 18 AM. J. CRIM. L. 61 (1990); Michelle D. Wilkins, Comment, *Solving the Problem of Prenatal Substance Abuse: An Analysis of Punitive and Rehabilitative Approaches*, 39 EMORY L.J. 1401 (1990).

6. *See*, John E.B. Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1 (1984); Deborah A. Wainey, *The Use of Juvenile Court Jurisdiction and Restraining Authority to Address the Problem of Maternal Drug Abuse in Ohio*, 17 OHIO N.U.L. REV. 611 (1991); Judith Kahn, Note, *Of Women's First Disobedience: Forsaking a Duty of Care*

abuse.[7] Another major issue of this debate focuses upon the constitutional rights of the mother versus the alleged constitutional right of the fetus to be born with a sound mind and body.[8]

Three major decisions reported in Ohio have addressed the problem of maternal substance abuse.[9] Two of these cases originated in the juvenile court system.[10] The third case involved the prosecution of a mother for the criminal endangering[11] of her infant due to prenatal substance abuse.[12] Taken together, these cases exemplify the currently existing uncertainty over the appropriate method with which to address this crisis. Recently, legislation has been introduced into the Ohio General Assembly in an attempt to address the crisis.[13]

This comment analyzes the problems currently facing the Ohio courts and the Ohio General Assembly in dealing with the problem of maternal substance abuse. Section II of this comment provides background information on the problem of maternal substance abuse with the major focus on cocaine and "crack" cocaine. Section III analyzes the currently reported case law in Ohio on this issue. Section IV ana-

---

to her Fetus—Is This A Mother's Crime, 53 BROOK. L. REV. 807 (1987); Note, *Maternal Rights and Fetal Wrongs: The Case Against Criminalization of "Fetal Abuse,"* 101 HARV. L. REV. 994, 1005-21 (1988) [hereinafter *Maternal Rights and Fetal Wrongs*].

For a discussion of the medical profession's view toward this issue, see, Board of Trustees, American Med. Ass'n, *Legal Interventions During Pregnancy; Court-Ordered Medical Treatments and Legal Penalties for Potentially Harmful Behavior by Pregnant Women*, 264 JAMA 2663 (1990). The report concludes that criminal sanctions or civil liability for harmful behavior toward a fetus are inappropriate and recommends intervention through rehabilitative treatment. *Id.* at 2670; *see also* Committee on Substance Abuse, American Acad. of Pediatrics, *Drug-Exposed Infants*, 86 PEDIATRICS 639 (1990) [hereinafter *Drug-Exposed Infants*]. This report advocates educating women regarding the hazards of drug use on the fetus and encouraging drug avoidance. *Drug-Exposed Infants*, *supra*, at 642. The Academy also advocates effective drug treatment and notes that punitive measures toward pregnant women have no proven benefit for infant health. *Id.*

7. *See* Kathryn Schierl, Comment, *A Proposal to Illinois Legislators: Revise the Illinois Criminal Code to Include Criminal Sanctions Against Prenatal Substance Abusers*, 23 J. MARSHALL L. REV. 393 (1990); *see also* Balisy, *supra* note 1, 1235-38.

8. *See* Meyers, *supra* note 6, at 55-65; Balisy, *supra* note 1, at 1219-32; *Maternal Rights and Fetal Wrongs*, *supra* note 6, at 995-1009; *see also*, Doretta McGinnis, *Prosecution of Mothers of Drug-Exposed Babies: Constitutional and Criminal Theory*, 139 U. PA. L. REV. 505, 516-21 (1990); Kary L. Moss, *Substance Abuse During Pregnancy*, 13 HARV. WOMEN'S L.J. 278, 284-85 (1990).

9. *See*, State v. Gray, No. L-89-239, 1990 Ohio App. LEXIS 3782 (Ohio 6th App. Dist. Aug. 31, 1990), *aff'd*, 584 N.E.2d 710 (Ohio 1992); Cox v. Court of Common Pleas, 537 N.E.2d 721 (Ohio Ct. App. 1988); *In re* Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986).

10. *Cox*, 537 N.E.2d 721; *Ruiz*, 500 N.E.2d 935.

11. OHIO REV. CODE ANN. § 2919.22 (Anderson Supp. 1991). The statute reads in relevant part: "No person, who is the parent . . . of a child under eighteen years of age . . . shall create a substantial risk to the health or safety of the child, by violating a duty of care, protection, or support." *Id.* § 2919.22(A).

12. *Gray*, 1990 Ohio App. LEXIS 3782.

13. S. 82, 119th Ohio General Assembly, Reg. Sess. (1991) (introduced Feb. 26, 1991).

lyzes the pending legislation in the Ohio General Assembly and the problems with this legislation. This comment concludes that the criminal sanctions proposed in the legislation for the maternal substance abuser do not represent an appropriate response to this problem. Finally, this comment suggests alternatives for legal intervention.

II. BACKGROUND: COCAINE USE AND ITS EFFECTS

The last ten to fifteen years have seen a widespread increase in the use of cocaine and "crack"[14] cocaine among women, most notably, among pregnant women and women of childbearing age.[15] Because of their availability, cocaine and its smokeable form "crack" have become the drugs of choice for many women.[16]

The danger inherent in crack use is that the inhalation of the smoke affects the brain much quicker than the inhalation of cocaine powder through the nasal passages, thereby producing an instant rush and leading to more rapid addiction as the user seeks to maintain the exhilarated feeling.[17] One major study has shown that there is little difference in the prevalence of the use of illicit drugs between women of different races and socioeconomic status.[18] In the sample population studied, black women were more likely to use cocaine whereas white

---

14. "Crack" is the street term for cocaine that is processed into a freebase form by mixing it with sodium bicarbonate (baking soda) and water. The mixture "crackles" when heated, and the user usually inhales the vapors while smoking the mixture in a pipe. Donald I. Macdonald, American Med. Ass'n, *From the Alcohol, Drug Abuse, and Mental Health Administration: Drug Alert*, 255 JAMA 1987, 1987 (1986); *see also* ARNOLD M. WASHTON, COCAINE ADDICTION 14-16 (1989).

15. *See generally* Chavkin & Kandall, *supra* note 2; *see also* OHIO TASK FORCE ON DRUG-EXPOSED INFANTS, OHIO DEP'T OF HEALTH, FINAL REPORT: OHIO TASK FORCE ON DRUG-EXPOSED INFANTS 11 (May 1990) [hereinafter FINAL REPORT]. The Task Force notes that 11 percent of all babies born in the Dayton, Ohio, area hospitals in May, 1989, exhibited evidence of cocaine exposure within two days of birth. *See* FINAL REPORT, *supra*, at 11. A urine screening conducted at St. Vincent Medical Center in Toledo, Ohio, on infants born between May and October, 1988, revealed evidence of drug exposure in 13 percent of newborns. *Id.* Most of the mothers were in the 20-29 year age bracket, were single, and were on public assistance. *Id.* A repeat study in March, 1989, showed 24 percent of infants positive for drug use. *Id.* In a further study in August, 1989, the percentage had risen to 37.7 percent. *Id.*

16. Crack is usually sold in small vials or foil packets, and the price of doses sold on the street can range as low as $5 to $10 per dose. *See* Macdonald, *supra* note 14, at 1987; *see also* WASHTON, *supra* note 14, at 16. A vial may contain one or a few "rocks" or tiny pea-sized pellets, each of which yields approximately four to five hits (inhalations) when smoked in a pipe. WASHTON, *supra* note 14, at 18.

17. WASHTON, *supra* note 14, at 16.

18. *See* Andrew Skolnick, *Cocaine Use in Pregnancy: Physicians Urged to Look for Problem Where They Least Expect It*, 264 JAMA 306, 306 (1990). Skolnick cites a study performed by Ira J. Chasnoff, M.D., of the Northwestern University Medical School in Chicago, Illinois. *Id.* The study examined the prevalence of illicit drug use among women who received prenatal care at five public clinics in Pinellas County, Florida, and among women who received prenatal care at twelve out of twenty private obstetric offices in the same county. *Id.*; *see also* Ira J. Chasnoff, et

women showed more evidence of marijuana use.[19] Black women, however, were ten times more likely to be reported to public health authorities for substance abuse during pregnancy than white women.[20]

When a pregnant woman uses cocaine or other illicit drugs, these drugs not only cause dependency in the woman, but also cross the placenta and reach the fetal circulatory system, thereby affecting the unborn child.[21] Just recently, the effects of cocaine upon the fetus and the newborn child have begun to be documented.[22] In general, these effects include an increased incidence of premature birth, impaired fetal growth, and neonatal seizures.[23]

After birth, symptoms of withdrawal in the newborn can include a high-pitched cry, sweating, excoriations (abrasions or sores) on the extremities, and gastrointestinal difficulties.[24] More importantly, however, one study indicates that in utero exposure to cocaine "leads to significant impairment in neonatal neurobehavioral capabilities."[25] Other studies report additional serious side effects to the fetus and newborn child.[26] While the long term effects of in utero exposure to cocaine are

---

al., *The Prevalence of Illicit-Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202 (1990).

19. *See* Chasnoff, et al., *supra* note 18, at 1204. Skolnick also notes that Dr. Chasnoff has found an increase in the number of women using cocaine prior to delivery in the belief that it will shorten labor and " 'enhance the thrill of delivery.' " *See* Skolnick, *supra* note 18, at 306. Dr. Chasnoff warns that such binge use of cocaine near the end of a pregnancy can lead to a severe risk to the fetus of in utero infarctions of the brain, heart, and other organs. *Id.* at 309. An infarction is a sudden insufficiency of blood supply due to any one of various causes that results in a dead area of tissue in an organ. STEDMAN'S MEDICAL DICTIONARY 779 (25th ed. 1990).

20. *See* Chasnoff, et al., *supra* note 18, at 1204.

21. *Drug-Exposed Infants*, *supra* note 6, at 639 (noting that a drug-exposed infant may suffer withdrawal symptoms in utero when drugs are withdrawn from a dependent mother or after delivery when the mother's use no longer directly affects the newborn child).

22. *See* Suzann Silverman, *Scope, Specifics of Maternal Drug Use, Effects on Fetus are Beginning to Emerge from Studies*, 261 JAMA 1689 (1989).

23. *See generally*, *Drug-Exposed Infants*, *supra* note 6. The term neonatal derives from the word neonate meaning the newborn child. STEDMAN'S MEDICAL DICTIONARY 1029 (25th ed. 1990).

24. *Drug-Exposed Infants*, *supra* note 6, at 639.

25. Ira J. Chasnoff, et al., *Temporal Patterns of Cocaine Use in Pregnancy; Perinatal Outcome*, 261 JAMA 1741, 1744 (1989) (reporting the perinatal outcomes of a group pregnant women who used cocaine as compared to a group of pregnant women with no history or evidence of substance abuse). Specifically, the researchers in the cited study found that infants exposed to cocaine exhibited significant impairment in the areas of orientation and motor ability and a number of abnormal reflexes. *Id.* at 1743.

The word neurobehavioral is a combination of the word root neuro, relating to the nerves or nervous system, and behavior, meaning any mental or motor act or activity. STEDMAN'S MEDICAL DICTIONARY 179, 1042 (25th ed. 1990).

26. *See, e.g.*, Rodrigo Dominguez, et al., *Brain and Ocular Abnormalities in Infants with In Utero Exposure to Cocaine and Other Street Drugs*, 145 AM. J. DISABLED CHILD 688 (1991) (reporting congenital ocular abnormalities and congenital brain malformations in infants with in utero exposure to cocaine and other vasoconstrictive drugs); Margot van de Bor, et al., *Decreased*

not presently known, the previously documented effects should trigger investigations into the appropriate methods to stem the rise in maternal drug abuse in order to preserve the health of future generations.

III. OHIO CASE LAW

Three recent cases reported in Ohio have dealt with the problem of maternal substance abuse.[27] Two of these actions were originally filed in the juvenile courts.[28] The third action arose out of the criminal indictment of a woman under Ohio's child endangering statute.[29]

A. In re Ruiz

Luciano Ruiz was born on December 31, 1985, mildly premature and somewhat undergrown, at an estimated 35 weeks gestation.[30] His mother was a self-admitted heroin addict, and the infant's urine screen tested positive for both cocaine and heroin.[31] A diagnosis of neonatal drug withdrawal was made and, subsequently, the Wood County Court of Common Pleas, Juvenile Division, entered an order for immediate custody of the child by the County Department of Human Services.[32] When the infant's mother failed to comply with the terms of the reunification plan[33] filed by the Department of Human Services, the Department instituted an action pursuant to Ohio's child abuse statute.[34]

Cardiac Output in Infants of Mothers Who Abused Cocaine, 85 PEDIATRICS 30 (1990) (concluding that intrauterine cocaine exposure decreases cardiac output and increases arterial blood pressure in the newborn infant).

27. *See* State v. Gray, No. L-89-239, 1990 Ohio App. LEXIS 3782 (Ohio 6th App. Dist. Aug. 31, 1990), *aff'd*, 584 N.E.2d 710 (Ohio 1992); Cox v. Court of Common Pleas, 537 N.E.2d 721 (Ohio Ct. App. 1988); *In re* Ruiz, 500 N.E.2d 935 (Ohio C. P. 1986).

28. *Cox*, 537 N.E.2d at 722; *Ruiz*, 500 N.E.2d at 935.

29. See *supra* note 11 (for the text of this statute).

30. *Ruiz*, 500 N.E.2d at 936.

31. *Id.* The infant exhibited symptoms after birth including "irritability, pronounced jitteriness, hypertonicity, diarrhea, and initial feeding difficulty with regurgitation of food." *Id.*

32. *Id.*

33. The reunification plan called for parent-child visitation, parental training, and for the mother to enter drug treatment and to refrain from drug usage. *Id.* at 936.

A case plan or reunification plan is required to be filed by any child service agency that files a complaint alleging a child is abused, neglected, or dependent, or by an agency that has temporary or permanent custody of a child. OHIO REV. CODE ANN. § 2151.412(A) (Anderson 1990). The general goal of the case plan is to reunite the parent and child if out-of-home placement is indicated. The case plan can also require the parents of the child to undergo mandatory counseling or to participate in any supportive services required by the plan. *Id.* § 2151.412(H)(1)-(2).

34. OHIO REV. CODE ANN. § 2151.031(B). The statute provides that an abused child includes any child who "[i]s endangered as defined in section 2919.22 of the Revised Code, except that the court need not find that any person has been convicted under that section in order to find that the child is an abused child." *Id.* Section 2919.22(A) prohibits a parent from creating a "substantial risk to the health or safety of the child." OHIO REV. CODE ANN. § 2919.22(A) (Anderson Supp. 1991).

The court framed the issue as "whether a finding that a child is abused may be predicated solely upon the prenatal conduct of the mother."[35] The court held that "a viable fetus is a child under the existing child abuse statute, and harm to it may be considered abuse under R.C. 2151.031."[36]

In reaching its holding, the court reviewed Ohio case law regarding the rights previously afforded to unborn children.[37] The court specifically cited two Ohio Supreme Court decisions. The first decision extended legal protection to a viable fetus who was injured and subsequently born alive.[38] The second decision allowed a wrongful death cause of action where the child was born alive but died shortly thereafter.[39]

The holdings in these two cases, as well as a subsequent decision,[40] enabled the *Ruiz* court to focus on whether an unborn, but viable, fetus was entitled to protection under Ohio's child abuse statute. The first decision, *Williams v. Marion Rapid Transit, Inc.*,[41] held that an unborn viable child is a person and that injuries he received were done to his person within the meaning of the Ohio Constitution at the time of the prenatal injury.[42] The second decision, *Jasinsky v. Potts*,[43] expanded the *Williams* court's interpretation of the word "person" to include an unborn viable child under Ohio's wrongful death statute.[44]

---

35. *Ruiz*, 500 N.E.2d at 935-36 (Ohio C.P. 1986).

36. *Id.* at 939.

37. *Id.* at 936.

38. Williams v. Marion Rapid Transit, Inc., 87 N.E.2d 334 (Ohio 1949).

39. Jasinsky v. Potts, 92 N.E.2d 809 (Ohio 1950) (holding that a wrongful death action would lie where an unborn but viable child suffered a third-party negligently inflicted prenatal injury and died approximately three months after birth as a result of the injury).

40. Stidam v. Ashmore, 167 N.E.2d 106 (Ohio Ct. App. 1959).

41. 87 N.E.2d 334 (Ohio 1949).

42. *Id.* at 340. Section 16 of Article I of the Ohio Constitution provides: "All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay." OHIO CONST. art. I, § 16.

The court in *Williams* specifically noted that to hold otherwise would "require this court to announce that as a matter of law the infant is a part of the mother until birth and has no existence in law until that time." 87 N.E.2d at 340. The court determined that to so rule would constitute adhering to "a time-worn fiction not founded on fact and within common knowledge untrue and unjustified." *Id.*

The *Williams* court distinguished the case on its facts from a prior Massachusetts case. 87 N.E.2d at 337. In *Dietrich, Adm'r. v. Inhabitants of Northampton*, the court denied recovery on behalf of a fetus based on the early common law, which bestowed legal protection at birth because it was only then that a fetus was considered to be capable of existence separate from the mother. 138 Mass. 14 (1884).

43. 92 N.E.2d 809 (Ohio 1950).

44. *Id.* at 811.

The *Ruiz* court also cited *Stidam v. Ashmore,*[45] in which a wrongful death action was allowed where the viable fetus was subsequently stillborn.[46] The Ohio Supreme Court later upheld the *Stidam* decision in *Werling v. Sandy.*[47] The *Ruiz* court further noted that the Supreme Court of Ohio had held that an unborn fetus was not a person under Ohio's homicide statute,[48] but questioned whether the later holding in *Werling*[49] would have an effect on a future ruling under the homicide statute.[50]

The *Ruiz* court found additional support for its holding in *Roe v. Wade,*[51] which specifically stated that a state acquires a compelling interest in the life of a fetus at the point of viability.[52] Therefore, pursuant to the "essence of *Roe*"[53] and the developing case law in Ohio, the court held that the unborn viable fetus was a child under the provisions of Ohio's child abuse statute.[54] Although the *Ruiz* decision stands as good law in Ohio, its precedential effect is somewhat minimized since the decision was rendered at the trial court level and other Ohio courts are not bound to follow this decision.

---

45. 167 N.E.2d 106 (Ohio Ct. App. 1959); see *In re* Ruiz, 500 N.E.2d 935, 937 (Ohio C.P. 1986).

46. *Stidman,* 167 N.E.2d at 108. The court noted that the principles enunciated by the Ohio Supreme Court in *Williams* and *Jasinsky* "lead logically and irresistibly to the conclusion that such a cause of action does exist" for the wrongful death of a viable child which is subsequently stillborn. *Id.* The *Stidam* court noted the potential for "bizarre results" if recovery were allowed where a child was born alive yet not allowed if the child were stillborn. *Id.*

47. 476 N.E.2d 1053 (Ohio 1985). "It is logically indefensible as well as unjust to deny an action where the child is stillborn, and yet permit the action where the child survives birth but only for a short period of time." *Id.* at 1055.

48. *Ruiz,* 500 N.E.2d at 937; *see also* State v. Dickinson, 275 N.E.2d 599 (Ohio 1977) (holding that a defendant driver who caused an accident, as a direct result of which a seven-month old viable fetus was aborted, could not be properly convicted of vehicular homicide where the child was not born alive).

49. See *supra* note 47 (for holding of *Werling*).

50. *Ruiz,* 500 N.E.2d at 937.

51. 410 U.S. 113 (1973); *see Ruiz,* 500 N.E.2d at 937.

52. *Roe,* 410 U.S. at 163.

53. *Ruiz,* 500 N.E.2d at 938.

54. *Id.* The court additionally cited with approval a Michigan case. *Id.* In *In re Baby X,* the Michigan court held that "a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child within the jurisdiction of the probate court." 293 N.W.2d 736, 739 (Mich. Ct. App. 1980).

Other courts have also agreed that prenatal use of dangerous drugs by a mother is probative of future child neglect and have held that the juvenile court has authority to exercise jurisdiction where a child is born under the influence of a dangerous drug. *See e.g., In re* Troy D., 263 Cal. Rptr. 869 (Ct. App. 1989); *In re* Valerie D., 595 A.2d 922 (Conn. App. Ct. 1991); *In re* Stefanel Tyesha S., 536 N.Y.S.2d 280 (App. Div. 1990).

B. *Cox v. Court of Common Pleas*

The sole issue in *Cox v. Court of Common Pleas*[55] was whether the juvenile court had jurisdiction to regulate an adult pregnant woman's conduct toward her unborn child.[56] The state's complaint alleged two causes of action.[57] The first cause of action alleged that the unborn child was a neglected child pursuant to Ohio Revised Code section 2151.03 because the mother was seven months pregnant, had used cocaine and opiates throughout her pregnancy, and had failed twenty-three drug screenings during her pregnancy.[58] The second cause of action alleged that the unborn child was a dependent child pursuant to section 2151.04 of the Ohio Revised Code.[59]

The juvenile court determined that it had jurisdiction to proceed in the matter and ordered the mother to cease her use of illegal drugs and to submit to a medical examination to determine the health of the child.[60] The mother failed to comply with the court's order, and the state subsequently filed a contempt motion against the mother seeking to have her confined to a secure drug treatment facility to prevent her from further injuring the unborn child.[61] In the meantime, the mother, who was an adult over eighteen years of age, filed an action seeking a writ of prohibition ordering the juvenile court to cease its exercise of jurisdiction over her.[62]

The appellate court construed the issue as strictly a matter of statutory construction in issuing the writ of prohibition. The court held that the juvenile court was without jurisdiction to control the conduct of the mother.[63] It specifically declined to answer the question of

---

55. 537 N.E.2d 721 (Ohio Ct. App. 1988).

56. *Id.* at 722.

57. *Id.*

58. *Id.* at 722-23. Section 2151.03 describes a "neglected child" as including any child "[w]ho lacks proper parental care because of the faults or habits of his parents, guardian, or custodian." OHIO REV. CODE ANN. § 2151.03(A)(2) (Anderson 1990).

59. *Cox*, 537 N.E.2d at 723. A "dependent child" is defined as any child "[w]ho lacks proper care or support by reason of the mental or physical condition of his parents, guardian, or custodian." OHIO REV. CODE ANN. § 2151.04(B).

60. *Cox*, 537 N.E.2d at 723. In so finding, the trial court determined that the unborn fetus was approximately six months old and a "person." *Id.*

61. *Id.*

62. *Id.* at 722. The juvenile courts in Ohio have exclusive original jurisdiction over any child "who on or about the date specified in the complaint is alleged to be a juvenile traffic offender, or a delinquent, unruly, abused, neglected, or dependent child." OHIO REV. CODE ANN. § 2151.23(A)(1). A child is defined "as a person who is under the age of eighteen years." *Id.* § 2151.011(B)(1). An adult is defined as "an individual eighteen years of age or older." *Id.* § 2151.011(B)(2).

63. *Cox*, 537 N.E.2d at 725. The court emphasized that the jurisdiction the General Assembly granted to the juvenile court is "exclusively statutory [and] may not be transcended." *Id.* at

whether the juvenile court could exercise jurisdiction over the unborn child and whether the statutory definition of a "child" under the neglect statute included "an unborn child."[64] The court also declined to address the issue of whether any act of the mother during the pregnancy might be the subject of litigation after the birth of the child if born alive.[65] The basic posture of the court was that the General Assembly might act to confer additional statutory jurisdiction, but until that time, the court could not judicially legislate to confer additional jurisdiction.[66]

The lone dissenting judge determined that the mother was not entitled to any relief because, in his opinion, the mother's taking of drugs during pregnancy constituted neglect to the child in utero under the statute.[67] As the concurring opinion pointed out, however, the dissent focused on the merits of the trial court matter, rather than the issue of jurisdiction, which was the only issue properly before the appellate court.[68]

Although not specifically stated in the majority opinion, the appellate court clearly takes issue with the fact that the trial court did not adjudge the unborn child to be dependent and/or neglected prior to ordering the mother to cease her use of illegal drugs and to submit to a medical examination. This is the very basis for its decision that the juvenile court was without jurisdiction over the adult mother and the

---

The court rejected outright the state's contention that jurisdiction existed by virtue of Ohio Revised Code section 2151.359, which authorizes the juvenile court to issue and to enforce any order "necessary to . . . [c]ontrol any conduct or relationship that will be detrimental or harmful to the child." OHIO REV. CODE ANN. § 2151.359(A) (Anderson 1990); *see Cox*, 537 N.E.2d at 724. The court specifically stated: "R.C. 2151.359 does not expand the jurisdictional limitations of R.C. 2151.23, which establishes the exclusive original jurisdiction of the juvenile court." *Cox*, 537 N.E.2d at 724.

64. *Cox*, 537 N.E.2d at 724. The mother did not raise the issue of jurisdiction over the unborn child. *Id.* at 725.

65. *Id.*

66. *Id.* The court emphasized that "no matter how 'just' the cause, a court cannot confer jurisdiction upon itself to correct a perceived wrong." *Id.* To expand the jurisdiction of the juvenile court "would constitute judicial legislation and violate the fundamental constitutional principle of checks and balances . . . ." *Id.*

67. *Id.* at 728-29 (Lynch, J., dissenting). Judge Lynch relied on the Ohio case law holding that an unborn child is a person for the filing of a personal injury action seeking damages for prenatal injuries. *Id.* at 729; *see also supra* notes 38-47 and accompanying text. The judge also relied on the decision of *In re Ruiz*, 500 N.E.2d 935 (Ohio C.P. 1986), characterizing this decision as "directly on point" in support of the trial court judge's ruling. *Cox*, 537 N.E.2d at 729.

68. *Cox*, 537 N.E.2d at 726 (Whiteside, J., concurring). Judge Whiteside felt that the dissent's reliance on the prior case law granting the right of recovery for prenatal injury to a subsequently born child was inapposite in the case at bar. *Id.* at 727. He specifically noted that in these cases the right of recovery after birth related back to the injury suffered prenatally and determined that these cases in no way supported the extension of rights to the child while still in the

reason why the court did not have to squarely address the issue of whether an unborn child was entitled to protection under Ohio's juvenile statutes. This suggests that it is possible that the majority may have confirmed the exercise of jurisdiction over the mother had the trial court followed proper procedures.

It is not clear how the appellate court would have ruled if squarely confronted with the question of whether the unborn child was entitled to legal protection under Ohio's juvenile statutes. The majority sympathized with the "sentiments raised by the dissent"[69] and suggested that the actions of the mother may give rise to an action after the birth of the child.[70] Such an action might be predicated on the prior case law decisions granting recovery for prenatal injury to a subsequently born child,[71] as held by the *Ruiz* court.[72] The appellate court, however, would not be bound by the decision in *Ruiz* and might once again defer the responsibility for expanding jurisdiction under the Ohio juvenile statutes to the General Assembly.

C. *State v. Gray*

Tammy Gray gave birth on July 28, 1987, to an allegedly cocaine-addicted baby.[73] A Lucas County Grand Jury subsequently indicted her in 1988 on one count of child endangerment in violation of Ohio Revised Code section 2919.22(A).[74] The complaint alleged in part that the defendant had "recklessly create[d] a substantial risk to the health or safety of her subsequently born child"[75] due to her ingestion of cocaine during the third trimester of her pregnancy.[76] Gray moved for a dismissal of the action on the ground that "R.C. 2919.22(A) did not create a duty of care owed to a fetus."[77] The motion was granted and the state appealed.[78]

On appeal, the state advanced two arguments: (1) Ohio Revised Code section 2919.22(A) creates a duty of care to a fetus which becomes a child; and (2) even if no duty existed toward the fetus, a duty does exist once the child is born, and the transfer of blood containing cocaine through the umbilical cord prior to severance constitutes a vio-

---

69. *Id.* at 725.
70. *Id.*
71. *See supra* notes 38-47 and accompanying text.
72. *In re* Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986).
73. State v. Gray, No. L-89-239, 1990 Ohio App. LEXIS 3782, at *1 (Ohio 6th App. Dist. Aug. 31, 1990), *aff'd*, 584 N.E.2d 710 (Ohio 1992).
74. *Id.*; *see supra* note 11 (for relevant text of the statute).
75. *Gray*, 1990 Ohio App. LEXIS 3782 at *1-2.
76. *Id.*
77. *Id.* at *2.
78. *Id.*

lation of Ohio Revised Code section 2919.22(A).[79] The court rejected the first argument, finding the "well-reasoned decision of the trial court to be dispositive of the issues raised by the state."[80] Relying on general principles of statutory construction, the court also rejected the state's second argument, finding it could not conclude that "the General Assembly intended to make a criminal act the passage of harmful substances from a mother to her child in the brief moments from birth to the severance of the umbilical cord."[81] Accordingly, the appellate court affirmed the judgment of the trial court, dismissing the complaint against the defendant.[82]

The trial court decision is vital to an understanding of the impact of the *Gray* decision.[83] The trial court defined the issue as "whether R.C. 2919.22(A) can be applied to a woman who ingests cocaine during her pregnancy when such ingestion results in a substantial risk to the health or safety of her subsequently born child."[84] To establish a violation of section 2919.22(A), the state must prove: "(1) that the defendant owed a duty of care, protection or support to a child under eighteen; (2) that the defendant violated that duty; and (3) that the violation resulted in a substantial risk to the child's health or safety."[85] In other words, the defendant must owe a duty of care at the time of the alleged violation in order to be found guilty.[86]

The state argued that it was not asking the court to establish a duty of care towards the fetus. The court, however, noted the absurdity of such an argument by asking "how can one owe a duty of care . . . to the child to be born without owing a duty of care to the fetus?"[87] While the court agreed with the state's contention that a criminal defendant's conduct need not occur at the time the injured party is

---

79. *Id.* at *2-3.

80. *Id.* at *3.

81. *Id.* at *4. For a case upholding a conviction of the mother for passage of cocaine through the umbilical cord to the newborn, see *State v. Johnson*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991). The mother, in *Johnson*, was prosecuted under a statute that made it a crime to deliver a controlled dangerous substance to a minor. *Id.* at 419. Evidence presented at trial showed that the mother voluntarily ingested the cocaine and knew that the cocaine would pass to the child after birth and prior to the severing of the umbilical cord. *Id.* at 420 (Cobb, J., concurring specially). The opinion engendered a sharp dissent stating that the drug delivery statute was not intended to apply to the facts of this case. *Id.* at 421 (Sharp, J., dissenting). *But cf.* People v. Hardy, 469 N.W.2d 50 (Mich. Ct. App. 1991) (holding that the legislature did not intend a woman to be prosecuted for delivery of cocaine through the umbilical cord to her newborn infant under Michigan's drug delivery statute).

82. *Gray*, 1990 Ohio App. LEXIS 3782 at *4-5.

83. The trial court opinion is set forth in the appellate opinion as Appendix A. *Id.* at *5.

84. *Id.* at *7.

85. *Id.* at *8-9.

86. *Id.*

87. *Id.* at *10.

harmed for criminal liability to attach, the court stated that under Ohio Revised Code section 2919.221(A), the violation of the duty of care is the prohibited conduct, not the eventual harm.[88] The court refused to interpret the statute to include a duty of care to the fetus and held that the duty of care under section 2919.22(A) "does not arise until a live child is born of the pregnancy."[89] Since the complaint alleged that the defendant violated a duty of care during the third trimester of her pregnancy, the mother could not be convicted because she did not owe the unborn child a duty of care at that time.[90]

The court also drew a distinction between acts of commission and acts of omission,[91] noting that section 2919.22(A) had consistently been applied to acts of parental neglect or acts of omission.[92] The court determined that the act of ingesting cocaine clearly constituted an act of commission.[93] Based upon this fact and the prior Ohio Supreme Court interpretation[94] of section 2919.22(A), the court determined that the statute was not intended to apply in this case.[95]

On February 12, 1992, the Ohio Supreme Court upheld the rulings of the trial and appellate courts in *Gray*.[96] The court determined that current criminal statutes are "to be strictly construed against the state and liberally construed in favor of the accused."[97] Further, the "words and phrases in Ohio statutes are to be construed 'according to

---

88. *Id.* at *9-10.

89. *Id.* at *10. To hold otherwise, the court would have interpreted "the word 'child' in the statute to include [a] 'fetus.' " *Id.*

90. *Id.* The court determined that a plain reading of the statute required a parent-child relationship to be in existence at the time the substantial risk of harm was caused. *Id.* at *10-11. The court cited with approval a California case that stated, to commit the offense of child endangering, a parent must have care, custody or control of a child " 'which presupposes the existence of a living child susceptible to custody or control.' " *Id.* at *11 (quoting Reyes v. Superior Court, 141 Cal. Rptr. 912, 914 (Cal. Ct. App. 1977)). The *Reyes* court, interpreting a statute similar to Ohio Revised Code section 2919.22(A) in the case of a pregnant heroin addict, determined that the word "child" in the statute did not include a "fetus," that the language of the statute "strongly suggested that the section was not intended to be applicable to prenatal conduct," and that when the legislature "intended to include a fetus or unborn child within the protection of a penal statute, it [had] done so expressly." 141 Cal. Rptr. at 913, 914.

91. *Gray*, 1990 Ohio App. LEXIS 3782 at *16-17.

92. *Id.* at *17. The court cited *State v. Kamel*, discussing Ohio Revised Code section 2919.22(A) and stating in relevant part: "Division (A) is concerned with circumstances of neglect as is indicated by the committee comment to R.C. 2919.22. Manifestly, such neglect is characterized by acts of omission rather than acts of commission." *Id.* at *15-16 (quoting State v. Kamel, 466 N.E.2d 860, 863 (Ohio 1984)).

93. *Gray*, 1990 Ohio App. LEXIS 3782 at *16.

94. *See supra* note 89 and accompanying text.

95. *Gray*, 1990 Ohio App. LEXIS 3782 at *16-17. In *Gray*, the court also deferred to the Ohio General Assembly the decision of whether or not "to criminalize the ingestion of cocaine during pregnancy when such ingestion results in harm to the subsequently born child." *Id.* at *19.

96. *See* State v. Gray, 584 N.E.2d 710 (Ohio 1992).

the rules of grammar and common usage.' "[98] A plain reading of Ohio Revised Code section 2919.22(A), therefore, required that a parent-child relationship be in existence at the time of the creation of a substantial risk of harm to the child.[99] The statute did not apply to Gray's conduct because she "did not become a parent until the birth of the child[, nor did] the child become a 'child' within the contemplation of the statute until [it] was born."[100] The court did note that the Ohio General Assembly currently had before it Senate Bill No. 82 which, if passed, would be designed to address the type of situation presented by this case.[101] The court, therefore, felt it appropriate to defer to the legislature to undertake "the thorough investigation necessary to resolve this important and troubling social problem."[102]

D. Summary of Ohio Case Law

With the exception of one juvenile court in Ohio,[103] the courts have been unwilling to step in and judicially legislate on the issue of whether the unborn child is entitled to protection against the mother's prenatal acts. The recent decision by the Ohio Supreme Court in *State v. Gray*[104] indicates that the court was unwilling to expand Ohio's child endangering statute to encompass child neglect or abuse through a pregnant woman's use of drugs or alcohol. Under the existing criminal law, a substantial risk of harm to the child cannot be created until the parent-child relationship comes into existence.[105] The court, therefore, deferred to the Ohio General Assembly the task of specifically creating any crime of prenatal child neglect.[106]

The court in *Cox*[107] refused to consider the issue of whether an unborn child is entitled to protection,[108] holding that the juvenile court was without jurisdiction to regulate the conduct of an adult pregnant woman.[109] The *Cox* court also deferred to the Ohio General Assembly the task of legislating with regard to maternal substance abuse.[110] The juvenile court in *Ruiz*,[111] however, boldly declared that the unborn via-

98. *Id.* (quoting OHIO REV. CODE ANN. § 1.42 (Anderson 1990)).
99. *Id.* at 711.
100. *Id.*
101. *Id.* at 712.
102. *Id.* at 713.
103. *In re* Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986).
104. 584 N.E.2d at 710.
105. *Id.* at 711.
106. *Id.* at 713.
107. Cox v. Court of Common Pleas, 537 N.E.2d 721 (Ohio Ct. App. 1988).
108. *Id.* at 724.
109. *Id.*
110. *Id.* at 725.
111. *In re* Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986).

ble child is a child within the definition of an abused child under Ohio Revised Code section 2151.031.[112] The *Ruiz* court determined viability as the appropriate point at which the unborn child's right to life, free from harm, should be protected.[113]

Although these three cases can be distinguished on the issues addressed by the courts in each instance, it is evident that the judicial picture in Ohio regarding legal action for maternal substance abuse is far from clear. It is apparent that the Ohio General Assembly must intervene and adopt legislation that will guide the courts in their resolution of these difficult issues.

IV. ANALYSIS OF PENDING LEGISLATION IN OHIO

A. Overview

In an attempt to address the growing concern associated with the issue of maternal substance abuse, a bill was introduced into the Ohio General Assembly on February 26, 1991.[114] The bill was referred to the Senate Judiciary Committee on March 5, 1991,[115] and sponsor testimony was heard on the bill in committee hearings on July 24, 1991.[116]

The proposed bill would amend the definition of a "neglected child" as found in Ohio Revised Code section 2151.03(A)[117] to include any child "who is addicted at birth to a drug of abuse, as defined in section 3719.011 of the Revised Code, as the result of his mother's use of the drug of abuse during pregnancy."[118] According to the bill's sponsor, this provision includes the drug-addicted child within the "purview" of the Child Abuse and Neglect Law.[119] By acknowledging the addicted newborn as a neglected child due to the mother's substance abuse during pregnancy, this amendment indirectly recognizes the fetus

---

112. *Id.* at 938.

113. *Id.*

114. S. 82, 119th Ohio General Assembly, Reg. Sess. (1991) (introduced by Senator Cooper Snyder).

115. *Senate Activity Report*, 60 GONGWER NEWS SERVICE, INC. OHIO REPORT NO. 43, Mar. 5, 1991, at 2.

116. *Senate Activity Report*, 60 GONGWER NEWS SERVICE, INC., OHIO REPORT NO. 141, July 24, 1991, at 4.

117. OHIO REV. CODE ANN. § 2151.03(A) (Anderson 1990); *see supra* note 58 (for the relevant text of section 2151.03(A)).

118. S. 82, § 2151.03(A)(8). A "drug of abuse" is defined as "any controlled substance as defined in Section 3719.01 of the Revised Code." OHIO REV. CODE ANN. § 3719.011(A) (Anderson 1988). "Controlled substance" is defined as a "drug, compound, mixture, preparation, or substance included in Schedule I, II, III, IV, or V." *Id.* § 3719.01(D). Cocaine and its derivatives are listed in Schedule II of the controlled substances section. *Id.* § 3719.41, SCHEDULE II(A)(4).

119. Memorandum on the *Content and Operation of Senate Bill 82* during the 119th Ohio General Assembly, Regular Session (on file with the *University of Dayton Law Review*).

as a person under the Ohio State Constitution.[120] By amending the existing definition of a neglected child under the Ohio juvenile code, the bill would create an additional ground upon which to bring a child neglect action against the mother of a child.[121]

The major change the bill proposes is the creation of the new offense of "prenatal child neglect" to be codified at section 2919.221 of the Ohio Revised Code.[122] By its inclusion in Title 29 of the Ohio Revised Code, the bill signifies that the statute would criminalize a woman's prenatal conduct.[123] One provision of the bill, to be codified at section 2919.221(A), states: "No woman by her use during pregnancy of a drug of abuse, as defined in Section 3719.011 of the Revised Code, shall cause her child to be addicted at birth to a drug of abuse."[124] A violation of section 2919.221(A) would constitute the offense of prenatal child neglect, an aggravated felony of the second degree.[125] A violator of section 2919.221(A), however, would be sentenced under the provisions of the bill, rather than under the general felony sentencing statute.[126] If the woman has not been convicted of or pleaded guilty to a prior violation of section 2919.221(A), she may elect to "successfully complete a drug addiction program"[127] or "undergo implantation of a hormonal contraceptive device, . . . participate in a five-year program of monitored contraceptive use approved by the court, and during the five-year period abstain from the addictive use of drugs of abuse."[128] If a woman has previously been convicted of or pleaded guilty to a violation of section 2919.221(A), she gets no option to elect; she is sentenced to undergo implantation of a hormonal device, to participate in the five-year contraceptive program, and to abstain from abusing drugs during that period.[129]

---

120. See supra note 42 (for language of Section 16 of Article I of the Ohio Constitution).

121. S. 82, § 2151.03(A)(8).

122. Id. § 2919.221.

123. Title 29 of the Ohio Revised Code codifies Ohio's criminal laws.

124. S. 82, § 2919.221(A).

125. *Id.* § 2919.221(B).

126. *Id.* The general felony sentencing statute in Ohio provides penalties for an aggravated felony of the second degree as follows: The minimum term of incarceration "shall be three, four, five, six, seven, or eight years and the maximum term shall be fifteen years." OHIO REV. CODE ANN. § 2929.11(B)(2)(a) (Anderson Supp. 1991). Additionally, a fine may be levied against the offender of not more than $7,500. *Id.* § 2929.11(C)(2). If the offender has previously been convicted of or pleaded guilty to a felony of any degree, or aggravated murder or murder, the term of incarceration shall be "eight, nine, ten, eleven, or twelve years, and the maximum term shall be fifteen years." *Id.* § 2929.11(B)(2)(b).

127. S. 82, § 2919.221(B)(1)(A).

128. *Id.* § 2919.221(B)(1)(B).

129. *Id.* § 2919.221(B)(2). No penalties are provided for the supplier of the drugs, whether it be the unborn child's father or another person. Apparently, the supplier, if caught, would be

The bill also contains an enhanced penalty provision.[130] If the woman fails to make the election required as a first time offender or fails to act in accordance with any sentence imposed as a subsequent offender, she will be found guilty of "aggravated prenatal child neglect, an aggravated felony of the first degree."[131] Apparently, the woman would then be sentenced pursuant to the general felony sentencing statute.[132]

One final provision of the bill provides that the woman sentenced under the statute must bear the cost of taking any court-ordered action unless she is indigent.[133] If she is indigent and elects a drug treatment program, the Board of Alcohol, Drug Addiction, and Mental Health in the county in which the woman resides must pay for the treatment.[134] If the woman elects the contraceptive treatment program, the County Department of Human Services is to assist her in finding a source of payment for the program or procedure.[135]

B. Analysis of Pending Legislation

This subsection analyzes in detail the legislation pending before the Ohio General Assembly. It initially addresses both sides of the current debate over criminalization of a pregnant woman's prenatal conduct. It then compares the proposed legislation to current Ohio law and investigates potential problems with the bill's provisions. The standard of culpability under the proposed criminal provision is examined in the context of the physical and psychological aspects of cocaine addiction. Finally, the bill's penalty provisions are compared to existing penalties under Ohio law and are analyzed under constitutional standards.

1. The Debate Over Criminalization

The proposed creation of the offense of prenatal child neglect by Ohio Senate Bill No. 82 again brings to the forefront the debate over whether criminalization is in the best interests of the child or the

---

prosecuted according to Ohio's drug trafficking statute. OHIO REV. CODE ANN. § 2925.03 (Anderson Supp. 1991).

130. S. 82, § 2919.221(E).

131. *Id.*

132. The general felony sentencing statute provides an incarceration term of five, six, seven, eight, nine, or ten years, with a maximum term of twenty-five years if there is no previous first, second, or third degree felony or murder conviction or guilty plea. OHIO REV. CODE ANN. § 2929.11(B)(1)(a) (Anderson Supp, 1991). If there is a prior guilty plea or conviction, the incarceration term is ten, eleven, twelve, thirteen, fourteen, or fifteen years, and the maximum term is twenty-five years. *Id.* § 2929.11(B)(1)(b). The fine for an aggravated felony of the first degree is not more than ten thousand dollars. *Id.* § 2929.11(C)(1).

133. S. 82, § 2919.221(D).

134. *Id.*

mother.[136] Pro-criminalization advocates maintain that voluntary drug treatment programs and civil child abuse and neglect statutes have been largely inadequate in dealing with the problem of maternal substance abuse.[137] Additionally, attempts to prosecute mothers under current drug statutes have met with difficulty.[138] Criminalization of prenatal conduct is considered necessary to deter pregnant women from abusing drugs.[139] Incarceration, however, must be combined with other measures in order for the state to carry out its responsibility of rehabilitating the offender.[140]

On the other hand, those opposed to criminalization of prenatal substance abuse maintain that such criminalization is unwarranted because criminal laws regarding illicit substance abuse are already in effect and these laws apply to all persons, not just pregnant women.[141] Difficulty is also noted in defining the duty of care the mother owes to the unborn child.[142] Under the proposed legislation in Ohio, this duty

---

136. *See supra* notes 5-8 and accompanying text.

137. *See* Schierl, *supra* note 7, at 402-404. Schierl argues that state intervention occurs too late where the state takes custody over the drug-exposed child because the damage to the child occurs in the uterus when the mother ingests the cocaine. *Id.* at 404. Additionally, Schierl argues that custody of the child is "not a sufficiently coercive factor to compel many of these women to comply with court-ordered rehabilitation." *Id.*

138. *Id.* at 406. The major problem under currently existing statutes is the lack of notice to women that their conduct during pregnancy may be subject to criminal sanctions. *Id.*

139. *Id.* at 408. Schierl argues that intervention through the criminal system is appropriate because the woman's conduct is not only harmful to her body, but to the fetus and society as well. *Id.* at 407. She maintains that women who continue to use drugs "*will* be detected and *will be* treated." *Id.* at 408.

Presumably, this conclusion rests on the assumption that widespread mandatory urinalysis of newborns will be effectuated, leading to diagnoses of drug-exposed infants and, in turn, to prosecution of the mother for ingesting drugs during the pregnancy. In order for this to occur, however, a state legislature will also have to amend its statutes to provide for such mandatory testing procedures and issue standards regarding detection levels. *See* Balisy, *supra* note 1, at 1235 (advocating criminal penalties to deter women who abuse alcohol, drugs, or tobacco during pregnancy). Balisy also advocates a civil cause of action for prenatal tort or diminished life against both parents of substance-abused infants. *Id.* at 1236.

140. *See* Schierl, *supra* note 7, at 409. Schierl advocates the inclusion of drug treatment, parenting programs, and educational programs, but concludes that criminal sanctions are necessary to coerce the mother's participation in such programs. *Id.* at 410.

141. *See* Wendy K. Mariner, et al., *Pregnancy, Drugs, and the Perils of Prosection*, 9 CRIM. J. ETHICS 30, 31 (1990). The authors argue that if drug use alone (as opposed to trafficking) is not a criminal offense, "then what is being punished is the status of being pregnant." *Id.* The authors further note that neither prosecution, existing prohibitions, or increased penalties have stopped distribution or use of drugs. *Id.*; *see also*, McGinnis, *supra* note 8, at 529 (noting that it is difficult to maintain respect for a system that prosecutes drug-addicted mothers, arguably the victims of profit-seeking drug dealers, while the dealers are perceived as "going free").

142. *See*, Mariner, et al., *supra* note 140, at 32-33. The authors argue that a duty imposed to prevent a risk of harm to the fetus is a state-imposed standard on the woman directing her in how to care for her own body during pregnancy and encompasses lawful as well as unlawful behavior. *Id.* The authors also question whether such a duty would also be owed to the state under

appears to be an obligation on the part of the mother not to cause her child to be born addicted to a drug of abuse.[143] If a woman is to be punished under a criminal statute, questions also arise as to culpable mental intent. One author argues that it is not possible to create an objective criminal standard to judge maternal conduct.[144] By articulating an objective standard, the state punishes women in a strict liability sense without regard as to whether these women were financially or physically able to meet the objective standard of conduct.[145]

Opponents of criminalization also maintain that such state action will deter women from seeking necessary prenatal care[146] and discourage maternal/fetal bonding.[147] Finally, opponents maintain that criminal statutes and sanctions will undermine the doctor-patient relationship because the doctor, in effect, must become an agent of the state criminal justice system.[148] Imposing criminal sanctions creates an adversarial relationship between the doctor and patient because the doctor is required to monitor the maternal/fetal relationship and report noncompliance to the state.[149]

2. Comparison of Proposed Legislation to Existing Ohio Law

Under the existing law in Ohio, in order for a child to be adjudged abused, the parent must create a substantial risk to the health or safety of the child.[150] A conviction is not necessary under Section 2919.22(A),

---

143. S. 82, 119th Ohio Gen. Assembly, Reg. Sess., § 2919.221(A), (1991).

144. *See* McNulty, *supra* note 5, at 305. McNulty notes two general levels of intent in criminal statutes: "an objective intent, requiring recklessness or negligence, and a subjective intent, requiring that the person act purposely or knowingly." *Id.*

145. *Id.*; *see also* McGinnis, *supra* note 8, at 522. Drug addiction presents unique questions under criminal law regarding voluntary versus involuntary acts. McGinnis, *supra*, note 8 at 522. McGinnis further maintains that it is unlikely that female pregnant addicts are culpable within the accepted terms of criminal law. *Id.* at 523.

146. *See* Elizabeth L. Thompson, Note, *The Criminalization of Maternal Conduct During Pregnancy: A Decisionmaking Model for Lawmakers*, 64 IND. L.J. 357, 370 (1988-89) (deterring women from prenatal care is "perhaps the greatest danger" under adopting a scheme of fetal neglect and endangerment laws because women will not receive adequate care, thereby resulting in higher maternal and fetal medical problems and death).

The usual rejoinder to this charge from pro-criminalization advocates is that these pregnant addicts do not seek out such prenatal care at present. This outlook, however, ignores the fact that for those addicts that do currently seek care, criminalization and penal sanctions for drug addiction *will* probably drive them away from care.

147. *See Maternal Rights and Fetal Wrongs*, *supra* note 6, at 1005 (arguing that fetal abuse legislation only emphasizes the woman's perception of her fetus as a legal adversary and able to curtail her legal rights, thereby fostering hostility between the mother and child).

148. *Id.* at 1011.

149. *Id.* On the other hand, the author argues that an education/funding approach to the problem would encourage women to see their doctors and would foster a caring and trusting relationship between the doctor and patient. *Id.*

150. OHIO REV. CODE ANN. § 2919.22(A) (Anderson Supp. 1991).

however, in order for the juvenile court to find that a child is an abused child.[151] This was the basis for the determination of abuse in the *Ruiz*[152] decision. The pending legislation in Ohio proposes both to amend the definition of a neglected child to include one who is addicted at birth to a drug of abuse as the result of his mother's use of such a drug during pregnancy,[153] as well as to create the new offense of prenatal child neglect.[154] It is clear that a proceeding could then be instituted under either section. If the action is instituted under proposed section 2151.03(A)(8), it would proceed under the jurisdiction of the juvenile court in the same manner as is currently provided under the juvenile statutes for an adjudicatory hearing[155] and a dispositional hearing.[156] On the other hand, if the action were instituted under proposed section 2919.221(A), it would proceed under the general jurisdiction of the court of common pleas to hear criminal matters.[157]

What is not clear, however, is whether the two proposed statutes would also work in tandem, similar to the manner in which sections 2151.03 and 2919.22(A) presently operate.[158] It is unclear whether a conviction under proposed section 2919.221(A) would be necessary in order to bring an action under proposed section 2151.03(A)(8). It is also unclear whether a dismissal or a finding of not guilty under proposed section 2919.221(A) would preclude a subsequent action in the

---

151. OHIO REV. CODE ANN. § 2151.031(B) (Anderson 1990).

152. *In re* Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986); *see supra* notes 30-54 and accompanying text (disscussing this case).

153. S. 82, 119th Ohio Gen. Assembly, Reg. Sess., § 2151.03(A)(8) (1991).

154. *Id.* § 2919.221(A).

155. OHIO REV. CODE ANN. § 2151.28 (Anderson 1990). One function of the adjudicatory hearing is to determine whether the child is an abused, neglected, or dependent child as alleged in the complaint filed. *Id.* § 2151.28(A)(2). The court shall also determine at the adjudicatory hearing "whether the child should remain [with the parent] or be placed in shelter care until the dispositional hearing." *Id.* § 2151.28(B).

156. *Id.* § 2151.35. The dispositional hearing is a separate hearing held pursuant to an adjudication of the child as a neglected, abused, or dependent child. *Id.* § 2151.35(B)(1). The court may consider any evidence that is material and relevant including medical testimony and social services testimony. *Id.* § 2151.35(B)(2)(c).

The court has the power to place the child into protective supervision, or the temporary or permanent custody of a placement agent, either parent, or foster care. *Id.* § 2151.353(A)(1), (2), (4). The court may also place reasonable restrictions on the parents if the court issues an order for protective supervision. *Id.* § 2151.353(C).

157. OHIO REV. CODE ANN. § 2931.03 (Anderson 1987) (providing that the "court of common pleas has original jurisdiction of all crimes and offenses, except in cases of minor offenses the exclusive jurisdiction of which is vested in courts inferior to the court of common pleas").

Section 2151.23 of the Ohio Revised Code also gives the juvenile court concurrent original jurisdiction to "hear and determine all cases of misdemeanors charging adults with any act or omission with respect to any child, which act or omission is a violation of any state law or any municipal ordinance." OHIO REV. CODE ANN. § 2151.23(B)(1) (Anderson 1990).

158. *See supra* notes 99 and accompanying text.

juvenile court under proposed section 2151.03(A)(8). Presumably, the answer must be that a subsequent action would be precluded under section 2151.03(A)(8). If the evidence is insufficient to show newborn addiction in order to convict a woman under proposed section 2919.221(A), then there can be no adjudication of the child as neglected under proposed section 2151.03(A)(8).[159]

Additional problems arise over the phrase "addicted at birth" in both proposed sections.[160] Initially, criteria must be determined that the medical profession will utilize for the diagnosis of addiction at birth. A second issue is whether this diagnosis will depend on a newborn's urinalysis alone, or whether additional criteria are necessary to establish a diagnosis of drug addiction. A third issue is how this diagnosis will differ from a diagnosis of cocaine intoxication, which might not pose as serious a risk to the newborn child and for which such criminal sanctions against the mother might be unjustified. A fourth concern is who or what organization will be responsible for adopting standards, or adapting currently existing standards, to comply with the mandate of the proposed statute. Finally, reporting measures must be adopted, or adapted from the existing statutes, in order to insure proper and confidential reporting of test results.

These initial concerns must be addressed in order for the proposed legislation to have any effect. The legislators considering this proposal must conduct an investigation to determine if a standard statewide medical protocol presently exists to diagnose drug addiction. Standardization of diagnostic criteria is essential for impartial application of such a statute. If standardized criteria do not exist, a method must be implemented to develop these criteria. The same principles apply to urinalysis testing. Without a set of standardized criteria to be implemented statewide, the danger of selective prosecution under the statute becomes apparent. Methods also should be standardized for the reporting of such data.[161]

---

159. This is not to say, however, that a neglect action would be precluded under another subsection of Ohio Revised Code section 2151.03.

160. S. 82, 119th Ohio Gen. Assembly, Reg. Sess., §§ 2151.03(A)(8), 2919.221(A) (1991).

161. The Ohio Task Force on Drug-Exposed Infants has recommended periodic universal urine testing for drugs in order to develop statistics on the number of women and children affected by substance abuse. *See* FINAL REPORT, *supra* note 15, at 24. The Task Force recommends that participation be mandatory for all maternity hospitals and the program be run for five years. *Id.* The testing is to be conducted "based on the best available technical information at the time the screenings are conducted." *Id.* It is also recommended that the screening program "be reviewed by a panel of legal, ethical and medical experts for adequacy of procedures relative to the need for informed consent and confidentiality." *Id.*; *see also* Adirim & Sen Gupta, *supra* note 3, at 292 (reporting that no state currently has statewide protocols for testing pregnant women and newborns for illicit substances, although some hospitals have these protocols in effect). *But see* Kandall, *Legal Issues in Drug Testing of Postpartum Women and Newborns as the Basis for*

Under Ohio's current juvenile statutes, there is a mandatory reporting provision for child abuse or neglect.[162] This statute requires any professional named, acting in his official or professional capacity, who knows or suspects that a child under the age of eighteen "has suffered or faces a threat of suffering any physical or mental wound, injury, disability, or condition of a nature that reasonably indicates abuse or neglect of the child,"[163] to make an immediate report or cause an immediate report to be made.[164] The professionals listed include a "physician, hospital intern or resident, dentist, practitioner of a limited branch of medicine or surgery, registered nurse, licensed practical nurse, visiting nurse, or other health care professional."[165]

The reporting statute does contain exemptions.[166] For example, the statute contains a provision exempting the physician from reporting physician-patient communications in accordance with section 2317.02(B)(1)[167] of the Ohio Revised Code to which the doctor could not testify at trial. The reporting statute also provides an automatic waiver provision.[168] The physician is required to make a report where: (1) the patient is a child under the age of eighteen;[169] (2) the physician "knows or suspects, as a result of the communication or any observations made during that communication, that the patient has suffered or faces a threat of suffering"[170] a physical or mental injury indicating abuse or neglect;[171] *and* (3) "the physician-patient relationship does not arise out of the patient's attempt to have an abortion without . . . notification [to] her parents."[172] Therefore, if the drug-exposed newborn is viewed as the patient, the three requirements of the statute would be met, the waiver would apply, and the statute mandates that the physician report the condition indicating abuse or neglect.

Civil and Criminal Proceedings, 23 CLEARINGHOUSE REV. 1406, 1409 (1990) (arguing that administration of drug testing to infants without parental consent violates parental rights).

162. OHIO REV. CODE ANN. § 2151.421 (Anderson 1990).

163. *Id.* § 2151.421(A)(1).

164. *Id.*

165. *Id.*

166. *Id.* § 2151.421(A)(3).

167. OHIO REV. CODE ANN. § 2317.02(B)(1) (Anderson 1991). This section provides that a physician shall not testify:

> concerning a communication made to him by his patient in that relation or his advice to his patient, . . . except that, if the patient is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject.

Id.

168. OHIO REV. CODE ANN. § 2151.421(A)(3) (Anderson 1990).

169. *Id.* § 2151.421(A)(3)(a).

170. *Id.* § 2151.421(A)(3)(b).

171. *Id.*

172. *Id.* § 2151.421(A)(3)(c).

The reporting statute provides civil and criminal immunity to professionals who in good faith make such reports and participate in any subsequent judicial proceeding.[173] On the other hand, this section "does not confer immunity upon those who fail to carry out the mandate of the statute."[174] The reporting statute, therefore, appears to work in conjunction with the proposed amendment of the definition of a neglected child[175] to require reporting of any suspected incidents of neglect or abuse. Presumably, the reporting statute also works in conjunction with the section creating the new offense of prenatal child neglect[176] although no language to this effect appears in the bill. If this is the intention of the General Assembly, then language should be inserted in the bill to make it clear how the two sections would interact.

3. Culpability Standard Under Proposed Section 2919.221(A)

The language of the bill also raises questions as to the standard of culpability required under proposed section 2919.221(A).[177] Ohio law defines four mental states to describe the degrees of culpability necessary for commission of a crime: purpose, knowledge, recklessness, and negligence.[178] Purpose is defined as a specific intention to cause a certain result or to engage in conduct of a particular nature regardless of the outcome.[179] A person acts knowingly "when he is aware that his conduct will probably cause a certain result."[180] Recklessness is defined as disregarding a known risk where it is certain that the conduct will likely cause a certain result.[181] Negligent conduct results from a lapse of the standard of care required of a person under the circumstances, where her conduct may cause a certain result.[182] Under the statute, proof of any degree of culpable mental state is sufficient to prove all lesser degrees.[183]

The Ohio Supreme Court has previously held that recklessness is the culpable mental state required for child endangering under Ohio Revised Code section 2919.22(B).[184] This holding was later followed by

173. *Id.* § 2151.421(G)(1).
174. Brodie v. Summit County Children Servs. Bd., 554 N.E.2d 1301, 1309 (Ohio 1990).
175. S. 82, 119th Ohio Gen. Assembly, Reg. Sess., § 2151.03(A)(8) (1991).
176. *Id.* § 2919.221(A).
177. *See supra* notes 143-45 and accompanying text.
178. OHIO REV. CODE ANN. § 2901.22 (Anderson 1987).
179. *Id.* § 2901.22(A).
180. *Id.* § 2901.22(B).
181. *Id.* § 2901.22(C).
182. *Id.* § 2901.22(D).
183. *Id.* § 2901.22(E).
184. State v. Adams, 404 N.E.2d 144, 145-46 (Ohio 1980) (where criminal statute fails to designate degree of culpability, it is presumed to be recklessness, unless strict liability plainly indicated).

an Ohio appeals court which held that recklessness is the culpable mental state required for child endangering under Ohio Revised Code section 2919.22(A).[185] Following these two opinions, it is logical to conclude that since no degree of culpability is designated in proposed section 2919.221(A), the culpability standard will be recklessness.

Culpability or intent must combine with a voluntary act in order to constitute a crime.[186] Although the initial use of a drug must be considered a voluntary act, "continued use by addicts is rarely, if ever, truly voluntary."[187] Cocaine is physically as well as psychologically addicting.[188] Medical studies show that the drug penetrates the brain cells, alters the chemical activity within them, and produces changes in the person's moods and feelings.[189] These chronic changes "may give rise to compulsive cravings for the drug, impaired cognitive abilities, and negative mood states, all of which will tend to fuel repeated drug use."[190] This raises serious questions about both the voluntariness of the act of the pregnant addict in using cocaine and whether the requisite state of culpability, i.e., recklessness, exists.

It may be argued that a woman's initial use of cocaine, with the knowledge that she is pregnant, is a voluntary act and, therefore, she may be subject to prosecution. This does not, however, appear to be the intent of the proposed legislation. The bill does not punish the mother's initial use of the drug. Rather, it punishes the woman for causing her child to be born addicted to the drug.[191] In the case of the addict, it might then be argued that the woman who is abusing cocaine or other drugs just prior to delivery is not acting in conscious disregard of a known risk where she is certain that her conduct will likely cause a certain result. She is, instead, acting in response to a psychological and physical craving that she cannot overcome without appropriate treatment. Indeed, the pregnant addict's mental state may be such that she does not realize or even consider the possible harmful effects of her drug use on her baby.[192] Even if she does know that the drug is harmful to the fetus, she may be unable to act in accordance with this knowledge.[193]

---

185. State v. Williams, 486 N.E.2d 113 (Ohio Ct. App. 1984).

186. WAYNE R. LAFAVE & AUSTIN W. SCOTT, CRIMINAL LAW, § 3.11(a) (2d ed. 1986).

187. Mariner, et al., *supra* note 141, at 36.

188. *See* WASHTON, *supra* note 14, at 35.

189. *Id.*

190. *Id.*

191. S. 82, 119th Ohio Gen. Assembly, Reg. Sess., § 2919.221(A) (1991).

192. *See* McGinnis, *supra* note 8, at 524 (likening the pregnant addict to a person suffering from temporary insanity). McGinnis specifically notes that the American Psychiatric Association describes alcoholism and cocaine abuse as mental disorders. *Id.* at 519 n.77.

193. *Id.* at 525.

It must be noted that under Ohio law a criminal act may not be excused or mitigated because it was prompted by an irresistible impulse "when the offender has the mental capacity to know the difference between right and wrong, and to appreciate his legal and moral duty in respect thereto."[194] Diminished capacity likewise has been held not to be a defense to a crime.[195] Additionally, the insanity defense cannot be successfully established simply on the basis that the condition resulted from the use of drugs where drug use is not shown to be habitual or chronic.[196] This may possibly leave open, however, the chance for a successful insanity defense where the drug use is shown to be habitual and chronic. Moreover, irresistible impulse or temporary insanity defenses may be successful in negating intent where the defendant does not have the mental capacity to know the difference between right and wrong.

The purpose of this discussion is in no way to condone the use of drugs by the pregnant addict, but merely to emphasize the difficult issues that confront both the courts and the legislature in attempting to deal with the problem of maternal substance abuse. The problem is not strictly legal in nature, but also involves significant medical aspects of both a psychological and physical nature.

4. Analysis of Proposed Penalty Provisions

The penalty provisions of the proposed legislation also merit scrutiny. A violation of section 2919.221(A) constitutes a felony of the second degree;[197] however, the statute requires women to be sentenced according to the bill's provisions, rather than according to the existing felony sentencing statute.[198] A first conviction or guilty plea forces the woman to elect between two alternatives and to act in accordance with this election.[199] The first alternative is for the woman successfully to complete a drug addiction program.[200] This may not present a major problem, provided adequately funded and staffed drug treatment programs are available.[201] The bill's provisions, however, are unclear as to: (1) whether the woman is also to be sentenced to incarceration during this program; (2) whether these programs will be mandatory inpatient

194. State v. Schaffer, 177 N.E.2d 534, 534 (Ohio Ct. App. 1960) (quoting the syllabus).
195. State v. Huertas, 553 N.E.2d 1058 (Ohio 1990).
196. State v. Mosher, 523 N.E.2d 527 (Ohio Ct. App. 1987).
197., S. 82, 119th Ohio Gen. Assembly, Reg. Sess., § 2919.221(B) (1991).
198. *Id.*
199. *Id.* § 2919.221(B)(1).
200. *Id.* § 2919.221(B)(1)(A).
201. For a discussion regarding problems in obtaining treatment for pregnant substance abusers, see Mariner, et al., *supra* note 141, at 36-37; Lynn M. Paltrow, *When Becoming Pregnant is a Crime*, 9 CRIM. J. ETHICS 41, 42 (1990).

programs; or (3) whether the woman is to be treated on only an outpatient basis. The only mention of drug treatment programs in the bill, other than in the sentencing provision of section 2919.221, is found in the proposed amendment to Ohio Revised Code section 340.033.[202] This amendment merely states that the Board of Alcohol, Drug Addiction, and Mental Health Services is to "ensure that drug addiction programs are available for women who elect or are sentenced under Section 2919.221 of the Revised Code to enter such programs."[203] Presumably, this leaves the responsibility to the Board to obtain funding and to establish, staff, and maintain such drug treatment programs. This, in turn, will depend upon the General Assembly approving the necessary appropriations of funds to carry out the statute's mandate. This is a critical factor if the sentencing provisions of proposed section 2919.221 are to be effective.

A recent study conducted by the Ohio Task Force on Drug-Exposed Infants documented the critical unmet need for treatment and recovery services in Ohio.[204] The Task Force strongly recommended that "[a]ppropriate treatment and recovery programs must be assured for all pregnant women and for all women of childbearing age, with provisions for their children, regardless of income."[205] Regardless of the outcome of the presently pending legislation, the funding must be appropriated if the state of Ohio hopes to properly address the problem of maternal substance abuse.

The second alternative for a first time offender under proposed section 2919.221(A) requires the woman to "undergo implantation of a hormonal contraceptive device, . . . [to] participate in a five-year program of monitored contraceptive use approved by the court, and during the five-year period, abstain from the addictive use of drugs of abuse."[206] This alternative becomes mandatory for a subsequent offender.[207] This penalty provision implicates many of a woman's constitutional rights, most notably, the right to privacy.

---

202. S. 82, § 340.033(A)(14).

203. *Id.*

204. *See* FINAL REPORT, *supra* note 15, at 32. Preliminary data "indicates the numbers of women in Ohio needing treatment and recovery services is in the thousands." *Id.*

205. *Id.* The Task Force estimates the cost to be $90 per day in a residential treatment center for a woman with one child. *Id.* At a length of nine months of treatment, this totals $24,500 for one woman's recovery. *Id.* The estimated annual cost for one facility with twenty clients is $486,000, and the estimated annual cost for seven such facilities is $3,402,000. *Id.*

206. S. 82, § 2919.221(B)(1)(B).

207. *Id.* § 2919.221(B)(2).

a. Constitutional Implications of the Penalty Provisions

In *Skinner v. Oklahoma*,[208] the United States Supreme Court struck down an Oklahoma statute providing for compulsory sterilization of persons convicted two or more times of crimes involving moral turpitude.[209] In striking down the statute, Mr. Justice Douglas stated: "We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and *procreation* are fundamental to the very existence and survival of the race."[210] He further characterized the statute's sterilization mandate as a deprivation of a "basic liberty."[211]

The Supreme Court initially developed the modern right to privacy in the case of *Griswold v. Connecticut*,[212] in which the Court struck down a Connecticut statute forbidding the use of contraceptives by married couples.[213] The right to privacy is found in several Bill of Rights guarantees that "have penumbras, formed by the emanations from those guarantees that help give them life and substance"[214] thereby forming a "zone of privacy"[215] into which the government may not intrude through means that are unnecessarily broad.[216] The Court extended this holding in *Eisenstadt v. Baird*[217] to encompass the use of contraceptives by single persons. In the words of the Court, "[i]f the right of privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[218] Moreover, "where a decision as fundamental as that to bear or beget a child is involved, regulations imposing a burden on it may be justified only by compelling state interests, and must be narrowly drawn to express only those interests."[219]

---

208. 316 U.S. 535 (1942).

209. *Id.* at 536. The statute at issue in *Skinner* penalized habitual criminals convicted of certain offenses, such as larceny, but not habitual criminals convicted of similar offenses, such as embezzlement. *Id.* at 538-39. The apparent justification for the law was the belief that criminal traits were inherited and that such criminals would parent potential socially undesirable children. *Id.* at 538. The law was struck down on equal protection grounds. *Id.*

210. *Id.* at 541 (emphasis added).

211. *Id.*

212. 381 U.S. 479 (1965).

213. *Id.*

214. *Id.* at 484.

215. *Id.*

216. *Id.*

217. 405 U.S. 438 (1972).

218. *Id.* at 453; *see also* Roe v. Wade, 410 U.S. 113 (1973) (extending the right of privacy in the abortion context).

219. Carey v. Population Servs. Int'l, 431 U.S. 678, 686 (1977).

Taken together, these cases evidence a privacy right to reproductive autonomy that may only be infringed upon where the government has a compelling interest. Moreover, the regulation must be narrowly tailored so as to address only those interests.[220] Arguably, the state has an interest in seeing that women remain drug-free during pregnancy so as to give birth to healthy children. This may provide the compelling state interest necessary for intervention in the form of drug treatment programs.

Although the state interest may be compelling, the means proposed by the second penalty provision in the bill are not narrowly tailored in order to justify the intrusion on the women's reproductive and privacy rights.[221] Where such fundamental rights as procreation are concerned, a court would be obliged to subject the means to advance the compelling state interest to "particularly careful scrutiny."[222] The penalty provision forces an invasive bodily procedure upon a woman, i.e., implantation of a hormonal device, requires her to be monitored for five years, and requires her to abstain from addictive drug use during those five years.[223] The implantation and forced participation in a five-year contraceptive program clearly run counter to the woman's fundamental privacy right of procreation. Additionally, the means that have been chosen are not the least intrusive under the circumstances. Therefore, the state may not intrude upon such a fundamental right in this manner.

The penalty provision is also illogical. It requires a woman to remain drug free during the five-year period, but it makes no provision for providing drug treatment to the woman. The statute seeks to prevent the birth of children addicted to drugs. The state's compelling interest in seeing that women remain drug-free during pregnancy so as to give birth to healthy children must be accomplished through narrowly tailored means. The state's interest can be met through the less intrusive means of providing drug treatment and education programs for maternal substance abusers.

The invasive procedure proposed under the second penalty provision might also be challenged on Fourth Amendment privacy grounds.[224] Through the Fourth Amendment, the Constitution forbids

---

220. *Id.*

221. S. 82, 119th Ohio Gen. Assembly, Reg. Sess., § 2919.221(B)(1)(B) (1991); *see also supra* text accompanying note 206 (text of proposed penalty provision).

222. *Roe*, 410 U.S. at 170 (Stewart, J. concurring).

223. S. 82, § 2919.221(B)(1)(B).

224. The Fourth Amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ." U.S. CONST. amend. IV. Although the first ten amendments known as the Bill of Rights were originally held to be applicable only to the federal government, *Barron v. Baltimore*, 32 U.S.

unreasonable searches and seizures.[225] The basic purpose of the Fourth Amendment has been characterized as to safeguard the privacy and security of individuals against arbitrary invasions by government.[226] A woman, therefore, has a right to bodily integrity and to be free from an unreasonable seizure of her person by state action.[227] Again, a compelling state interest is necessary to justify an intrusion limiting this fundamental right.[228]

Although some authority suggests the state's interest in the potential life of an unborn child may outweigh an intrusion on the rights of the pregnant woman to refuse medical treatment,[229] these cases have dealt with life-threatening situations to the child that have required prompt action.[230] The state action proposed in the pending Ohio legislation is markedly different. The intrusion through implantation of a hormonal contraceptive device is not necessary to save the life of a child. Such an intrusion is not geared towards the compelling government interest in the potential life of an unborn child, but rather, is based on a belief that drug abusing women are not worthy of bearing children. Therefore, this penalty provision cannot withstand constitutional scrutiny.

The penalty provision of proposed section 2919.221(B)(1)(B), as well as the enhanced penalty provision,[231] also bear scrutiny under the Eighth Amendment's cruel and unusual punishment clause.[232] The statute's enhanced penalty provision provides that a woman failing to make the required election or failing to act in accordance with any sentence imposed shall be guilty of aggravated prenatal child neglect, an aggravated felony of the first degree.[233] Under the current child endangering

---

(7 Pet.) 243 (1833), the Fourteenth Amendment's due process clause incorporates these individual rights and guarantees these rights to the individual as against state action. Palko v. Connecticut, 302 U.S. 319 (1937).

225. Terry v. Ohio, 392 U.S. 1 (1968).

226. Berger v. New York, 388 U.S. 41 (1967).

227. *See Maternal Rights and Fetal Wrongs, supra* note 6, at 1001-02.

228. *See supra* text accompanying notes 219-20.

229. *See, e.g.*, Jehovah's Witnesses v. King County Hosp., 278 F.Supp. 488 (W.D. Wash. 1967), *aff'd*, 390 U.S. 598 (1968) (per curiam) (order for blood transfusion warranted over parents' objection on religious grounds); Jefferson v. Griffin Spalding County Hosp. Auth., 274 S.E.2d 457 (Ga. 1981) (ordering Caesarian section be performed on pregnant woman over her religious objections); Raleigh Fitkin-Paul Morgan Memorial Hosp. v. Anderson, 201 A.2d 537 (N.J. 1964) (blood transfusions may be administered to save the life of mother or child despite mother's religious objections).

230. See cases cited *supra* note 229.

231. S. 82, 119th Ohio Gen. Assembly, Reg. Sess., § 2919.221(E) (1991).

232. The Eighth Amendment prohibits excessive bail, excessive fines, and cruel and unusual punishment. U.S. CONST. amend. VIII.

233. S. 82, § 2919.221(E). For the terms of incarceration and fines imposed for an aggravated felony of the first degree, see *supra* note 231-32 and accompanying text.

statute,[234] a violation creating a substantial risk to the health or safety of a child is a misdemeanor of the first degree, unless the violation results in serious physical harm to the child or the offender has a previous conviction for any offense towards children, in which case the violation is a felony of the fourth degree.[235] A misdemeanor of the first degree carries a term of imprisonment of not more than six months[236] and a fine of not more than one thousand dollars.[237] The term of imprisonment for a felony of the fourth degree is eighteen months, two years, thirty months, or three years, and the maximum is five years.[238] The fine for a felony of the fourth degree is not more than two thousand five hundred dollars.[239]

The argument may be made that the penalty provisions[240] under proposed section 2919.221 create a cruel and unusual punishment for the mother because the same status of being drug-addicted and being adjudged a child endangerer under existing section 2919.22(A) is penalized much less harshly than if the woman "causes" her child to be born addicted. The argument in fact has been made that the cruel and unusual punishment clause, as construed by the United States Supreme Court in *Robinson v. California*,[241] prohibits criminalization of fetal or child abuse or neglect by pregnant addicts.[242] The Supreme Court in *Robinson* characterized drug addiction as a status and accepted the disease-type model of addiction.[243] Arguably, what the State of Ohio is attempting to do is punish the woman for the status of being drug-addicted and subsequently becoming pregnant. This situation is distinguishable solely on the basis of the maternal/fetal relationship from crimes committed by other addicts. This relationship is so inextricably intertwined by virtue of the fact that it is the woman who carries the unborn child within her own body. Anything a woman does while pregnant has the potential to harm the child. If we are to penalize the woman for being drug-addicted and pregnant, then we should also penalize the fathers under the proposed statute for having unprotected

234. OHIO REV. CODE ANN. § 2919.22 (Anderson Supp. 1991). For the relevant text of this statute, see *supra* note 11.

235. OHIO REV. CODE ANN. § 2919.22(D).

236. *Id.* § 2929.21(B)(1).

237. *Id.* § 2919.21(C)(1).

238. *Id.* § 2919.11(B)(7).

239. *Id.* § 2929.11(C)(4).

240. S. 82, 119th Ohio Gen. Assembly, Reg. Sess., § 2919.221(B)(1)(B), (B)(2), & (E) (1991).

241. 370 U.S. 660 (1962).

242. Robert Batey & Sandra Anderson Garcia, *Prosecution of the Pregnant Addict: Does the Cruel and Unusual Punishment Clause Apply?*, 27 CRIM. L. BULL. 99 (1991).

243. 370 U.S. at 666-67.

sexual intercourse with a woman known to be a drug abuser where a child is born of that union. The father would seem to be equally at fault in this situation.

b. Medical Implications of the Penalty Provisions

Questions also arise regarding the safety, efficacy, and propriety of the implantation of a hormonal contraceptive device. The proposed statute indicates the woman may undergo implantation of "Norplant or a similar contraceptive device."[244] Norplant is a contraceptive system approved by the Food and Drug Administration (FDA) on December 10, 1990, after approximately twenty years of research and development.[245] The system consists of six flexible, tubular, silicon-rubber capsules containing the progestin levorngestrel, a synthetic form of the female hormone progesterone.[246] The six tubes are inserted under the skin in a woman's upper arm, where they slowly release the synthetic hormone over a period of five years.[247] Successful use of the product "depends on correct and carefully performed subdermal insertion."[248]

Norplant, however, is not without its problems. The most common adverse side effects associated with its use are lengthened menstrual bleeding and irregular spotting between menstrual periods.[249] The FDA has also indicated in a statement approving Norplant that it is contraindicated for women who have acute liver disease, unexplained vaginal bleeding, breast cancer, or blood clots in the legs, lungs, or eyes.[250] The cost for the implant is estimated at approximately $500 to $600, excluding the physician's fee for insertion and removal.[251] Even prior to the FDA's approval of the drug, a debate over the appropriate use of the implant began.[252] Some have indicated that it would be a possible

---

244. S. 82, § 2919.221(B)(1)(B).

245. G.R. Huggins & Anne Colston Wentz, *Obstetrics and Gynecology*, 265 JAMA 3139 (1991).

246. *Id.*

247. *Id.; see also* Stuart L. Nightingale, *From the FDA: New Contraceptive Implant System Approved*, 265 JAMA 847 (1991). The cumulative annual pregnancy rate over five years is 1.1%. *See generally* Nightingale, *supra*, at 847. Pregnancy is prevented through the inhibition of a woman's ovulation and through thickening of the cervical mucus. *Id.*

248. Nightingale, *supra* note 247, at 847.

249. Philip J. Hilts, *U.S. Approves Contraceptives Planted in Skin*, N.Y. TIMES, Dec. 11, 1990, at A1; *see also* Jennifer J. Bush, *Orange County Focus: Countywide; 4 Doctors Trained in Contraceptive Use*, L.A. TIMES, Mar. 21, 1991, at B3 (Orange County ed.). The manufacturer, Wyeth-Ayerst Laboratories in Philadelphia, Pennsylvania, also notes such side effects as nausea, headaches, nervousness, dizziness, acne, change of appetite, weight gain, breast pain, and hair loss. Bush, *supra*, at B3.

250. *See* Hilts, *supra* note 249, at A1.

251. *See* Bush, *supra* note 249, at B3.

252. *See generally* Malcolm Gladwell, *Science Confronts Ethics In Contraceptive Implant; Long Process Ends With Approval*, WASHINGTON POST, Oct. 31, 1990, at A1.

solution to part of the problem of drug-addicted infants, but others worry that government intervention might be construed as an endorsement of sexual activity and note that the implant would not affect the problem of sexually-transmitted diseases and AIDS.[253] Others have suggested that the appropriate use of the implant is solely on a voluntary basis and not as a device to reduce the number of drug-addicted newborns.[254]

Apparently, the sponsors of the Ohio legislation feel that Norplant offers a possible solution to the problem of drug-addicted infants born in Ohio by their inclusion of section 2919.221(B)(1)(B) in the proposed bill. This is troublesome, however, because Norplant is a contraceptive device with demonstrable side effects. Forced implantation of this device may implicate a woman's protected First Amendment religious beliefs where a woman's religion does not condone contraceptive practices. The contraindications present yet another problem because a complete and thorough medical history must be obtained prior to the implant being inserted. The FDA also indicated in its instructions to the drug's manufacturer that the company must tell physicians that removal of Norplant must be done on demand, without any questions asked, to *any* woman who wants it removed.[255] This instruction, if followed, means that the woman sentenced in Ohio could demand removal for any reason at any time.

Finally, there are problems of cost and personnel. The present estimated cost is $500 to $600 per implant, and the manufacturer has yet to indicate whether or not the implant will be made available to organizations such as public health clinics at a discount.[256] This is of critical importance because under the provisions of proposed Senate Bill No. 82 the woman sentenced is required to pay for the procedure.[257] Physicians must also be trained in how to properly insert and remove the implant. The manufacturer indicated that by June, 1991, approximately 1,000 physicians in selected clinics and medical centers across the country would be trained.[258] This number is small, when compared to the number of physicians in the United States, and it does not reflect whether any type of priority system is being used to determine who receives training first.

---

253. *Id.*

254. *Id.*

255. *See* Hilts, *supra* note 249, at A1.

256. *Id.*

257. S. 82, 119th Ohio Gen. Assembly, Reg. Sess., § 2919.22(D) (1991).

258. *See* Hilts, *supra* note 249, at A1.

C. *Alternatives for Legal Intervention*

The most acceptable provision in the pending Senate bill is the proposed amendment of the definition of a neglected child to include one who is addicted at birth to a drug of abuse as the result of his mother's use of the drug of abuse during pregnancy.[259] This is an amendment to Ohio's Juvenile Code and would place the problem of the drug-addicted and neglected child under the jurisdiction of the juvenile court. Even this provision, however, ignores the fact that the damage is done to the child in utero at the time the pregnant woman abuses the drug, although the harm does not become apparent to society until the child is born.

The problem of the drug-addicted newborn child is not strictly one of legal dimensions. It is also a problem of medical and social dimensions. A framework is already in place to deal with this problem in the form of the Ohio Juvenile Code, as administered under Ohio Revised Code section 2151. The Juvenile Code already contains existing definitions for neglected,[260] abused,[261] and dependent[262] children. By expanding the definition of the neglected child to include a drug-addicted newborn, the General Assembly can expand the jurisdiction of the juvenile court to deal with this problem in an appropriate fashion. If a newborn is adjudicated a neglected child at an adjudicatory hearing,[263] the court may then determine whether the child should remain with the mother or should be placed in shelter care until the dispositional hearing.[264] A court appointed guardian *ad litem* ensures protection of the child's interest during the juvenile court proceedings.[265] The court has the power to issue orders of disposition with regard to the child[266] and, more important, the court can issue orders to restrain or control the conduct of the parent if detrimental or harmful to the child.[267] In the case of the drug-addicted newborn child adjudicated to be a neglected child, this provision would enable the court to order the mother to attend drug treatment and other educational programs. This, in turn, negates the need to criminalize the maternal substance abuser's prenatal conduct.

---

259. S. 82, § 2151.03(A)(8).
260. OHIO REV. CODE ANN. § 2151.03 (Anderson 1990).
261. *Id.* § 2151.031.
262. *Id.* § 2151.04.
263. *Id.* § 2151.28.
264. *Id.* § 2151.28(B).
265. *Id.* § 2151.281.
266. *Id.* § 2151.353.
267. *Id.* § 2151.359.

The Juvenile Code also contains a mandatory reporting procedure to compel health care personnel to report suspected incidents of neglect and abuse.[268] Amendments to this statute should be made in order to mandate urinalysis testing statewide for all newborn infants, and appropriate standards and criteria for diagnosing newborn drug addiction should be developed and implemented. These test results should not, however, be used for the basis of a criminal investigation of the mother. Reunification plans prepared by social service workers must also be cognizant of the recovering addict's needs. Drug treatment programs should also focus on parenting education and training for vocational skills in order to rehabilitate the woman to become a productive member of society.

In summary, the provisions of the Juvenile Code are well-suited to dealing with the problems of maternal substance abuse through the amendment of the neglected child definition to include a child who is born addicted to a controlled substance. The interplay between the social services, medical profession, and legal profession under the Juvenile Code serves to provide a more trusting and caring framework within which to address and eventually remedy the problem of maternal substance abuse. The Ohio General Assembly should seriously consider and implement the philosophy and recommendations of the Ohio Task Force on Drug-Exposed Infants.[269] Appropriate funding legislation must also be introduced in the General Assembly for adequate drug prevention, treatment, and educational programs.

Finally, the General Assembly should also study the legislation enacted or pending in other jurisdictions dealing with the problem of maternal substance abuse. For example, Florida has expanded its definition of harm under its child abuse and neglect laws to include physical dependency of a newborn on a controlled substance, but provides that no parent shall be subject to a criminal investigation solely on the basis of the infant's drug dependency.[270] Illinois and Minnesota have similarly amended their definitions of child neglect.[271] Other states, including Iowa, Massachusetts, and Oklahoma, have revised their reporting

---

268. *Id.* § 2151.421.

269. *See* FINAL REPORT, *supra* note 15. The Task Force's philosophy is that treatment, not punishment, should be the primary method of rehabilitating substance abusers, that prevention is the key, and that solutions to the problem must be based in the local community. *Id.* at 8. The Task Force does not advocate mandatory reporting of women for use of illegal drugs, but believes that evidence of such use should lead to a referral for treatment and services only. *Id.*

270. FLA. STAT. ANN. § 415.503 (West Supp. 1991).

271. *See* ILL. ANN. STAT. ch. 23, para. 2053 (Smith-Hurd Supp. 1991); MINN. STAT. ANN. § 626.556(c) (West Supp. 1991).

statutes to require reports to be made where there is evidence in the child of dependence or exposure to controlled substances.[272]

In addition, other states have legislation pending regarding maternal substance abuse or have recently passed legislation addressing this problem. Currently, Michigan has a bill pending to amend its definition of child neglect to include the situation where a newborn child's blood or urine contains any amount of a controlled substance or a metabolite of a controlled substance.[273] Missouri also has recently passed a bill requiring, as of January 1, 1992, that all physicians providing obstetrical care and gynecological treatment counsel pregnant women regarding the effects of smoking cigarettes, use of alcohol, and the use of controlled substances.[274]

V. CONCLUSION

The current crisis of maternal substance abuse endangers not only the health of women of childbearing age, but also the health and lives of their unborn and subsequently born children. The widespread availability of cocaine and "crack" cocaine has made these drugs the drugs of choice for many women. Although the long-term effects of in utero cocaine exposure on infants is not currently known, the immediate effects are manifesting themselves in premature birth, impaired fetal growth, neonatal seizures, and neurobehavioral deficits. In Ohio, it is estimated that pregnant women and women of childbearing age currently needing drug treatment and recovery services number in the thousands.

The Ohio courts, with the exception of one reported case, have been reluctant to step in and declare that the unborn child is deserving of protection under either the Juvenile Code or the child endangering statute. In an attempt to remedy this problem, the Ohio General Assembly is currently considering a bill that would expand the definition of a neglected child under the Juvenile Code, as well as create a new criminal offense of prenatal child neglect. Whereas the amendment of the Juvenile Code represents an appropriate response to the problem, the criminal provision represents an inappropriate response and suffers from numerous shortcomings, constitutional and otherwise.

---

272. *See* IOWA CODE ANN. § 232.77 (West Supp. 1991); MASS. GEN. LAWS ANN. ch 119, § 51A (West Supp. 1991); OKLA. STAT. ANN. tit. 21, § 846 (West Supp. 1991).

273. H.R. 4124, 86th Mich. Legislature, Reg. Sess. (1991) (introduced Feb. 7 1991).

274. S. 190, 86th Mo. General Assembly, 1st Reg. Sess. (1991) (codified at MO. ANN. STAT. §§ 191.725-.745 (Vernon Supp. 1992)). The legislation also calls for drug education in grades one through twelve regarding the effects of drugs on the newborn; for the establishment of a toll-free information line providing information and resources for treatment and referral; and that pregnant women referred for substance abuse treatment will be first priority users of available treatment. *Id.*

The Ohio General Assembly should abandon its attempt to criminalize maternal substance abuse. The proper solution lies not in punishing the maternal substance abuser for her drug addiction, but in treatment and rehabilitation to bring the abuser back into the mainstream of life as a productive and protective parent. The Ohio Juvenile Code presents the appropriate framework for dealing with this problem through its integrated approach of the legal, medical, and social services professions. Therefore, the Ohio General Assembly should focus its attention on expanding the jurisdiction of the juvenile court system as a means of dealing with the growing problem of maternal substance abuse. The General Assembly should enact treatment and prevention legislation, as well as appropriate funding legislation, to ensure that the legal, medical, and social services professions work in concert to solve this problem.

Deborah Ann Bailey