A Response to "Cocaine Babies" - Amendment of Florida's Child Abuse and Neglect Laws to Encompass Infants Born Drug Dependent

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A RESPONSE TO "COCAINE BABIES"—AMENDMENT OF FLORIDA'S CHILD ABUSE AND NEGLECT LAWS TO ENCOMPASS INFANTS BORN DRUG DEPENDENT

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WHILE children born with drugs in their system as a result of maternal drug use is not new,¹ cocaine has only recently become a significant part of the problem. One South Florida hospital reported the birth of over 100 cocaine babies in 1986 alone.² Yet, until 1987, the Florida's Department of Health and Rehabilitative Services (HRS) did not allow its social workers to investigate such cases because state law did not recognize these children as abused or neglected.³ A public health nurse might be sent to interview the family and inspect the home environment, but a caseworker could not be called in unless there was a finding of actual abuse or neglect.⁴

In March 1987, this policy was changed: Hospital workers are now required to immediately notify HRS whenever a baby is born with drugs in its system.⁵ Within twenty-four hours of receiving such a report, a public health nurse must visit and evaluate the newborn's home environment.⁶ Nevertheless, the public health nurse would still need additional evidence that the child might be abused or neglected before calling a caseworker,⁷ leaving the standard for calling in a caseworker unchanged. During the 1987 Regular Session, however, the Florida Legislature passed Committee Substitute for House Bill 155,⁸ amending the state's child abuse and neglect laws to encompass children born drug dependent. A

¹. Reports regarding the effects of fetal addiction to narcotics appeared in medical journals as early as 1892. D. HAWKINS, DRUGS AND PREGNANCY 145 (1983). One commentator calculates that at least one in every 1,000 births in the United States involves a mother who uses heroin or methadone. Zagon, Opiods and Development: New Lessons From Old Problems, NAT'L INST. ON DRUG ABUSE RESEARCH No. 60, at 59 (1985).

². Miami Herald, Feb. 25, 1987, at 1BR, col. 2. Florida's Department of Health and Rehabilitative Services (HRS) does not currently compile statewide statistics showing how many children are born to drug abusing mothers. Id. The problem may be growing as a consequence of the spread of "crack" cocaine. "Crack" is the street name for small chunks or rocks of freebase cocaine which has been extracted from cocaine powder in a simple, inexpensive procedure. See Washton, Gold & Pottash, "Crack," 80 POSTGRAD. MED. 52 (1986) [hereinafter "Crack"]).


⁴. Id. at 8A, col. 1-2.


⁶. Id.

⁷. Id.

⁸. Ch. 87-90, 1987 Fla. Laws 333 (amending FLA. STAT. § 415.503(7)(a) (1985)).
caseworker can now be called in immediately after HRS receives such a report and child dependency proceedings can be initiated to remove the child from parental custody.

In this Comment, the author begins by summarizing Florida's child abuse and neglect laws, and then considers the status of unborn children in Florida before the passage the new legislation. He then assesses the scope of a pregnant woman's right to privacy, and surveys the limitations other jurisdictions have imposed on this right. Next, the author analyzes Committee Substitute for House Bill 155. Finally, he evaluates failed legislation which would have imposed criminal penalties for certain kinds of prenatal drug use.

I. CURRENT FLORIDA LAW

Chapter 415\(^6\) sets forth a statutory scheme designed to provide comprehensive protective services for abused and neglected children. Generally, it requires that such cases be reported to HRS which must take appropriate action to prevent further harm.\(^9\) More specifically, the current reporting provision mandates that any person who knows of or suspects child abuse or neglect must immediately report it to HRS. This duty extends, \textit{inter alia}, to teachers, health care providers, social workers, and day care workers.\(^11\) Knowingly and willfully failing to report suspected abuse, or preventing another from doing so constitutes a second degree misdemeanor.\(^12\)

HRS is capable of receiving and investigating abuse and neglect reports twenty-four hours a day, seven days a week.\(^13\) Once a report is received, a child protection investigation is commenced within twenty-four hours, and must be completed within thirty days.\(^14\) In each case, the investigation determines: (1) the composition of the family or household; (2) whether there is any evidence of abuse or neglect; (3) the immediate and long-term risk of the child's remaining in the existing home environment; and (4) what protective services are necessary to ensure the child's well-being and future development.\(^15\) A report must be prepared indicating

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14. \textit{Id.}
15. \textit{Id.} § 415.505(1)(b)(1)-(4).
whether abuse or neglect was “indicated” or “unfounded.” The findings are then transmitted to HRS’ abuse registry. If a child is in imminent danger, a law enforcement officer or authorized agent of HRS may take the child into protective custody, with or without parental consent. Once in custody, the child will not be placed in a shelter unless there is no parent, legal custodian, or other responsible adult relative available to provide adequate supervision and care.

The Florida Juvenile Justice Act, (“the Act”) authorizes HRS, a state attorney, or any other person to initiate child dependency proceedings when there is evidence of abuse and neglect. The Act’s purpose is to assure that abused or neglected children receive the care, guidance, and control which will best promote their welfare, preferably at home. It seeks to preserve and strengthen family ties whenever possible; a child will not be removed from parental custody unless that is the only way to safeguard the child’s welfare.

Dependency proceedings begin with an adjudicatory hearing. If the child is adjudged dependent, a disposition hearing is held to determine what to do with the child. The court may place the child under the protective supervision of HRS in the child’s own home, or in the home of a relative or other person. Alternatively, the court may commit the child to the temporary custody of HRS or a licensed child care agency. The court may also compel the

16. Id. § 415.504(4)(c). An “[i]ndicated report’ means a report made pursuant to section 415.504 when a child protective investigation determines that some indication of abuse or neglect exists.” Id. § 415.503(8) (1985). An “[u]nfounded report’ means a report made pursuant to section 415.504 when an investigation determines that no indication of abuse or neglect exists.” Id. § 415.503(15).
17. Id. § 415.505(1)(f) (Supp. 1986).
18. Id. § 415.506 (1985).
22. Id. § 39.001(2)(b).
23. Id. § 39.001(2)(c).
27. Id. § 39.41(1)(c)-(d).
natural parents or legal guardian of a child to receive counseling.\textsuperscript{28} The court may retain jurisdiction to subsequently change the child's custody status.\textsuperscript{29} It can also permanently commit a dependent child to HRS or a licensed child-placing agency for adoption based on a finding that it is in the best interests of the child to do so.\textsuperscript{30} However, since permanent commitment severs both parental rights and the court's jurisdiction over the child, it is usually a last resort:

The permanent loss of custody of a child is a far more severe remedy than any other available in dependency proceedings and, indeed, it is one of the most severe decisions courts can make. Since it is such an extreme remedy, courts will usually first attempt other remedies including treatment, counseling, protective supervision and foster care. They will use performance agreements to attempt to push the parents or custodian into providing a proper setting for the child. When all else fails, and the prospect for abuse and neglect continues, the court must consider permanent commitment proceedings.\textsuperscript{31}

Chapter 415\textsuperscript{32} defines an "[a]bused or neglected child" as "a child whose physical or mental health or welfare is harmed, or threatened with harm, by the acts or omissions of the parent or other person responsible for the child's welfare."\textsuperscript{33} Child abuse or neglect is "harm or threatened harm to a child's physical or mental health or welfare."\textsuperscript{34} Such "harm" can occur when the person responsible for the child's welfare acts or fails to act in certain specified ways.\textsuperscript{35} Significantly, a "child" is defined as "any person under

\begin{itemize}
\item \textsuperscript{28} Id. § 39.41(7).
\item \textsuperscript{29} Id. § 39.41(1)(e).
\item \textsuperscript{30} Id. § 39.41(1)(f).
\item \textsuperscript{31} Reno & Smart, supra note 24, at 292.
\item \textsuperscript{33} Id. § 415.503(1) (1985).
\item \textsuperscript{34} Id. § 415.503(3).
\item \textsuperscript{35} Id. § 415.503(7)(a)-(f). "Harms" to the child include injury sustained as a result of excessive corporal punishment, sexual battery, sexual abuse, exploitation, abandonment, failure to provide supervision or guardianship, and failure to supply adequate food, clothing, shelter or health care. Id.
\end{itemize}
the age of 18 years." Thus the statutory scheme expressly excludes the unborn from its coverage.37

Relying on well-established common law principles, the courts have consistently held that criminal laws prohibiting certain acts against "human beings" do not authorize prosecutions predicted on acts committed against fetuses.38 For example, in *State v. Gonzalez,*39 the state appealed the dismissal of manslaughter and aggravated battery charges against a medical doctor for allegedly performing an illegal abortion on a minor. The Third District Court of Appeal framed the issue as "whether a fetus is a human being within the meaning of the Florida manslaughter statute."40 In affirming the dismissal, the court held to the common law rule that the killing of a fetus is not homicide unless the child is born alive and then dies from injuries previously sustained. The court held that "[s]ince 'human being' is not defined in Florida Statutes and until the Florida Legislature specifically changes it, the common law definition controls."41 Likewise, the court in *State v. McCall*42 held that the term "human being" does not include a viable, full-term fetus in the process of being born. While acknowledging that the common law rule may be archaic, the court refused to alter it because "substantive changes in long-standing common law rules are best left to the legislature."43

In the civil context, Florida courts have repeatedly held that unborn children are not "persons" for purposes of recovery under the

36. *Id.* § 415.503(2). A "child" for purposes of the criminal child abuse statute is "any person under the age of 18 years." *Fla. Stat.* § 827.01(1)(1985).

37. Section 1.01(3) defines "person" to include "individuals, children, firms, associations, joint adventures, partnerships, estates, trusts, business trusts, syndicates, fiduciaries, corporations, and all other groups or combinations." *Id.*


39. 467 So. 2d 723, 725 (Fla. 3d DCA), *petition for review denied,* 476 So. 2d 67 (Fla. 1985). Florida does have a feticide statute providing that "the willful killing of an unborn, quick child by any injury to the mother of such child which would be murder if it resulted in the death of such mother shall be deemed manslaughter." *Fla. Stat.* § 782.09 (1985).

40. *Gonzalez,* 467 So. 2d at 725.

41. *Id.* at 726.

42. 458 So. 2d 875 (Fla. 2d DCA 1984).

wrongful death statute. In *Stern v. Miller*, the parents of a seven-month-old fetus involved in an automobile accident brought a wrongful death action when the child was subsequently stillborn. The Florida Supreme Court recognized that the majority of jurisdictions permit wrongful death actions when a child is stillborn as a result of tortious prenatal injury, but it nevertheless refused to do so. The court predicated its refusal on legislative intent, noting that when Florida's lawmakers enacted the Wrongful Death Act, they "had the opportunity to further define the meaning of the term 'person' [to include the unborn] and chose not to do so." In *Duncan v. Flynn*, the supreme court reaffirmed its decision in *Stern*, adding that for the purposes of the Wrongful Death Act, a child is not "born alive" until he or she acquires an existence separate from the mother.

The case law is clear: The legal conception of "person" does not include a fetus. Thus, it appears that the state's prior child abuse and neglect laws excluded children born addicted to drugs or otherwise harmed as a result of the mother's prenatal drug use because the conduct producing the adverse consequences occurred before birth. Indeed, in an informal opinion issued on December 13, 1986, the Attorney General concluded that unless and until legislatively amended or judicially determined otherwise, I am of the view that the existing definitions of terms contained in [section 415.503] operate to preclude a child born addicted to drugs from being considered a victim of 'child abuse or neglect' for purposes of [sections 415.502-.514].

44. 348 So. 2d 303, 304 (Fla. 1977).
45. Id. Florida's Wrongful Death Act provides a cause of action "[w]hen the death of a person is caused by the wrongful act, negligence, default, or breach of warranty . . . ." FLA. STAT. § 768.19 (1985).
47. FLA. STAT. §§ 768.16-.27 (1985).
48. 348 So. 2d at 307. In *Stokes v. Liberty Mutual Insurance Company*, 213 So. 2d 695 (Fla. 1968), the supreme court was called upon to determine whether parents could recover under the Wrongful Death of Minors Act when a fetus was stillborn as a result of prenatal injuries caused by another's negligence. The court held that "a right of action . . . can only arise after the live birth and subsequent death of the child." Id. at 700. Presumptively aware of this decision, the legislature declined to redefine the word "person" when it passed a modified Wrongful Death Act in 1972.
49. 358 So. 2d 178 (Fla. 1978).
50. Informal Attorney General Opinion issued to Representative Lippman on Dec. 18, 1986, at 3-4 (on file, Florida State University Law Review). Preliminarily, the Attorney General noted:
This interpretation is consistent with a prior administrative construction applied by HRS. On March 9, 1987, however, HRS Secretary Gregory Coler instituted a statewide policy requiring the department to be notified immediately whenever a baby is born drug dependent. Legally, this new policy was problematic; at that time infant drug dependency did not constitute child abuse or neglect. Consequently it was unclear whether HRS possessed the statutory authority to require and receive such reports, much less conduct protective service investigations.

II. THE RIGHT TO PRIVACY

When attempting to protect the health and welfare of children, lawmakers must be conscious of the parents’ constitutional right of privacy. The inalienable right of the people to enjoy privacy and personal autonomy within the law is deeply rooted in Anglo-American jurisprudence, indeed

"[n]o right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others... The right to one's person may be said to be a right of complete immunity: to be let alone."

The Court has held that this constitutional guarantee restricts the scope of legislative prerogative, protecting individuals from unwar-

The administrative construction of a statute by the agency charged with its administration is entitled to great weight and will not be overturned unless clearly erroneous (citations omitted).

Additionally, a court reviewing such an agency construction must defer to the agency's interpretation of an operable statute as long as that interpretation is consistent with legislative intent and is supported by substantial, competent evidence.

Id. at 1-2 (citations omitted).


52. See supra notes 5-7, and accompanying text.

ranted governmental intrusion in matters of marriage, procreation, contraception, family relationships, childrearing and education.\textsuperscript{54}

In \textit{Roe v. Wade},\textsuperscript{55} the Court held that the right to privacy imposed definite limits on legislation which interfere with a woman's freedom to control her own pregnancy. It reasoned that the Fourteenth Amendment applied to "persons," which does not encompass the unborn. The Court attempted to balance a woman's right to control her pregnancy against the state's interest in protecting potential life. It recognized an "important and legitimate [state] interest in potential life," which becomes compelling when the fetus reaches viability.\textsuperscript{56} A state may act as to proscribe terminating a viable fetus "except when it is necessary to preserve the life or health of the mother."\textsuperscript{57} In \textit{Roe's} wake, many jurisdictions have acted to protect viable fetal life.\textsuperscript{58}

\section*{III. OTHER JURISDICTIONS}

Dependency actions predicated on a newborn's drug addiction have frequently succeeded. In the Michigan case of \textit{In re Baby X},\textsuperscript{59} the court found sufficient evidence of neglect to take temporary custody of an infant that began exhibiting symptoms of withdrawal within twenty-four hours of birth. On appeal, the mother contended that prenatal conduct could not constitute neglect or abuse under Michigan's Probate Code and, therefore, the court lacked ju-

\begin{itemize}
\item \textsuperscript{55} 410 U.S. 113 (1973).
\item \textsuperscript{56} \textit{Id}. at 163.
\item \textsuperscript{57} \textit{Id}. at 163-64. The Court did note that most states recognize the legal "personhood" of the unborn under certain limited circumstances. \textit{Id}. at 161. The common law right of action for prenatal injuries was first recognized in Bonbrest v. Kotz, 65 F. Supp 138 (D.D.C. 1946). At common law the killing of a viable fetus was a misdemeanor; harming a fetus did not constitute murder unless the child was born alive and subsequently died from prenatal injuries. Myers, \textit{supra} note 56, at 10. Only the Supreme Judicial Court of Massachusetts has rejected this view and held that a fetus is a "person" for purposes of that state's vehicular homicide statute. \textit{See} Commonwealth v. Cass, 392 Mass. 799, 467 N.E. 2d 1324 (1984). \textit{See generally} Note, The Creation of Fetal Rights: Conflicts with Woman's Constitutional Rights to Liberty, Privacy, and Equal Protection, 95 YALF L.J. 599 (1986).
\item \textsuperscript{58} \textit{See} Jefferson v. Griffin Spalding County Hosp., 247 Ga. 86, 247 S.E.2d 457 (1981) (pregnant woman who objected to surgery on religious grounds judicially compelled to undergo a cesarean section to assure the survival of her unborn child). \textit{But see} In re Steven S., 126 Cal. App. 3d 23, 178 Cal. Rptr. 525 (1981) (juvenile court that ordered a pregnant mother detained to protect her unborn child when she was certified to receive intensive psychiatric treatment reversed because a fetus is not within the ambit of the abuse and neglect statutes which authorizes dependency proceedings).
\item \textsuperscript{59} 97 Mich. App. 111, 113, 293 N.W.2d 736, 738 (1980).
\end{itemize}
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risdiction. While it agreed that the statute did not apply to the unborn, the court of appeals nevertheless upheld the lower court by employing some judicial sleight of hand: "Since Baby X was born before the instant petition was filed . . . . this aspect of jurisdiction is not properly at issue. The prenatal period is only pertinent because it is the sole asserted basis for establishing jurisdiction based on neglect."60 The court held that "a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child."61

The New York case of In re Male R 62 involved a drug dependent infant whose mother never actually had physical custody. The court ruled nonetheless that the child was neglected. It held that the mother's addiction to prescription drugs rendered her unable to care for the infant, thereby placing the child in imminent danger of neglect.63 In In re Smith,64 however, the court went a step further. It ruled that evidence of a mother's refusal to seek treatment for her alcohol abuse or to seek proper medical care for the unborn child was "sufficient to establish an 'imminent danger' of impairment of physical condition, including the possibility of fetal alcohol syndrome, to the unborn child," and therefore the child was "neglected." Most significantly, the court held that an unborn child is a "person" under New York's abuse and neglect state.65

An Ohio court reached the same result in In re Ruiz.66 Nora Ruiz was an admitted heroin addict. She used the narcotic throughout the last two weeks of her pregnancy, which terminated in a premature delivery. Baby Ruiz' urine subsequently tested positive for cocaine and heroin. The court held that a viable fetus is a "child" under the Ohio abuse statute, relying on the state's com-

60. Id. at 114-15, 293 N.W.2d at 738. The court did not decide whether such conduct justified depriving the mother of custody.
61. Id. at 116, 293 N.W.2d at 739.
63. Id. at 6, 422 N.Y.S.2d at 823. New York statutorily provides that a child who is placed in imminent danger as a result of his parents' drug use is a neglected child. See infra note 77 and accompanying text. Significantly, the mother refused to enroll in a drug treatment program to overcome her barbiturate addiction even after her newborn began suffering withdrawal. The court declined to decide whether an adjudication of neglect could be based solely upon prenatal maternal conduct. In re Male R., 102 Misc. 2d at 6, N.Y.S. 2d at 823.
65. 128 Misc. 2d at 980, 492 N.Y.S.2d at 335.
66. 27 Ohio Misc. 2d 31, 33, 500 N.E.2d 935, 936 (1986).
pelling interest in protecting viable potential life. The court reasoned that by using heroin so late in her pregnancy, Ruiz had created "a substantial risk to the health" of her baby.\footnote{Id. See also \textit{Ohio Rev. Code Ann.} § 2919.22(A) (Anderson 1986): No person who is the parent, guardian, custodian, person having custody or control, or person in loco parentis of a child under eighteen years of age or a mentally or physically handicapped child under twenty-one years of age, shall create a substantial risk to health or safety of the child, by violating a duty of care, protection or support.}

Several states have child abuse and neglect statutes which arguably provide protection for infants adversely affected by their mothers' prenatal drug abuse. For example, a New Jersey statute provides that:

> Whenever it shall appear that any child within this State is of such circumstances that his welfare will be endangered unless proper care or custody is provided, an application . . . may be filed . . . seeking that the Bureau of Childrens Services accept and provide such care or custody of such child as the circumstances may require . . . The provisions of this section \textit{shall be deemed to include an application on behalf of an unborn child.}''\footnote{N.J. \textit{Stat. Ann.} § 30:4C-11 (West 1981) (emphasis added).}

This statute proports to give courts jurisdiction over pregnant women whose conduct endangers the welfare of their unborn fetuses. It is an extremely broad provision which arguably encompasses not only prenatal drug use but many forms of other conduct as well: performing hazardous work; using legal drugs such as alcohol, caffeine or nicotine; and possibly even sexual practices which pose a threat of harm to the unborn child.

New York's child neglect statute, on the other hand, is more narrowly drawn, citing specific kinds of prohibited conduct:

> "Neglected child" means a child less than eighteen years of age (1) whose physical, mental or emotional condition has been impaired . . . as a result of the failure of his parent . . . to exercise a minimum degree of care . . . in providing the child with proper supervision or guardianship, . . . by misusing a drug or drugs . . . to the extent that he loses self control of his actions; or by any other acts of a similar serious nature requiring the aid of the court.\footnote{N.Y. \textit{Jud. Fam. Ct. Act} § 1012(f) (McKinney 1983) (emphasis added).}
It focuses upon the parents' capacity as caregivers rather than upon the child's condition. This statute appears to authorize child dependency proceedings in cases of parental drug use even where the child is born drug free, or where older children are involved.

Massachusetts has a reporting provision which is similar to the new Florida legislation. The Commonwealth's statute requires a child abuse report whenever a child "is suffering physical or emotional injury resulting from abuse inflicted upon him including sexual abuse, or from neglect, including malnutrition, or who is determined to be physically dependent upon an addictive drug at birth." Like Florida's new law, this statute avoids granting constitutionally questionable legal rights to the unborn. Instead, it focuses solely upon the child's condition at birth, and unlike the analogous New York and New Jersey laws, it expressly refers to the child's physical addiction.

IV. THE FLORIDA LEGISLATION

House Bill 155 was prefiled by Representative Lippman on February 2, 1987. On March 4, 1987, Senator Weinstein prefied Senate Bill 323, the companion to House Bill 155. As originally filed, House Bill 155 expanded the meaning of "harm" constituting "child abuse or neglect" for the purpose of providing protective services to include "[i]njury sustained by a newborn infant as a result of being born [drug] dependent." The specific drugs on which a newborn's drug dependency constitutes abuse or neglect are listed in Schedules I & II of the Florida Comprehensive Drug Abuse Prevention and Control Act. Cocaine, cannabis, lysergic acid diethylamide, morphine, and heroin are among the better known drugs listed. Under this legislation, a newborn's dependency on any drug listed in the two schedules would not be consid-

70. MASS. GEN. LAWS ANN. ch. 119, § 51A (West Supp. 1987) (emphasis added).
73. Dem., Coral Gables.
74. FLA. LEGIS., HISTORY OF LEGISLATION, 1987 REGULAR SESSION, HISTORY OF SENATE BILLS at 84, SB 323. Since the House version ultimately passed, this Comment refers only to House Bill 155.
77. See FLA. STAT. § 893.03(1)-(2) (Supp. 1986) (full list of prohibited drugs).
ered child abuse or neglect if the drugs were administered pursuant to a detoxification program or any other medically approved treatment modality.\textsuperscript{78}

A. Legislative History of House Bill 155

House Bill 155 was initially referred to the House Committee on Health and Rehabilitative Services,\textsuperscript{79} which in turn sent the bill to the Subcommittee on Social, Economic and Developmental Services.\textsuperscript{80} Major changes occurred in Subcommittee at the behest of several groups concerned about pregnant women's right to privacy, including the Florida American Civil Liberties Union, the Florida Women's Political Caucus, and the Florida Coalition for Choice.\textsuperscript{81} Representative Lippman prepared two substantive amendments, which were introduced in Subcommittee by Representative Jennings.\textsuperscript{82} The amendments were incorporated and the bill was favorably passed on to the full committee.\textsuperscript{83} The House Committee on Health and Rehabilitative Services reported House Bill 155 favorably as a Committee Substitute.\textsuperscript{84} The Committee Substitute for House Bill 155 was then passed unanimously by the House of Representatives without revision.\textsuperscript{85} The following day it was unanimously passed by the Senate, while the Committee Substitute for Senate Bill 323 was tabled.\textsuperscript{86} The new legislation was signed into law by the Governor on June 18, 1987. It became effective on October 1, 1987.\textsuperscript{87}

1. Amendment #1

The first amendment adopted in Subcommittee made the “[p]hysical dependency of a newborn infant upon any drug,”\textsuperscript{88}

\textsuperscript{78} Ch. 87-90, 1987 Fla. Laws 333. “Detoxification” is defined as “the administering of drugs under medical supervision in decreasing doses, pursuant to federal permit, to reach a drug-free state.” Fla. Stat. § 397.021(4) (1985).


\textsuperscript{80} Id.

\textsuperscript{81} See Subcomm. Tape, supra note 51.

\textsuperscript{82} Repub., Sarasota. See Subcomm. Tape, supra note 51. A title amendment was also introduced. Id.

\textsuperscript{83} Id.

\textsuperscript{84} Fla. H.R. Comm. on HRS, tape recording of proceedings (Apr. 22, 1987) (on file with committee).


\textsuperscript{86} Fla. S. Jour. 447 (Reg. Sess. May 27, 1987).

\textsuperscript{87} Ch. 87-90, 1987 Fla. Laws 333.

\textsuperscript{88} Id.
rather than "injury sustained by a newborn infant as a result of being born drug dependent" part of the definition of "harm" constituting "child abuse or neglect." The introduction of the amendment addressed concerns that the "injury sustained" language, by suggesting that fetuses are capable of receiving injuries, would redefine the term "child" under Florida's abuse and neglect statutes to include the unborn. By focusing solely on the newborn's condition, rather than acts affecting the fetus generally, the amended language avoids any unintended granting of legal status to the unborn and thereby impermissibly invading "the constitutional protection a woman has in deciding what to do about a pregnancy."

2. Criminal Prosecution and Amendment #2

The most controversial feature of the original House Bill 155 was that it authorized criminal prosecution of a mother who gives birth to a drug dependent child. Under existing law, upon receiving a report alleging that a child has received an observable injury or medically diagnosed internal injury, HRS will determine whether the cause was abuse or neglect. If HRS determines that a reported injury did occur as the result of abuse or neglect, it must make an oral, and then a written report to the state attorney and the appropriate law enforcement agency. When it receives oral notification, the law enforcement agency may begin a criminal investigation. If so, its findings must be reported to the state attorney. HRS can also request a criminal investigation when the department deems it appropriate.

Under early versions of House Bill 155, however, a finding that a newborn is drug dependent would have required HRS to automatically notify the state attorney and the appropriate law enforcement agency, thereby producing a criminal investigation which could culminate in criminal charges against the mother. Lawmakers' concern with this eventuality lead to the introduction

90. Subcomm. Tape, supra note 51 (amendment 1 to HB 155 (1987)).
92. Subcomm. Tape, supra note 51.
94. Id. § 415.505(3).
95. See Fla. Stat. § 415.505(g) (Supp. 1986). Of course, a mother cannot be prosecuted for her "status" as a drug addict, but rather for inflicting harm on her unborn child by exposing it to addictive drugs. See Robinson v. California, 370 U.S. 660 (1962).
of a second amendment which provided "that no parent of [a drug dependent] newborn infant shall be subject to criminal investigation solely on the basis of such infant's drug dependency." As Representative Lippman explained in Subcommittee, "there was a well-founded anxiety that we were looking to arrest moms. We are not looking to do that," but "to intervene . . . [to] try to bring the family back together." Undoubtedly, this basic change made House Bill 155 far more palatable to many legislators.

B. Constitutionality

Under Roe v. Wade, the state has a compelling interest in protecting a viable fetus. Arguably, the new legislation constitutionally protects Florida's interest in drug-free infants by focusing solely upon the newborn's drug dependency. Medically, for a newborn to be born drug dependent, the mother must have heavily abused a physically addictive drug well into the final weeks of her pregnancy. For example, if a woman who uses heroin stops taking the drug more than two weeks before delivery, the newborn will not suffer from withdrawal. With drugs that do not create physical dependency, such as cocaine, the substance will not be present in the newborn's system unless the mother has used it within twenty-four hours prior to delivery. Since the mother's drug use would have to continue into the last month of pregnancy, after the fetus becomes viable, Florida's interest may indeed be compelling. While Committee Substitute for House Bill does in-
fringe upon a pregnant women's right to privacy, the legislators apparently concluded that such privacy rights are outweighed by the state's compelling interest in protecting drug dependent infants.\(^{102}\)

**C. Shortcomings**

The new legislation does not consider a drug dependent newborn abused or neglected when the child's dependency results from the mother's use of drugs administered in conjunction with a detoxification program or medically approved drug treatment.\(^{103}\) These omissions may subject the legislation to an equal protection challenge on the grounds that there is no rational basis for classifying a newborn's drug dependency according to the manner in which his mother obtained the drugs or whether usage of the drug is per se illegal. Many drugs on which a newborn's dependency would not constitute abuse or neglect are as dangerous as the ones that do. For example, methadone, a synthetic opiate administered to addicts in detoxification programs, produces more violent withdrawal symptoms in newborns than heroin.\(^{104}\) Furthermore, alcohol abuse is not addressed even though fetal alcohol syndrome causes severe
and permanent damage and is the most common form of dependency afflicting both mothers and infants.\textsuperscript{105}

It can be argued, however, that ingesting alcohol or drugs administered in conjunction with a detoxification program or other medically approved treatment procedures are legal acts. In other words, the rational basis for exempting fetal alcohol syndrome and certain drug dependencies from the legislation’s coverage lies in the fact that the harm to the newborn did not result from criminal behavior by the mother. Nevertheless, this contention is contrary to the public policy behind Florida’s abuse and neglect provisions: protection of the child’s health and welfare. Focusing solely upon the child’s health and welfare, there seems little reason to distinguish between the origins of the harm.

V. OTHER LEGISLATION—CRIMINAL PROSECUTION

While criminally prosecuting a woman who gives birth to a drug dependent child was a realistic possibility under the unamended version of House Bill 155, it remained unclear which statutory provision would authorize such action. Chapter 827 provides criminal penalties for the abuse of children as well as adults.\textsuperscript{106} “Aggravated child abuse,” a second degree felony, is defined as one or more acts committed by a person who: (a) commits aggravated battery on a child; (b) willfully tortures a child; (c) maliciously punishes a child; or (d) willfully and unlawfully cages a child.”\textsuperscript{107} For the purposes of this chapter, “child” is defined as “any person under the age of 18 years.”\textsuperscript{108} Since this definition of “child” has already been interpreted to exclude the unborn,\textsuperscript{109} giving birth to a drug dependent child probably does not constitute aggravated child abuse as the harm to the child occurred before it was born.

One of the few reported examples of such a prosecution is the California case of \textit{Reyes v. Superior Court.}\textsuperscript{110} Margaret Reyes was a heroin addict who continued to use the narcotic during her pregnancy. She was warned by a public health nurse that if she failed

\begin{itemize}
\item \textsuperscript{105} “The abnormalities most typically associated with alcohol teratogenicity . . . [are] central nervous system dysfunction; a characteristic cluster of a facial abnormalities; and variable major and minor malformations.” Clarren & Smith, \textit{The Fetal Alcohol Syndrome}, 298 New Eng. J. Med. 1063 (1978).
\item \textsuperscript{106} FLA. STAT. §§ 827.01-.071 (1985 & Supp. 1986).
\item \textsuperscript{107} Id. § 827.03(1) (1985).
\item \textsuperscript{108} Id. § 827.01(1).
\item \textsuperscript{109} See supra notes 36-37 and accompanying text.
\item \textsuperscript{110} 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977).
\end{itemize}
to seek prenatal medical care, her child's health would be endangered. She did not do so, and continued to use heroin during the last month of her pregnancy. Reyes gave birth to twin boys, both of whom were addicted to heroin, and suffered from withdrawal. She was subsequently charged with two counts of felony child endangering. Not surprisingly, the appellate court held that the crime of child endangering "was not intended to apply to conduct endangering an unborn child," and ordered the case dismissed.\footnote{111}

Criminally prosecuting mothers who give birth to drug dependent babies conflicts with the public policy underlying Florida's child welfare laws. The Florida Legislature's paramount concern in providing comprehensive protective services for abused and neglected children is "to preserve the family life of the parents and children, to the maximum extent possible, by enhancing the parental capacity for adequate child care."\footnote{112} Criminal prosecution would needlessly destroy the family by incarcerating the child's mother when alternative measures could both protect the child and stabilize the family.

Potential criminal liability would also encourage addicted women to terminate or conceal their pregnancies. For example, to avoid being reported by medical personnel, who would have a statutory duty to do so, a pregnant addict might refrain from obtaining proper prenatal and postnatal care.\footnote{113} She might even deliver without medical assistance, thereby risking injury and death to both herself and the child. Finally, fear of prosecution could deter pregnant drug abusers from seeking treatment for drug problems.\footnote{114}

\section*{A. House Bill 536}

House Bill 536 would have criminalized the birth of a drug dependent newborn. The bill was prefiled by Representative Garcia\footnote{116} on March 16, 1987,\footnote{117} and referred to the House Committee on Health and Rehabilitative Services, where it died without de-
bate. The legislation proposed to amend the definition of torture to encompass "every act, omission, or neglect whereby a person knowingly causes a child unnecessary or unjustifiable pain or suffering." The bill would also have redefined aggravated battery as "every act, or omission, or neglect whereby a person knowingly causes a child great bodily harm, permanent disability, or permanent disfigurement."

Most significantly, House Bill 536 incorporated two presumptions regarding aggravated child abuse. The first presumption provided that "[i]f the child suffers death, great bodily harm, permanent disability, or permanent disfigurement caused by the parent's unlawful use of any substance controlled by section 893.03, regardless of when such unlawful use occurred, this shall be prima facie evidence of committing aggravated battery on the child." The second presumption provided that "[i]f the child suffers unnecessary or unjustifiable pain or suffering caused by the parent's unlawful use of any substance controlled by section 893.03, this regardless of when such unlawful use occurred, shall be prima facie evidence of torturing the child."

House Bill 536 was internally inconsistent, overbroad, and probably unconstitutional. Poor drafting and the amendment to House Bill 155, which precluded criminally investigating the mothers of drug dependent babies, doomed it to failure. The first problem with House Bill 536 concerned its redefinition of "child" to include "a newborn infant." This would do nothing to extend the protection of chapter 827 to the unborn: the drug dependency of an infant occurs before its birth, thus House Bill 536 arguably would have failed to criminalize behavior which rendered an infant drug dependent. A second difficulty arose from its extremely broad coverage. The legislation addressed death, great bodily harm, permanent disability, and unnecessary or unjustifiable pain or suffering by the child as a result of his parents' drug use. Except for the child's drug dependency, which is easily verified with urinalysis
and blood tests, it would be extremely difficult to prove a direct causal relationship between the mother’s drug use and the child’s condition at birth. According to HRS’ own analysis, the use of legal medication or substances during pregnancy could cause the same or similar conditions in the child as the use of illegal substances controlled in section 893.03.123 Moreover, the bill presumed abuse from parental drug use “regardless of when such unlawful use occurred. . . .”124 This language is excessively broad, applying not only to newborns, but also to older children who may have medical or emotional problems resulting from their parents’ past drug use.

Finally, the statutory presumptions which House Bill 536 would have added to the definitions of “aggravated battery” and “torture” are most probably unconstitutional. Under House Bill 536’s definitions, a person must “knowingly” commit aggravated battery or torture.125 The bill also provided that the infliction of an enumerated harm to the newborn “shall be prima facie evidence” of committing the prohibited act.126 By employing the phrase “shall be prima facie evidence,” the provision creates a rebuttable presumption, requiring the jury to presume the defendant’s “knowledge” unless the defendant produced evidence rebutting that presumption.127 This presumption is probably unconstitutional because it relieves the state of its burden of persuasion to prove the element of knowledge beyond a reasonable doubt.128

Even if House Bill 536’s presumptions were construed to create permissive inferences,129 they remain constitutionally questionable. It is well settled that a permissive inference must be judged in light of the circumstances giving rise to that inference.130 A permissive inference will be upheld only if it is show that it is “more likely than not” that the presumed fact flows from the proved fact.131 In the midst of heavy drug use, it is unlikely that a preg-

123. Staff Analysis, supra note 113 at 3.
125. Id.
126. Id.
127. In Miller v. Norvell, 775 F.2d 1572, 1576 (11th Cir. 1985), the court held that the phrase “shall constitute prima facie evidence” as used in an embezzlement statute, created a mandatory rebuttable presumption.
129. Permissive inferences serve the purpose of directing the jury’s attention to inferences it might draw and thus tend to encourage particular conclusions. Ulster County Court v. Allen, 442 U.S. 140, 170 (1979) (Powell, J., dissenting).
130. Id. at 162-63.
131. Id. at 165. Where the proved fact is the sole evidence of the presumed fact, the presumed fact must flow from the proven fact beyond a reasonable doubt. Id. at 167.
nant drug addict is capable of appreciating risk posed to her unborn child, or even to herself. Indeed, individuals who are, for example, physically addicted to heroin or deeply psychologically dependent on cocaine, may be so obsessed by their cravings for drugs that they are subjectively oblivious to other considerations such as the adverse consequences of their conduct for themselves and others. Consequently, it is unclear whether it is more likely than not that the presumed element of knowledge flows from the proven fact of harm suffered by the child. Thus House Bill 536's statutory presumptions were probably unconstitutional even if viewed as permissive inferences.

V. CONCLUSION

The passage of the Committee Substitute for House Bill 155 is clearly a step forward in Florida's efforts to protect the quality of life for children born to drug dependent mothers. In preparing this legislation, Florida's lawmakers succeeded in protecting the child's welfare without unduly infringing the mother's right to privacy. Unfortunately, while the legislation may improve the quality of life for some of Florida's children, there is still no protection for infants born suffering from fetal alcohol syndrome or legal drug toxicity. The legislature wisely declined to provide for the criminal prosecution of women who give birth to drug dependent children; House Bill 536 violated Florida's policy of preserving the family by authorizing criminal prosecutions of such mothers, even if one assumes its constitutionality. Hopefully Florida's legislators will seriously consider the negative impact of such an approach if it is proposed in the future.