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Shielding Ohio's Newborns: Defending a Broad Interpretation of Child within the Meaning of O.R.C. Sec. 3113.31

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SHIELDING OHIO'S NEWBORNS: DEFENDING A BROAD INTERPRETATION OF "CHILD" WITHIN THE MEANING OF O.R.C. § 3113.31

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I. INTRODUCTION

Gabrielle Smith was the victim of domestic violence perpetrated by her live-in boyfriend, Kevin Martin.[1] On June 8, 2008, Martin forced Smith to go for a ride in his car, and then proceeded to beat her savagely.[2] During this journey of terror, Martin struck Smith with a pistol, threatened to stab her in the neck with a screwdriver, and repeatedly smashed her head into the steering wheel.[3] Sadly, this tragic episode was not the first time that Martin had attacked Smith; he had battered and threatened his girlfriend on numerous previous occasions.[4]

Criminal charges stemming from this incident were filed against Kevin Martin, yet Gabrielle Smith still feared what he would do to her once he was eventually released from police custody.[5] In order to shield herself from further attacks, Smith filed for a civil protection order (CPO) against her boyfriend.[6] Like thousands of other CPOs issued annually across the state of Ohio,[7] the particular court order that Smith desired would restrict her abuser's ability to approach her and continue a cycle of violence.[8] It would also impose harsh criminal penalties upon Martin if he failed to abide by its terms.[9] On July 16, 2008, the Domestic Division of the Franklin County Court of Common Pleas granted Smith the injunctive relief that she sought.[10]

Very soon thereafter, however, it became apparent that the CPO she had just obtained was deficient in one very important respect: it did not designate her viable, unborn daughter as a protected party.[11] Martin was the father of this developing fetus and had previously threatened to shoot it while pressing the barrel of a gun to Smith's stomach.[12] Ohio Revised Code section 3113.31 ("O.R.C. § 3113.31"), the Ohio statute governing domestic violence, permitted Smith to petition the court to add to the CPO any "child" previously threatened by a family member's abusive

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[1] Smith v. Martin, No. 08AP-692, 2009 Ohio App. LEXIS 2955 (Ohio Ct. App. July 14, 2009).

[2] Modified Order of Protection Smith v. Martin, No. 08AP-692, 2009 Ohio App. LEXIS 2955 (Ohio Ct. App. July 14, 2009).

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Smith*, 2009 Ohio App. LEXIS 2955, at *1.

[7] THE SUPREME COURT OF OHIO, 2007 OHIO COURTS SUMMARY 108 (2007).

[8] OHIO REV. CODE ANN. § 3113.31(E)(1)(g) (LexisNexis 2010).

[9] *Id.* § 3113.31(L)(1).

[10] *Smith*, 2009 Ohio App. LEXIS 2955, at *1.

[11] *Id.*

[12] Modified Order of Protection, *supra* note 2.

acts.[13] Yet, when Smith attempted to modify her CPO to extend protection to her developing fetus, her request was summarily denied by the domestic court judge.[14] Thus, when Smith's child would be born only a few weeks later, the newborn would not enjoy the legal aegis of a protective order against her father.[15]

The Ohio Tenth District Court of Appeals upheld the decision of the trial court.[16] In *Smith v. Martin*, the appellate court refused Smith's request to interpret O.R.C. § 3113.31 in a way that would recognize her viable fetus as a "child" entitled to a CPO.[17] The court held that "[t]he trial court . . . effectively addressed the problem by ordering the boyfriend to stay away from Smith and to avoid contact. . . . The boyfriend obviously could not harm the child without having contact with the mother as long as the child was *in utero*."[18]

Over the last couple of decades, Ohio courts have begun to recognize the legal interests of viable fetuses.[19] Despite this trend, the Tenth District Court of Appeals still refused to interpret O.R.C. § 3113.31 broadly.[20] The appellate court even noted the potential that its interpretation might create situations in which "it would be a hardship for the mother to return to court to obtain a civil protection order for the child immediately after giving birth."[21] Smith herself experienced such hardship. After she gave birth to her daughter, three long months would go by before she was finally able to modify her CPO properly.[22] During this period, Kevin Martin unsuccessfully attempted to kidnap Smith's newborn baby.[23]

Smith's case exemplifies why the prevailing judicial interpretation of O.R.C § 3113.31 is erroneous. In ruling that a viable, unborn fetus is not a "child" under O.R.C. § 3113.31, courts essentially force newborns to undergo some period of time without adequate legal protection from domestic violence. Such a lapse in coverage can create opportunities for abusers to carry out acts of aggression or violence against unprotected children.

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[13] OHIO REV. CODE ANN. § 3113.31(C).

[14] *Smith*, 2009 Ohio App. LEXIS 2955, at *1.

[15] Modified Order of Protection, *supra* note 2.

[16] *Smith*, 2009 Ohio App. LEXIS 2955, at *6.

[17] *Id.*

[18] *Id.* at *1-2 (emphasis added).

[19] *See In re* Baby Boy Blackshear, 736 N.E.2d 462 (Ohio 2000) (holding that a mother may be civilly liable to her newborn child predicated solely on the prenatal conduct of the mother); Werling v. Sandy, 476 N.E.2d 1053 (Ohio 1985) (holding that a wrongful death action may lie on behalf of unborn child); Williams v. Marion Rapid Transit, Inc., 87 N.E.2d 334 (Ohio 1949) (holding that tort actions may lie for unborn children); *In re* Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986) (holding that mothers may be punished for abusing fetuses).

[20] *Smith*, 2009 Ohio App. LEXIS 2955, at *6-7.

[21] *Id.* at *6.

[22] Modified Order of Protection, *supra* note 2.

[23] *See* Docket Search, FRANKLIN CNTY. CLERK OF COURTS, http://fcdcfcjs.co.franklin.oh.us/CaseInformationOnline/ (accept "conditions of use and privacy policy"; then search "Last Name" for "Martin," "First Name" for "Kevin," "Middle Init" for "K"; follow "Case" for "08 CR 006650" and "08 CR 007122" hyperlinks).

This note will argue that viable fetuses should be viewed as "children" within the meaning of O.R.C. § 3113.31, therefore qualifying them for the protections afforded by CPOs. It will focus on the urgent need for such an interpretation based on child safety concerns arising primarily *after* the birth of the child, rather than those existing while the child is still *in utero*. Part II of this note will provide an overview of civil protection orders within the state of Ohio. Part III will analyze domestic violence statistics, case-law, scholarly research, and existing Ohio statutes in order to demonstrate why unborn, viable fetuses should be interpreted as "children" under O.R.C. § 3113.31. Part IV will show how the issue of maternal morbidity illustrates the child safety concerns created by a narrow interpretation of O.R.C. § 3113.31. It will also explain how the problem of parental kidnapping accentuates these concerns. Part V will explain how a narrow interpretation of O.R.C. § 3113.31 also fails to account for child safety concerns occurring when a mother has been coerced into returning to her abuser. Part VI will assuage any concerns among feminist advocates by demonstrating that the proposed broad interpretation of the word "child" will not impinge upon female reproductive rights. This note will conclude by calling upon Ohio courts to interpret O.R.C. § 3113.31 broadly to include viable unborn fetuses, thereby ensuring safety from domestic violence for all of Ohio's children.

II. AN OVERVIEW OF OHIO CIVIL PROTECTION ORDERS

A. The History and Function of CPOs in the Context of Domestic Violence

Section 3113.31 of the Ohio Revised Code was enacted in 1978[24] in the wake of a national movement directed towards addressing domestic violence as a public health problem.[25] Domestic violence, sometimes also referred to as "family violence" or "intimate partner violence," can come in many forms.[26] In the broadest sense, domestic violence "is the physical, emotional, or psychological abuse or threat

[24] Felton v. Felton, 679 N.E.2d 672, 674 (Ohio 1997).

[25] Jeffrey R. Baker, *Enjoining Coercion: Squaring Civil Protection Orders with the Reality of Domestic Abuse*, 11 J.L. & FAM. STUD. 35, 37 (2008). Baker does an excellent job outlining the long and tragic history of domestic violence:

> Domestic abuse, under other guises such as "wife beating" or "chastisement," is an ancient phenomenon, and laws have addressed it for ages. The Romans limited such practices, and the English common-law gave rise to the famous "Rule of Thumb." American law condoned or ignored family violence through the mid-1800s, when a few jurisdictions began to eliminate virtual immunity for wife beaters and generated some punishments for abusers. Even so, until the 1960s, courts and legislatures still were reluctant to interfere in "family matters," leaving violence behind closed doors as a purely private province and denying useful legal remedies to victims.

Id. at 36-37.

[26] *See* FAMILY VIOLENCE PREVENTION CTR. OHIO DEP'T OF PUB. SAFETY, WHAT YOU SHOULD KNOW ABOUT FAMILY VIOLENCE 1 (2009) [hereinafter FAMILY VIOLENCE]; CTRS. FOR DISEASE CONTROL AND PREVENTION, UNDERSTANDING INTIMATE PARTNER VIOLENCE: FACT SHEET (2009) [hereinafter FACT SHEET].

of abuse of a family or household member."[27] The United States Centers for Disease Control has stated:

> Intimate partner violence (IPV) occurs between two people in a close relationship. The term "intimate partner" includes current and former spouses and dating partners. IPV exists along a continuum from a single episode of violence to ongoing battering. IPV includes four types of behavior: Physical violence is when a person hurts or tries to hurt a partner by hitting, kicking, or other type of physical force. Sexual violence is forcing a partner to take part in a sex act when the partner does not consent. Threats of physical or sexual violence include the use of words, gestures, weapons, or other means to communicate the intent to cause harm. Emotional abuse is threatening a partner or his or her possessions or loved ones, or harming a partner's sense of self-worth. Examples are stalking, name-calling, intimidation, or not letting a partner see friends and family.[28]

In 2006 alone, Ohio law enforcement agencies collectively registered almost 72,000 domestic violence disputes.[29] Across the United States, it is estimated that almost 5.3 million intimate partner victimizations occur annually.[30] It is further estimated that the overall cost of domestic violence within the United States exceeds 5.8 billion dollars a year.[31]

The logic behind the creation of O.R.C. § 3113.31 was stated succinctly by the Ohio Supreme Court in *Felton v. Felton*.[32] There, the court stated that "[t]he [Ohio]

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[27] FAMILY VIOLENCE, *supra* note 26, at 1.

[28] FACT SHEET, *supra* note 26, at 1. The CDC's fact sheet outlines the manifold reasons why domestic violence is truly a public health problem:

> IPV can affect health in many ways. The longer the violence goes on, the more serious the effects.
>
> Many victims suffer physical injuries. Some are minor like cuts, scratches, bruises, and welts. Others are more serious and can cause lasting disabilities. These include broken bones, internal bleeding, and head trauma.
>
> Not all injuries are physical. IPV can also cause emotional harm. Victims often have low self esteem. They may have a hard time trusting others and being in relationships. The anger and stress that victims feel may lead to eating disorders and depression. Some victims even think about or commit suicide.
>
> IPV is linked to harmful health behaviors as well. Victims are more likely to smoke, abuse alcohol, use drugs, and engage in risky sexual activity.

Id.

[29] FAMILY VIOLENCE, *supra* note 26, at 1.

[30] *Id.*

[31] *Id.*

[32] *Felton*, 679 N.E.2d at 674. The *Felton* case involved the sufficiency of evidence necessary for a formerly abused wife to go forward with her CPO case. *Id.* The Ohio Supreme Court ruled that all that was necessary for the plaintiff to carry her burden of production was a preponderance of the evidence demonstrating that domestic violence had occurred. *Id.* at 678.

General Assembly enacted the domestic violence statute specifically to criminalize those activities commonly known as domestic violence and to authorize a court to issue protection orders designed to ensure the safety and protection of a complainant in a domestic violence case."[33] As defined in the statute, domestic violence occurs when an individual attempts to cause bodily injury to a family member.[34] Imminent threats of physical harm, sex offenses, and stalking perpetrated against a family member are also defined within the statute as forms of domestic violence.[35]

When such domestic violence occurs, victims may seek a CPO on behalf of themselves and any other "family or household members" threatened by the violence.[36] Once properly obtained after a court hearing, a CPO serves as a powerful bulwark against future acts of domestic violence.[37] CPOs impose strict "stay away" proscriptions upon abusive parties, restraining them from coming within a specified proximity to their victims.[38] In the words of the *Felton* court, "[i]n Ohio, the domestic violence statutes grant police and courts great authority to enforce protection orders, and violations of those protection orders incur harsh [criminal] penalties. . . . Therefore, protection orders issued pursuant to O.R.C. § 3113.31 are the . . . appropriate and efficacious method to prevent future domestic violence . . . ."[39] Empirical studies show that CPOs are highly effective in stopping abusers from committing further acts of domestic violence.[40] One of the most important features of CPOs is their ability to deny an abuser access to endangered children.[41] Many Ohio domestic court judges are in agreement that "[i]t is not just

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[33] *Id.* at 674.

[34] OHIO REV. CODE ANN. § 3113.31(A)(1).

[35] *Id.*

[36] *Id.* § 3113.31(C).

[37] *See* Mike Brigner, *Civil Protection Orders in Ohio Domestic Violence Cases*, 9 DOMESTIC RELATIONS J. OHIO 37, 37 (1997) ("The Ohio DV Act . . . provides the most powerful [domestic violence] relief ever enacted in this state. . . . The lawyer who ignores the remedies of this Act when family violence is present denies the client dramatic remedies that no other law can provide.").

[38] OHIO REV. CODE ANN. § 3113.31(E)(1)(b).

[39] *Felton*, 679 N.E.2d at 677. A recent "bench book" issued by the State Ohio states:

> The law provides for a preferred arrest policy if a peace officer has reasonable ground to believe a person has committed the offense of domestic violence or the offense of violating a protection order or consent agreement. Peace officers must provide victims with information about protection orders and domestic violence shelters. A peace officer, who arrests an offender for violating a protection order or consent agreement that is on its face valid, is immune from liability in a civil action for damages. All CPOs are enforceable throughout the state per Ohio law, and throughout the country per federal law.

MIKE BRIGNER, THE OHIO DOMESTIC VIOLENCE BENCHBOOK 35 (2d ed. 2003) [hereinafter BENCHBOOK].

[40] *See* Joan Zorza & Nancy K.D. Lemon, *Two-Thirds of Civil Protection Orders Are Never Violated: Better Court and Community Services Increase Success Rates*, 2 DOMESTIC VIOLENCE REPORT 51 (1997).

[41] BENCHBOOK, *supra* note 39, at 33.

physical harm to children that justifies such restrictions, but misuse of the children to manipulate the other parent and the court, such as past or threatened abduction."[42]

Civil protection orders issued under O.R.C. § 3113.31 afford the petitioning party significant advantages in addition to simply forcing the abusers to "stay away" from him or her.[43] These advantages extend far beyond what other, more limited types of protective orders available under Ohio law are capable of accomplishing on behalf of an abused party.[44] CPOs may last for years, are renewable, and their durations are not contingent upon the outcome of concurrent or pending judicial proceedings.[45] The statute also grants broad discretion to the courts to award various types of equitable relief in favor of the abused party.[46]

B. The Text of O.R.C. § 3113.31

Under O.R.C. § 3113.31, the categories of individuals that qualify as "family or household member[s]" of the respondent abuser are statutorily designated and therefore limited.[47] Subsection (A)(3) of this statute provides that "family or household member[s]" include:

> (a) Any of the following who is residing with or has resided with the respondent:
> (i) A spouse, a person living as a spouse, or a former spouse of the respondent;
> (ii) A parent, a foster parent, or a child of the respondent, or another person related by consanguinity or affinity to the respondent;
> (iii) A parent or a child of a spouse, person living as a spouse, or former spouse of the respondent, or another person related by consanguinity or affinity to a spouse, person living as a spouse, or former spouse of the respondent.
> (b) The natural parent of any child of whom the respondent is the other natural parent or is the putative other natural parent.[48]

The text of O.R.C. § 3113.31(A)(3) does not specifically enumerate viable, unborn fetuses among the various categories of "family or household members"

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[42] *Id.*

[43] *See* Brigner, *supra* note 37, at 39. For example, unlike the vast majority of court petitions in the state of Ohio, there is no filing fee for a civil protection order. *Id.*

[44] *Id.* at 37. The two other forms of restraining orders available within the state of Ohio, temporary restraining orders (TROs) and criminal temporary protection orders (TPOs), are not nearly as effective as CPOs in affording abuse victims a meaningful remedy. They both limit the forms of equitable relief available to the victim and expire after any court proceedings against the respondent are concluded. *Id.*

[45] *Id.* at 40.

[46] *Id.* at 40. This equitable relief can include ordering the respondent to attend mandatory counseling sessions or awarding the petitioner various objects around the formerly shared household, like the family automobile. *Id.* at 40-41.

[47] OHIO REV. CODE ANN. § 3113.31(A)(3).

[48] *Id.*

capable of being protected by CPOs.[49] Despite this fact, viable unborn fetuses should be entitled to obtain protection based upon a broad reading of the word "child" as found in subsections (ii) and (iii). The validity and urgency of such an interpretation is supported by domestic violence statistics, case-law, scholarly research, and other existing Ohio statutes.

III. AN ANALYSIS OF DOMESTIC VIOLENCE STATISTICS, CASE-LAW, SCHOLARLY RESEARCH, AND OHIO STATUTES SUPPORTING THE RIGHTS OF VIABLE FETUSES

A. The Prevalence of Domestic Violence Among Pregnant Women

A narrow reading of the word "child" under O.R.C. § 3113.31 fails to account for the high occurrence of domestic abuse among pregnant women. According to a recent study published in *Obstetrics and Gynecology*, research indicates that because the risk of domestic abuse to pregnant woman is so high, an "immediate need for [clinical] abuse assessment for *all* pregnant women" exists.[50] Approximately 300,000 pregnant women a year report being abused by an intimate partner,[51] and murder remains the second-leading cause of death among pregnant women within the United States.[52] As Professors Catherine F. Klein and Leslye E. Orloff note in their article, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*:

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[49] *Id.*

[50] Judith McFarlane et al., *Abuse During Pregnancy and Femicide: Urgent Implications for Women's Health*, 100 OBSTETRICS & GYNECOLOGY 1, 27 (2002) (emphasis added). This study concluded further that:

> The 821 women in this case-control study consisted of 174 women who survived an attempt on their life by their intimate partner (attempted femicides), 263 women killed by their intimate partner (completed femicides), and 384 women physically abused or threatened with physical harm but no attempt on their life was made (controls). Of the 821 women, only 687 (357 controls, 132 attempted femicides, and 198 completed femicides) reported ever being pregnant, thus 134 were excluded from the analyses.
>
> The attempted and completed femicides were 3-4 years older than the controls, and they reported relationships lasting almost 1-3 years longer. Nearly one-half of the controls were white women, compared with 22% attempted and 31% completed femicides. In contrast, more than 50% attempted and 38% completed femicides were black, as compared with 22% controls. The percentage of Latina women remained fairly constant (22-25%) over the three groups. The majority of all women, 62-82%, had at least a high school education. Similarly, most women (57-76%) were employed. More than two-thirds of all women were in current relationships. Although only 8% of the controls reported ever being abused during pregnancy, 26% attempted and 23% completed femicides were abused during pregnancy. City-to-city variation was evaluated and found to be minimal among the majority of the ten cities. Additional results revealed no significant differences among the cities when they were grouped by population sizes.

Id.

[51] FAMILY VIOLENCE, *supra* note 26, at 1.

[52] *Id.*

> Social science research demonstrates the importance of extending civil protection order coverage not only to parties who share a child in common, but also to pregnant women who are carrying the batterer's child. Data gathered on pregnancy and battering reveal that pregnant women face significant and increased risk of physical abuse. Recent research indicates that 37% of all obstetrical patients across race, class, and educational lines are physically abused while pregnant. Abuse often begins or escalates during pregnancy. Among battered women, 17% have been physically abused during pregnancy, with 60% of those women reporting more than one incident. The primary predictor of battering during pregnancy is prior abuse; in one study, 87.5% of women battered during the current pregnancy were physically abused prior to pregnancy. Often the worst abuse can be associated with pregnancy. Battering during pregnancy increases the risk of miscarriage and low-birth weight births. The March of Dimes reports that more babies are born with birth defects as a result of the mother being battered during pregnancy than from the combination of all the diseases for which we immunize pregnant women.[53]

Thus, pregnant mothers, and by extension viable fetuses, are at a heightened risk for domestic violence. Though it is highly uncommon, it is not unprecedented for fetuses to suffer pre-natal injury separate from the mother.[54] An effective CPO serves to decrease the risk of domestic violence posed to a pregnant mother. Furthermore, the simple act of adding a separate and distinct CPO for a viable fetus may serve as a "double warning" to potential batterers not to perpetrate acts of further violence against a pregnant mother. Recent state and federal jurisprudence suggests that the proper and expedient way to address this issue is through the judiciary, and not the legislature.

B. Roe v. Wade

Any discussion regarding the rights of unborn fetuses in the United States must be framed in the context of the landmark U.S. Supreme Court decision of *Roe v.*

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[53] Catherine F. Klein & Leslye E. Orloff, *Providing Legal Protection for Battered Women: An Analysis of State Statutes and Case Law*, 21 HOFSTRA L. REV. 801, 827-28 (1993).

[54] The most common situation in which a fetus can be harmed separately from an expectant mother occurs when the mother ingests certain drugs that would otherwise have no effect on her health, such as alcohol or tobacco. *See* Hughson v. St. Francis Hosp. of Port Jervis, 459 N.Y.S. 2d 814, 818 (N.Y. Sup. Ct. 1983) ("[T]he medical profession is increasing its knowledge as to the possible adverse effects upon the fetus of various drugs and other ingested substances previously thought to be harmless. Furthermore, increased use of prenatal diagnostic procedures . . . will require even more care on the part of the obstetrician . . . ."); *In re* Gloria C., 476 N.Y.S. 2d 991, 991 (N.Y. Fam. Ct. 1984) ("For example, ingestion of certain drugs may be entirely harmless to the mother while causing damage or even death to the fetus."). For a detailed analysis of the numerous problems that can result from pre-natal drug-use, see Victoria J. Swenson & Cheryl Crabbe, *Pregnant Substance Abusers: A Problem That Just Won't Go Away*, 25 ST. MARY'S L.J. 623, 627 (1994) ("Five to eight thousand babies each year are born with Fetal Alcohol Syndrome, although as many as 35,000 may exhibit alcohol-related birth defects. Fetal Alcohol Syndrome, caused by heavy alcohol consumption by pregnant women, is now recognized as the leading known cause of mental retardation in the United States.").

Wade.[55] This decision famously concluded that women have a limited right to obtain abortions based upon an implied constitutional "right of privacy."[56] *Roe* condoned the practice of abortion from the time of conception until the point of "viability," the point at which a fetus could survive outside the womb.[57] The *Roe* decision made it clear that once a fetus reaches the point of viability, a state acquires "an important and legitimate interest [in potential life]."[58] The court stated that "[t]his is so because the fetus then presumably has the capability of meaningful life outside the mother's womb. State regulation protective of fetal life after viability thus has both logical and biological justifications."[59]

C. In re Ruiz

Since this particular holding in *Roe*, nearly all state courts throughout the country have upheld statutory interpretations extending protective rights to viable, unborn fetuses.[60] Ohio has been no exception. Perhaps the most compelling case supporting the assertion that the statutory definition of "child" under O.R.C. § 3113.31 should be interpreted as to include viable, unborn fetuses is *In re Ruiz*.[61] In that case, a newborn child was born underweight and prematurely due to the mother's heroin use during pregnancy.[62] The mother was subsequently charged with the criminal offense of child abuse under section 2919.22 of the Ohio Revised Code.[63] The specific question before the Wood County Juvenile Court was "whether a finding that a child is abused may be predicated solely upon the prenatal conduct of the mother."[64] In order to determine the answer to that question, it was necessary for the court "to review the status of an unborn fetus as a 'child' under the child abuse statute alleged in the criminal complaint."[65]

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[55] Roe v. Wade, 410 U.S. 113 (1973).

[56] *Id.* at 153. The *Roe* decision has proven to be one of the most historic, controversial, and debated decisions in the history of the United States Supreme Court. For a more thorough and detailed analysis of the *Roe v. Wade* decision, see David J. Garrow, *Abortion Before and After Roe v. Wade: A Historical Perspective*, 62 ALB. L. REV. 833 (1999).

[57] *Roe*, 410 U.S. at 163.

[58] *Id.*

[59] *Id.*

[60] For a comprehensive overview of the legal status and rights of unborn children throughout the United States, see Amy Lotierzo, *The Unborn Child, A Forgotten Interest: Reexamining Roe in Light of Increased Recognition of Fetal Rights*, 79 TEMP. L. REV. 279 (2006) ("Since the Supreme Court announced the right to abortion in *Roe v. Wade*, there has been an increasing recognition and expansion of the rights of unborn children in various areas of the law . . . .").

[61] *In re* Ruiz, 500 N.E.2d 935 (Ohio C.P. 1986).

[62] *Id.* at 936.

[63] *Id.*

[64] *Id.* at 935-36.

[65] *Id.* at 936.

The court ultimately concluded that a viable fetus was indeed a child within the meaning of this particular statute.[66] It based its ruling on several considerations. First, the court recognized that viable fetuses were already afforded various other rights under Ohio law.[67] For example, statutes governing descent and distribution recognized an unborn child's right to inherit property.[68] Next, the court noted that a variety of different tort actions were also actionable against those who harmed viable fetuses.[69] Yet, the most persuasive consideration that favored the court's interpretation was the influence of the then recently rendered decision of *Roe v. Wade*.[70] According to the court, *Roe* was a signal to lower courts that they were entitled to take action in order to protect viable fetuses from danger.[71]

In light of clear judicial precedent supplied by both *Roe* and *Ruiz*, it is logical to conclude that Ohio courts are fully empowered to interpret domestic violence statutes in order to protect viable, unborn fetuses from physical harm. Expanding the meaning of the word "child" under O.R.C. § 3113.31 would prevent domestic abusers from getting anywhere close to a threatened fetus. The Tenth District Court of Appeals failed to properly use its inherent authority when it denied Smith's request to add her fetus as a party within her CPO.

D. In re Baby Boy Blackshear

Another Ohio case that stands for the proposition that viable fetuses should be afforded certain vital protective rights within our society is *In re Baby Boy Blackshear*.[72] The facts of that case involved an infant born addicted to cocaine as a result of his mother's drug use during pregnancy.[73] Upon discovering that the child was addicted, the delivering hospital staff contacted the local department of human services.[74] The department subsequently filed a dependency and neglect petition against the mother under section 2151.27 of the Ohio Revised Code and took custody of the child.[75] The mother then sued to reclaim custody of her child.[76] At

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[66] *Id.* at 939.

[67] *Id.* at 936.

[68] *Id.* at 937. Current Ohio statutes extending limited rights to viable fetuses will be discussed later in this section.

[69] *Id.* at 936-37.

[70] *Id.* at 938.

[71] *Id.* ("The essence of *Roe*, the state's interest in the potential human life at the time of viability, in conjunction with Ohio's developing case law, compels a holding that a viable unborn fetus is to be considered a child under the provisions of R.C. 2151.031.").

[72] *In re* Baby Boy Blackshear, 736 N.E.2d 462 (Ohio 2000).

[73] *Id.*

[74] *Id.* The county human services department had previously intervened two years earlier, when the mother gave birth to her first cocaine-addicted newborn. *Id.* at 463 n.1.

[75] *Id.* at 462-63. This statute states in pertinent part:

> [A]ny person having knowledge of a child who appears to . . . be an unruly, abused, neglected, or dependent child may file a sworn complaint with respect to that child in the juvenile court of the county in which the child has a residence or legal settlement or in which the . . . unruliness, abuse, neglect, or dependency allegedly occurred.

trial, the mother challenged the actions of the department of human services, arguing that an unborn fetus was not an abused "child" under section 2151.031 of the Ohio Revised Code.[77] Both the trial court and the intermediate appellate court found that a fetus addicted to cocaine was, indeed, an abused "child" within the meaning of section 2151.27 of the Ohio Revised Code.[78]

On final appeal, the Ohio Supreme Court ruled in favor of the department of human services, albeit on narrower grounds.[79] The court stated that it "[did] not agree with [plaintiff] in either how she has framed the issue or her interpretation of the statute. Accordingly, we find that the issue is not whether a fetus is a child but rather whether the plain language of R.C. 2151.031(D) applies to [the newborn]."[80] Despite the fact that the Supreme Court did not go so far as to say that a fetus was a "child" under section 2151.27 of the Ohio Revised Code, it did hold that "when a newborn child's toxicology screen yields a positive result for an illegal drug due to prenatal maternal drug abuse, the newborn is, for purposes of R.C. 2151.031(D), *per se* an abused child."[81]

This decision is important because it underscores the Ohio Supreme Court's interest in ensuring that Ohio's newborns are kept safe from harm during and after childbirth. As the dissent noted, "[a] positive result on a newborn's drug screen is probative evidence of *in utero* exposure to illegal drugs. Whether a newborn's *in utero* exposure to an illegal substance actually harms or threatens to harm the child is, however, a separate question . . . ."[82] Thus, even though the court did not equate fetuses with children, the Ohio Supreme Court still went to great lengths to see that newborns were ultimately protected by the statute. The court mentioned that the case was "a civil proceeding . . . [and] not subject to the strict construction rule. In fact, in this case the opposite is true because R.C. 2151.01 mandates the court to liberally construe and interpret the sections of R.C. Chapter 2151, so as to provide for the care and protection of children . . . ."[83] The court went on to state that:

> It is clear, and there can be no doubt, that an alleged abused child, once born, falls under the jurisdiction of the appropriate juvenile court. It is clear that a child has legal and constitutional rights and that juvenile courts were created, in part, to protect those rights and to empower the state to provide for the care and protection of Ohio's children. It is clear that there can be no more sacred or precious right of a newborn infant

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OHIO REV. CODE ANN. § 2151.27(A)(1).

[76] *Baby Boy Blackshear*, 736 N.E.2d at 463.

[77] *Id.*

[78] *Id*.

[79] *Id*. at 464.

[80] *Id.*

[81] *Id*. at 465.

[82] *Id*. at 466. (Cook, J., dissenting). Justice Cook would have remanded the case back to the trial court for a determination of whether or not the cocaine in the newborn's system had actually "harmed him." *Id.*

[83] *Id*. at 464 (majority opinion).

> than the right to life and to begin that life, where medically possible, healthy, and uninjured. And it is clear that to ignore these facts, these rights, and the numerous problems presented in these cases is to place our collective heads in the proverbial sand and hope that the vexing questions will somehow just disappear. Well, they will not![84]

This language openly challenges lower courts to address the visible gaps that exist in legislation pertinent to the safety of newborns. The court *Smith v. Martin* failed to adequately establish a safe environment for Smith's baby by not heeding this dictum.

E. Werling v. Sandy

The 1985 Ohio Supreme Court case of *Werling v. Sandy* also stands as a challenge to the notion that courts are somehow powerless to interpret standing laws broadly, thereby giving viable fetuses legal standing.[85] In *Werling*, a pregnant mother's baby was delivered stillborn due to an oversight by her hospital.[86] The mother then brought a wrongful death action against both her doctors and the hospital, claiming both had been negligent.[87] The trial court issued summary judgment in favor of the defendants, stating that no such cause of action existed for a viable fetus delivered stillborn.[88] The appellate court affirmed the trial court on the same grounds, yet certified the issue for the Ohio Supreme Court.[89]

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[84] *Id*. at 465.

[85] Werling v. Sandy, 476 N.E.2d 1053 (Ohio 1985).

[86] *Id*. at 1053.

> Appellant became pregnant during the summer months of 1980. She soon after consulted Drs. Sandy and Thompson for the necessary obstetrical care. The physicians initially determined that appellant was an increased labor risk due to her obesity. While her medical history also included nephritis and hypertension, appellant was examined by the physicians on fifteen occasions during her pregnancy and did not have any serious complications associated therewith.
>
> Appellant admitted herself to the hospital on the evening of April 30, 1981. She was under the supervision of Dr. Thompson by the early morning hours of the next day. A fetal monitor was attached to her body in order to evaluate the heartbeat of the fetus. All parties hereto agree that the nine-to-ten-month-old fetus was alive and viable just prior to delivery.
>
> However, prior to the decedent's birth, Dr. Thompson left the hospital to deliver another baby. Appellant remained in the labor room and her condition was monitored by the hospital's nursing staff. Without prior warning, the fetal monitor indicated that the baby's heart was no longer functioning. The only surgeon in the hospital was unavailable as he was in surgery with another patient. Upon completion of the operation, the surgeon examined appellant and ordered her prepped for surgery. Monica Jane was subsequently delivered stillborn by the surgeon.

Id.

[87] *Id*.

[88] *Id*.

[89] *Id*. at 1053-54.

The Ohio Supreme Court reversed and remanded the lower courts' holdings.[90] After surveying Ohio's long history of extending certain legal rights to viable fetuses, the court concluded that "[i]t 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. The requirement of birth in this respect is an *artificial demarcation.*"[91] The court invoked the language of *Roe* to support its holding, stating that:

> The [Roe] court found the compelling point in the state's legitimate interest of protecting potential life to be at viability . . . It follows, therefore, that our decision is entirely consistent with *Roe* to the effect that a viable fetus is a person entitled to protection and may be a basis for recovery under the wrongful death statute.[92]

The birth of a child in a CPO case can likewise be seen as a line of "artificial demarcation." If there exists a chance that a newborn may be seriously threatened by an abuser, then what difference does it make precisely when the child is born? The safety risks at stake were captured accurately by the *Werling* court when it quoted the following passage:

> To hold that the plaintiff [child] in the instant case did not suffer an injury in her person 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. In our view such a ruling would deprive the infant of the right conferred by the Constitution upon all persons, by the application of a time-worn fiction not founded on fact and within common knowledge untrue and unjustified.[93]

F. In re Gloria C.

At least one other state's court has chosen to judicially interpret its state CPO statute to include unborn, viable fetuses. In *In re Gloria C.*, a New York family court concluded that "an order of protection may issue to an unborn child where such is requested by the natural mother and the fetus is within a zone of danger amenable to legal redress."[94] The case involved a predicament very similar to Gabrielle Smith's.[95] In analyzing New York's CPO statute,[96] the court stated that "[t]he

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[90] *Id.* at 1057.

[91] *Id.* at 1055 (emphasis added).

[92] *Id*. at 1056.

[93] *Id*. at 1055 (quoting Williams v. Marion Rapid Transit, Inc., 87 N.E.2d 334, 340 (Ohio 1949)).

[94] *In re* Gloria C., 476 N.Y.S.2d 991, 991 (N.Y. Fam. Ct. 1984).

[95] The court in this case stated the facts as follows:

> The natural mother has initiated this proceeding pursuant to article 8 of the Family Court Act. By verified petition, dated March 29, 1984, she alleges that her husband assaulted her three times, hitting her in the head, punching her in the stomach, and throwing her onto the floor. Petitioner is four months pregnant. She has two children,

availability of this sanction [which may be imposed for violation of the order] adds a significant dimension of protection to an unborn child who has received an order of protection in its own right."[97] The court's opinion noted that, because the purpose of the CPO statute was to "stop the violence, [and] end the family disruption," preventing harm to developing fetuses was vital.[98] Like the *Ruiz* opinion, it too recognized that both the U.S. Supreme Court's holding in *Roe* and previous state case-law gave credence to its position.[99]

G. In re Dittrick Infant

Other states that have addressed the issue of extending CPO protection to viable fetuses have been less willing to do so. The 1977 case *In re Dittrick Infant* represents Michigan's attempt to grapple with the language of its own CPO statute.[100] In that case, a rural Michigan county's department of social services took emergency protective custody of an abusive couple's "child."[101] At the time that the protective custody order was rendered, the "child" in question was still 45 days away from being born.[102] The parents challenged the validity of the protective custody order on jurisdictional grounds.[103]

The Michigan Court of Appeals found in favor of the parents.[104] First, the court critically evaluated the meaning of the world "child" within Michigan's CPO statute.[105] Although the court "recognize[d] that the word 'child' could be read as applying even to unborn persons" it stated that "[its] reading of other sections of Chapter XIIA of the Probate Code convinces [the court] that the Legislature did not

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> ages 5 and 1 1/2, and she alleges that respondent threatened to take the younger child away from her. . . . The petitioner informed the Department of Probation that the respondent has a history of psychiatric problems and has told her he was trying to force her to have a spontaneous abortion.

Id. at 991 & n.1.

[96] *See* N.Y. FAMILY LAW § 812 (Consol. 2009).

[97] *In re Gloria C.*, 476 N.Y.S.2d at 992.

[98] *Id.*

[99] *Id.* at 996 ("This significant State interest [in protecting the fetus] is present during the entire pregnancy, though it does not become sufficiently compelling to override the woman's privacy right until (viability) about the third trimester." (quoting Roe. v. Wade, 40 U.S. 113, 162 (1973)).

[100] *In re* Dittrick Infant, 263 N.W.2d 37, 39 (Mich. Ct. App. 1977).

[101] *Id*. at 38.

[102] *Id*.

[103] *Id*. at 39. Like the mother in *In re Baby Boy Blackshear*, the parents in this case had a prior history of abusing their other children. The record showed that "the defendants' parental rights over defendant Carol Dittrick's first child were permanently terminated in May of 1976, following allegations of continuing physical and sexual abuse. Criminal charges against both defendants are now pending as a result of those abuse allegations." *Id.* at 38.

[104] *Id.* at 39.

[105] *Id.*

intend application of these provisions to unborn children."[106] Although the court essentially punted the responsibility of resolving the issue to the Michigan legislature, it added that "the background of the present case has convinced us that such amendments [to expand the meaning of 'child'] would be desirable."[107] The court further stated:

> Although the plaintiff Bay County Department of Social Services and the probate court acted without proper authority, we nevertheless believe that their actions were "correct" in the sense that the best interests of all concerned required that the defendants' infant not be left in defendants' custody. While we have ruled in the defendants' favor on the legal question raised, we do not intend to cause an immediate change of custody back to the defendants. We therefore order that the present custody arrangement shall remain in effect until 60 days after the release date of this opinion. This will allow sufficient time for a proper invocation of probate court jurisdiction in the event that plaintiff Bay County Department of Social Services believes that the parental home is still an unfit residence.[108]

H. In re Melissa Woodin

Minnesota courts have likewise chosen to narrowly interpret the meaning of the word "child" within their state's CPO statute. *In re Melissa Woodin* raised the question: "Does [a] trial court have jurisdiction to issue a protective order under [its domestic violence statute] when the parties have never been married, have never lived together, have no children in common, yet do have an unborn child claimed to be in common?"[109] There, a pregnant mother was in an abusive relationship almost identical to Gabrielle Smith's, with the exception that the mother and the father of the unborn child had never lived together.[110] The mother had filed for a CPO on behalf of her unborn child.[111] Instead of being denied coverage by the trial court, the petitioning mother was granted full CPO coverage for her fetus.[112]

The Minnesota Court of Appeals overturned the trial court, finding that "[b]ecause an 'unborn child' in common is not included as one of the relationships which would support issuance of a domestic abuse order, we conclude that the legislature did not intend to extend the protections of the act to these

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[106] *Id*.

[107] *Id*.

[108] *Id*. (citation omitted).

[109] *In re* Melissa Woodin, 455 N.W.2d 535, 536 (Minn. Ct. App. 1990).

[110] At the October 11, 1989 trial hearing on the mother's petition, the mother testified that she was twenty years old and lived with her parents. *Id.* Her testimony further indicated that she became pregnant in June 1989 and that the father of her fetus threatened her with bodily harm and to kill her, making her fearful for herself and her unborn child. *Id.*

[111] *Id*.

[112] *Id*.

circumstances."[113] Like the Michigan Court of Appeals, the Minnesota court also conceded that:

> In reaching this decision we are not unmindful that the type of continuing contact that accompanies a familial or household relationship may occur when two individuals have an unborn child in common. The legislature may wish to extend the Act to include unborn children in common as a basis for protection under the Act.[114]

Both *Dittrick Infant* and *Melissa Woodin*, like the opinion of the Ohio Tenth District Court of Appeals, stand for the proposition that legislative intent should take precedence over the safety of mothers. Both opinions rule against interpreting the word "child" broadly within their respective CPO statutes. Yet, strikingly, both opinions also recognize the vital safety risks inherent in a narrow interpretation of the statutes.[115] Each court actually encourages its state legislature to amend the obvious safety gaps created by the prevailing construction of their statutes.[116] The *Dittrick Infant* court went as far as to call a broad interpretation of the word "child" the "correct" one under the circumstances.[117] The court then proscribed further protective measures in order to ensure the safety of the endangered child.[118] The Michigan and Minnesota appellate courts "bent over backwards" to give deference to their respective state legislatures. Rather than pontificating about the serious safety concerns created by the narrow construction of the statute, they could have simply invoked the language of *Roe* to use appropriate measures "to protect potential life."

I. Scholarly Support

Numerous legal commentators have recognized that viable fetuses should be entitled to independent and separate protective rights.[119] Some scholars would go so far as to advocate that the line of demarcation for fetal rights should be the point of

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[113] *Id*. at 537.

[114] *Id*.

[115] *In re Dittrick*, 263 N.W.2d at 39; *In re Melissa Woodin*, 455 N.W.2d at 536.

[116] *In re Dittrick*, 263 N.W.2d at 39; *In re Melissa Woodin*, 455 N.W.2d at 536.

[117] *In re Dittrick*, 263 N.W.2d at 39.

[118] *Id*. The court issued the following instruction:

> While we have ruled in the defendants' favor on the legal question raised, we do not intend to cause an immediate change of custody back to the defendants. We therefore order that the present custody arrangement shall remain in effect until 60 days after the release date of this opinion. This will allow sufficient time for a proper invocation of probate court jurisdiction in the event that plaintiff Bay County Department of Social Services believes that the parental home is still an unfit residence.

Id. (citation omitted).

[119] *See, e.g.*, Jeffrey A. Parness & Susan K. Pritchard, *To Be or Not to Be: Protecting the Unborn's Potentiality for Life*, 51 U. CIN. L. REV. 257 (1982); Mamta K. Shah, *Inconsistencies in the Legal Status of an Unborn Child: Recognition of a Fetus as Potential Life*, 29 HOFSTRA L. REV. 931 (2001).

conception, rather than viability.[120] As Professors Jeffrey A. Parness and Susan K. Pritchard note, "[t]he failure to understand the *Roe* decision has led . . . to courts mistakenly denying the unborn non-fourteenth amendment protections to which the unborn are entitled."[121] Particularly persuasive is the work of Professor John. E. B. Myers. In his article, *Abuse and Neglect of the Unborn: Can the State Intervene?*, Myers poses the question: "When, if ever, can the state intervene in the life of a pregnant woman to curtail abuse and neglect of her unborn child?"[122] The *Ruiz* court seized on Myers' answer to this question in formulating its opinion:

> "The important state interests in preservation of life, the potentiality of life, and child welfare lend resolute support to the argument that child abuse and neglect statutes should include unborn children. In reality, this is the only way to give meaningful effect to those interests. An interest stripped of a method of enforcement is a feckless thing. Nowhere in law are significant state interests unaccompanied by a means of implementation. This is certainly true where the state seeks to prevent death or serious bodily injury. The only reasonable mechanism to implement state interests in the unborn is through existing abuse and neglect statutes. . . . Since these statutes can be construed to include the unborn, protection of legitimate state interests calls for such an interpretation. . . . Doing so will nourish important state interests, and extend long overdue legal protection to the unborn."[123]

J. Statutory Support

The *Werling* decision made it plain that, in Ohio, "[t]he rights of an unborn child are no strangers to our law."[124] Section 2105.14 of the Ohio Revised Code

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[120] Shah, *supra* note 119, at 969.

> The legal system has determined the extent to which a fetus should be protected under civil and criminal law by balancing various factors such as legislative intent, rules of statutory construction, the purpose of wrongful death liability and homicide convictions, logic, precedent, and changes in medical science. As demonstrated in this Note, applying a comparable methodology leads to the conclusion that the legal personality of potential life should commence at the moment of potentiality, namely conception. While courts, legislatures, scientists, and philosophers may never be able to resolve the question as to whether a fetus is a "person," extending the protections granted to a human being to a fetus, as a potential human life, from the moment of conception will provide consistency in the law, more effectively fulfill the social framework under which the legal status of a fetus is evaluated, and coincide with our innate reactions that a fetus has value, even though we are unable to exactly identify why or what.

Id. Such a stance would surely make fetal rights more clear cut, yet it is highly likely that such a determination would prove very controversial to the American public.

[121] Parness & Pritchard, *supra* note 119, at 258.

[122] John E. B. Myers, *Abuse and Neglect of the Unborn: Can the State Intervene?*, 23 DUQ. L. REV. 1, 3 (1984).

[123] *In re* Ruiz, 500 N.E.2d 935, 938 (Ohio C.P. 1986) (quoting Myers, *supra* note 122, at 29).

[124] *Werling*, 476 N.E.2d at 1054.

recognizes that "[d]escendants of an intestate begotten before his death, but born thereafter, in all cases will inherit as if born in the lifetime of the intestate and surviving him."[125] Ohio Revised Code section 2131.08(A) dictates that a child in gestation is a living person for the purposes of Ohio's rule terminating perpetuities,[126] while section 2108.01(D) states in pertinent part that "'[d]ecedent' means a deceased individual whose body or part is or may be the source of an anatomical gift. The term includes a stillborn infant and, subject to restrictions imposed by law other than *sections 2108.01* to *2108.29 of the Revised Code*, a fetus."[127] Most of these Ohio probate statutes are the result of the influence from the Uniform Probate Code,[128] a model set of statutes designed "to shorten and simplify the probate of estates" throughout the country.[129]

Beyond the realm of probate law, viable fetuses are granted additional statutory rights within Ohio. The State's aggravated murder statute recognizes that the "unlawful termination of another's pregnancy" is on the same footing as killing a living person.[130] Section 2919.18 of the Ohio Revised Code makes it a crime for a doctor to generally "perform or induce or attempt to perform or induce an abortion upon a pregnant woman after the beginning of her twenty-second week of pregnancy."[131] A noticeable hallmark of this statutory language is its reliance on the "viability" determination.[132] This could be the result of the *Roe* decision, which preceded the enactment of the legislation.[133]

What statutes like these demonstrate is that over the last couple of decades lawmakers and citizens from the state of Ohio have come to recognize the "timeworn fiction" of the indivisibility of mother and unborn child until the point of birth.[134] Jurists in favor of judicial deference to the Ohio General Assembly would likely posit that a "broad" reading of O.R.C. § 3113.31 is not acceptable, because the people of the Ohio have not given their consent for such an interpretation.[135] However, this argument fails to comprehend the subtlety of the danger posed by a narrow interpretation of O.R.C. § 3113.31. Unlike the fetal protection amendment to the aggravated murder statute, which was by and large spurned into enactment by an

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[125] OHIO REV. CODE ANN. § 2105.14. Ohio courts have recognized that "[a] bequest to children of testatrix or of some person who is indicated in the will, includes a child en ventre sa mere; since it is considered as a child in existence for all beneficial purposes." Ebbs v. Smith, 394 N.E.2d 1034, 1036 (Ohio Prob. Ct. 1979).

[126] OHIO REV. CODE ANN. § 2131.08(A).

[127] *Id.* § 2108.01(D).

[128] Lotierzo, *supra* note 60, at 292.

[129] *See* UNIF. LAW COMM'RS, UNIF. PROBATE CODE: A BRIEF OVERVIEW, *available at* http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-upcabo.asp.

[130] OHIO REV. CODE ANN. § 2903.01(A).

[131] *Id.* § 2919.18(A)(1).

[132] *Id.* § 2919.18.

[133] Roe v. Wade, 410 U.S. 113, 163 (1973).

[134] *See* Williams v. Marion Rapid Transit, Inc., 87 N.E.2d 334, 340 (Ohio 1949).

[135] *Vis-a-vis* the Ohio General Assembly.

obvious "gap" in the Ohio Revised Code, it is not readily apparent to voters and legislators that lapses in CPO coverage are likely to occur from the current construction of O.R.C. § 3113.31. It is, therefore, unlikely that lawmakers will be pressed to change the law through the legislature. This reality highlights the urgency of a broad judicial construction of Ohio's domestic violence statute. As previously noted, "[s]ince [existing] statutes can be construed to include the unborn, protection of legitimate state interests calls for such an interpretation."[136]

Admittedly, as long as a pregnant mother has a valid CPO herself, a viable fetus is virtually assured adequate protection from an abusive family member. Even the *In re Gloria C.* court recognized that "almost every act injurious or potentially injurious to the unborn child would, at the same time, be similarly offensive to the [mother]."[137] Thus, according to the *Smith* court, the value of any CPO obtained on behalf of a viable fetus would be essentially redundant until the child's birth.[138] Yet, this narrow interpretation of O.R.C. § 3113.31 fails to address vital post-pregnancy safety concerns involving the child. The following sections will explain some of these concerns and illustrate how a broader reading of the statute serves to address them.

IV. HOW THE ISSUES OF MATERNAL MORBIDITY AND CHILD ABDUCTION ILLUSTRATE THE SAFETY CONCERNS CREATED BY A NARROW INTERPRETATION OF O.R.C. § 3113.31

A. An Overview of the Issue of Maternal Morbidity

Currently, there is no uniform definition for maternal morbidity. One of the World Health Organization's current working definitions is: "[a]ny departure, subjective or objective, from a state of physiological or psychological well-being during pregnancy, childbirth and *the post-partum period*."[139] Maternal post-partum health complications present great challenges for healthcare professionals and mothers across the United States. A recent study published by the *American Journal of Public Health* concluded that for childbearing mothers "the burden of total morbidity is high."[140] The study found that "[m]aternal morbidity is a public health problem that affects nearly 1.7 million women annually, [and] can have an impact on fetal and infant health."[141] According to the study, approximately thirty-one percent

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[136] Myers, *supra* note 122, at 29.

[137] *In re* Gloria C., 476 N.Y.S.2d 991, 992 (N.Y. Fam. Ct. 1984).

[138] *See* Smith v. Martin, No. 08AP-692, 2009 Ohio App. LEXIS 2955, at *1-2 (Ohio Ct. App. July 14, 2009).

[139] U.K. ALL PARTY PARLIAMENTARY GRP. ON POPULATION, DEV., AND REPROD. HEALTH, BETTER OFF DEAD? A REPORT ON MATERNAL MORBIDITY 9 (2009) (emphasis added).

[140] Isabella Danel et al., *Magnitude of Maternal Morbidity During Labor and Delivery: United States, 1993–1997*, 93 AM. J. PUB. HEALTH 631, 633 (2003). The report further stated that "[t]he present study is the first, to our knowledge, to involve the use of population based data to summarize the prevalence of maternal morbidity during labor and delivery hospitalizations in the United States. The results show that the magnitude of the problem is greater than generally appreciated." *Id.*

[141] *Id.*

of all child-bearing American women experience some form of post-partum health complications.[142] Thousands of these women experience serious and life-threatening health problems.[143]

This information indicates that it is still common in America for mothers to be incapacitated as a result of pregnancy. Some of the most extreme medical problems resulting from pregnancy often require months of intensive rehabilitation.[144] In many instances, post-partum health complications could make it impossible for an abused mother to be near her newborn child. In such situations, an infant child would not enjoy sufficient legal protection from the threats of violence or abduction committed by an abuser. A mother's CPO would be of no value to an endangered child if he or she were not in close proximity to the mother.

The preceding data regarding the prevalence of post-partum health complications illustrates one of a multitude of situations in which a mother could be temporarily separated from her newborn. A child could just as easily be threatened while entrusted to the care of a babysitter, relative, or daycare center.[145] *Any* situation requiring the mother to be temporarily away from the child would create a similar lapse in protection.

B. An Overview of the Issue of Parental Kidnapping

The danger posed by such a lapse in court-ordered protection is not mere conjecture. According to experts on the psychology of sexual victimization, "[b]atterers often abduct children as the ultimate weapon against their partners, especially following separation where abduction or the threat of abduction is the

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[142] *Id.*

[143] *Id.*

[144] For example, Eclampsia, or pregnancy related hypertension, as well as birth-related maternal hemorrhaging can both require serious and long-term medical attention. *See* K.A. Douglas & C.W.G. Redman, *Eclampsia in the United Kingdom*, 309 BRIT. J. MED. 1395 (1994); STATE OF NEW YORK, DEP'T OF HEALTH, HEALTH ADVISORY: PREVENTION OF MATERNAL DEATHS THROUGH IMPROVED MANAGEMENT OF HEMORRHAGE (2004).

[145] The rates of children receiving child care from someone other than their biological mother is extremely high in the United States. A publication on the Federal Interagency Forum on Child and Family Statistics provides:

> In 2005, 61 percent of children ages 0–6 who were not yet in kindergarten (about 12 million children) received some form of child care on a regular basis from persons other than their parents. This is about the same proportion of children in child care as in 1995.
>
> Patterns of child care vary by the poverty status of the child's family. In 2005, children ages 0–6 in families with incomes at least twice the poverty level were more likely than children in families with incomes below the poverty level and children in families with incomes 100–199 percent of the poverty level to be in nonparental care (68 percent versus 51 and 53 percent, respectively). In addition, children in families with incomes at least twice the poverty level were more likely than children in families with lower incomes to be in home care by a nonrelative or in center-based programs such as nursery schools and other early childhood education programs.

America's Children: Key National Indicators of Well-Being, CHILDSTATS.GOV, http://childstats.gov/americaschildren/famsoc3.asp#18 (last visited Jan 13, 2011).

only 'battering technique' left."[146] Accordingly, there are "direct links among family violence, child abuse, and parental kidnapping."[147]

According to the American Bar Association, "[t]he term 'parental kidnapping' encompasses the taking, retention or concealment of a child by a parent, other family member, or their agent, in derogation of the custody rights, including visitation rights, of another parent or family member."[148] In 1988, parents or family members abducted an estimated 354,100 children in the United States.[149] The U.S. Department of Justice has stated that "[f]amily abductions constitute an important peril in the lives of children, particularly children living in households without one of their biological parents."[150]

Fathers commit the vast majority of such abductions,[151] and the most vulnerable child victims of family abduction are under the age of six.[152] Scholars have noted that fathers usually kidnap "either because they have lost, or fear they will lose, custody of the child in a court proceeding or because they want to retaliate against

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[146] MICHELE ANTOINETTE PALUDI, THE PSYCHOLOGY OF SEXUAL VICTIMIZATION: A HANDBOOK 189 (1999).

[147] *Id.* at 188.

[148] PATRICIA M. HOFF, PARENTAL KIDNAPPING: PREVENTION AND REMEDIES 1 (2000), http://www.abanet.org/child/pkprevrem.pdf.

[149] *Id.*

[150] HEATHER HAMMER ET AL., CHILDREN ABDUCTED BY FAMILY MEMBERS: NATIONAL ESTIMATES AND CHARACTERISTICS 9 (2002).

[151] *Id.* at 2.

[152] *Id.*

the other parent."[153] The most dangerous parental kidnappers will use weapons and physical force in order to abduct their children.[154]

C. How These Factors Combine to Allow Abusive Fathers to Exploit the Narrow Interpretation of O.R.C. § 3113.31

If a newborn child is separated from its mother and is thereby unprotected by a CPO, an abusive father has no legal disincentive to commit child abduction. In fact, if the abusive father is still married to the mother, there is almost nothing restricting him from legally taking the child into his custody. In Ohio, the local agency charged with juvenile protection may obtain custody of a child upon a finding that the child is "abused."[155] However, before an abusive parent can be stripped of custody, an independent complaint must be filed with that agency.[156] Thus, even though the local agency is empowered to deny a married, abusive father child custody of a newborn child, it is only able to do so after a lengthy fact-finding process.[157] Such proceedings would not be a deterrent to a married, abusive father determined to take swift control of his newborn son or daughter.

The only other means of determining custodial rights in Ohio are divorce, legal separation, and annulment proceedings.[158] If such proceedings have not been

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[153] Richard A. Campbell, *Transition: The Tort of Custodial Interference—Toward A More Complete Remedy to Parental Kidnappings*, 1983 U. ILL. L. REV. 229, 231 (1983). Campbell does an excellent job summarizing the incredible emotional tolls that parental kidnappings can exact upon families:

> Parental kidnapping causes great problems for both the custodial parent and the child. The custodial parent attempting to locate and recover a "stolen" child faces a grim task. At least twenty percent of the children stolen by noncustodial parents are never found. The custodial parent may spend an average of $ 20,000 trying to locate and regain custody of the child. In addition, parents who lose a child to a parental kidnapper often blame themselves for the kidnapping. These parets [sic] also may suffer great anguish which can cause physical and emotional problems resulting in physical or psychological injury.
>
> Parental kidnapping also harms the kidnapped child. Children, the real victims of this act, can suffer emotional and psychological harm when one parent forcefully takes them away from the other parent. Further damage to the children can occur if they are later uprooted and returned to the custodial parent after many years. The increasing number of parental kidnappings and the great damage done to the victims of this act combine to make parental kidnapping a significant problem facing our nation.

Id. at 231-33.

[154] HAMMER ET AL., *supra* note 150, at 8.

[155] OHIO REV. CODE ANN. § 2151.353; *see also id.* § 2151.031 (defining an "abused child" for the purposes of this statute).

[156] *See* FRANKLIN CNTY. CHILDREN SERVS., GUIDELINES: WHAT YOU NEED TO KNOW ABOUT CHILD ABUSE AND NEGLECT 14 (2009) (explaining the lengthy juvenile protective guidelines for Gabrielle Smith's jurisdiction).

[157] *Id.*

[158] OHIO REV. CODE ANN. § 3109.04(A) ("In any divorce, legal separation, or annulment proceeding and in any proceeding pertaining to the allocation of parental rights and

initiated by an abused wife and her newborn child is not mentioned in a pre-existing CPO, the abusive father is fully *entitled* to take the child if separated from its mother.[159] Such a result is clearly perilous to the safety and welfare of newborn children, because it allows abusers free reign to perpetrate further acts of violence against them.

Including viable fetuses under O.R.C. § 3113.31 would prevent such tragedies from occurring. If a pregnant mother knew that her abuser would be inclined to harm or abduct her anticipated newborn, she could file for a protective order on its behalf. With her child protected under a CPO, the mother would be assured that the safety of her child would not be compromised if she were rendered incapacitated as a result of the pregnancy or if she simply needed to temporarily leave her child in the care of another. Likewise, if the mother was still married to her abuser, she could be certain that his access to her son or daughter would be properly restricted.

V. HOW A NARROW INTERPRETATION OF O.R.C. § 3113.31 FAILS TO ACCOUNT FOR CHILD SAFETY CONCERNS OCCURRING WHEN A MOTHER IS COERCED INTO RETURNING TO HER ABUSER

A narrow reading of O.R.C. § 3113.31 also fails to account for situations in which battered mothers "reconcile" with abusers who still pose a threat to the mother's children. Studies have shown that battered women are often coerced by their abusers into continuing harmful relationships.[160] Such behavior is usually recognized as a step in the cycle known as "battered women's syndrome."[161] Battered women's syndrome is characterized by a state of "learned helplessness" stemming from sustained domestic abuse.[162] A recent article in *Psychiatric Times* noted:

> It is . . . understood that gender violence is fostered by the socialization of men to be more powerful than women. In some men, this process creates the need to abuse power and to control women. While the term "victim" is not always considered politically correct, in fact, until battered women take back some control over their lives, they may not truly be considered survivors. Psychological symptoms, called battered woman syndrome (BWS), develop in some women and make it difficult for them to regain control.[163]

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responsibilities for the care of a child . . . the court shall allocate the parental rights and responsibilities for the care of the minor children of the marriage.").

[159] *Id.* § 3109.03 ("When husband and wife are living separate and apart from each other . . . they shall stand upon an equality as to the parental rights and responsibilities for the care of their children and the place of residence and legal custodian of their children, so far as parenthood is involved.").

[160] *See* LENORE E. A. WALKER, THE BATTERED WOMAN SYNDROME 127 (2d ed. 2000).

[161] *Id.* at 3.

[162] *Id.* at 116.

[163] Lenore E. Walker, *Battered Woman Syndrome: Key Elements of a Diagnosis and Treatment Plan*, PSYCHIATRIC TIMES, July 7, 2009, at 1.

In such circumstances, a mother might even attempt to terminate her CPO in order to placate her abuser. The New Jersey case of *Stevenson v. Stevenson* is illustrative of such a situation.[164] There, a woman tried to terminate her existing CPO against her husband, despite the fact that he had very recently beaten her brutally.[165] The court denied the woman's request to terminate the CPO, recognizing that the court had broad discretion in making such a determination.[166] The court stated:

> Plaintiff's dissolution request, made despite the latest brutal beating she suffered at the hands of a drunken husband who has a past history of wife-beating and an alcohol abuse problem, is consistent with phase three of "the battered woman's syndrome." That phase of the battering cycle is characterized by a period of loving behavior by the batterer, during which pleas for forgiveness and protestations of devotion are often mixed with promises to seek counseling, stop drinking and refrain from further violence. A period of relative calm may last as long as several months, but in a battering relationship the affection and contrition of the batterer will eventually fade, and phases one and two, the "tension-building" phase and the "acute battering incident" phase, will start anew.[167]

Similarly, Ohio domestic courts have the power to review any motion to terminate a CPO. Several factors that the court may consider in determining whether to grant or deny such a motion are set forth in section 3113.31(D)(8)(c) of the Ohio Revised Code.[168] These factors include whether the petitioner consents to the termination, whether the petitioner fears the respondent, and the overall nature of the relationship between the petitioner and the respondent.[169] A court may deny the

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[164] Stevenson v. Stevenson, 714 A.2d 986 (N.J. Super. Ct. Ch. Div. 1998).

[165] *Id.* at 988. Abused mothers are often willing to rescind CPOs even after sustaining the most brutal forms of domestic violence. This case was no exception:

> On November 6, 1997, the parties appeared before this court for a hearing on plaintiff's complaint charging defendant with numerous violations of the *Prevention of Domestic Violence Act* (the Act). The testimony of plaintiff, the photographic exhibits offered by her counsel, and the graphic appearance at the hearing of the residual effects of the severe physical injuries she suffered, established by a clear preponderance of the evidence that defendant was guilty of attempted criminal homicide, aggravated assault, terroristic threats, criminal restraint and burglary, all in violation of the Act. These violations arose from a brutal, sadistic and prolonged attack by defendant on his wife during the late evening and early morning hours of October 29-30, 1997. The uncontroverted facts showed that during a drunken rage, defendant beat and tortured his wife so severely that she was critically injured, and had to be medevac'd by emergency helicopter to the Cooper Hospital Trauma Unit in Camden.

Id.

[166] *Id.* at 994.

[167] *Id.* at 993.

[168] OHIO REV. CODE ANN. § 3113.31(D)(8)(c).

[169] *Id.*

motion if the moving party does not show that a termination is appropriate under the circumstances.[170] Thus, if a judge senses that a battered mother is being coerced or threatened into terminating the CPO, he or she may deny the request.[171]

Yet, there is nothing in O.R.C. § 3113.31 that would *require* a coerced mother to modify her CPO to extend protection to a newborn. The *In re Gloria C.* court recognized that, "in the ordinary course of events, any violation of an order protecting the fetus would be dependent upon an adult, presumably the mother, filing a petition for redress on the fetus' behalf."[172] If a battered mother is under the domination of an abusive male, she will most likely refrain from including her expected baby within her pre-existing CPO. In such situations, the mother would become an instrument in exposing her child to further abuse.

A broad interpretation of O.R.C. § 3113.31 would avoid such a calamity by treating unborn, viable fetuses the same as children already living within a household. As the *In re Gloria C.* court stated, "[w]here a respondent has violated an order of protection issued to a child that has been born, legal redress is not absolutely dependent upon the willingness of the natural mother to proceed."[173] If the child's CPO was obtained while he or she was still *in utero*, "the court could proceed [to apply a remedy] even in the absence of the mother's desire to proceed or willingness to continue."[174] Thus, even if a mother's judgment became compromised by the influence of an abuser, a child would still enjoy adequate protection from domestic violence. If a fetus' right to a CPO were established, there would be "[n]o rational basis to deprive the unborn of the same enforcement procedures available to the child already born."[175]

VI. CONCERNS REGARDING WOMEN'S REPRODUCTIVE RIGHTS

Some feminist advocates would likely argue that the proposed approach towards civil protection orders impinges on female reproductive rights.[176] Their concerns lie in the possibility that another family member, and not the mother, would use a CPO

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[170] *Id.* § 3113.31(D)(8)(b).

[171] *Id.* Some might view these types of decisions as "paternalistic." However, authorities on the subject of domestic violence law have stated:

> This reconciliation pattern may frustrate those in the justice system, but judges have the authority to continuously use domestic violence laws to punish and prevent family violence, not regulate personal relationships. Judges will make their communities safer if they encourage victims to return to the justice system for help if reconciliation fails.

BENCHBOOK, *supra* note 39, at 36.

[172] *In re* Gloria C., 476 N.Y.S. 2d 991, 992 (N.Y. Fam. Ct. 1984).

[173] *Id.*

[174] *Id.*

[175] *Id.*

[176] *See generally* Amy Kay Boatright, *State Control Over the Bodies of Pregnant Women*, 11 J. CONTEMP. LEGAL ISSUES 903 (2001).

as a pretext for stopping the mother from aborting her fetus.[177] Such concerns are certainly not without merit, for as Professor Dawn E. Johnson has stated, "[a] woman's right to bodily autonomy in matters concerning reproduction is protected by the constitutional guarantees of liberty and privacy. . . . Any legal recognition of the fetus should be scrutinized to ensure that it does not infringe on women's constitutionally protected interests in liberty and equality during pregnancy."[178] Professor Johnson would call any expansion of fetal protective rights "foreboding" in light of its potential impact on maternal freedom.[179]

Another prominent Professor on reproductive law, Linda C. Fentiman, articulated in a recent scholastic publication that "[t]he last few years have witnessed an astonishing array of intrusive and punitive government actions against pregnant women. These government interventions, ranging from criminal prosecutions and fetal 'guardianship' proceedings to statutes safeguarding 'the unborn' and new 'regulatory interpretations' of existing law, are touted as necessary to protect fetuses . . . ."[180] She continued:

> Current "fetal protection" efforts pack a triple whammy: they undermine women's health, limit women's ability to fully participate in the economic life of the nation, and disproportionately affect the indigent and racial minorities. First, the new "fetal protection" threatens to limit women's ability to participate in the workforce and control their reproductive capability by raising the specter of civil or criminal liability if they engage in potentially risky activities before or during pregnancy. Second, many "fetal protection" initiatives seek to redefine the fetus as a person, with rights fully equal to those of a born human being, in a thinly disguised effort to limit abortion access. Finally, efforts to constrain women's actions for the benefit of their fetuses frequently reflect racial, gender, and class stereotypes about how women in general, or certain groups of women, do or should behave. It does not appear coincidental that poor women and women of color are the main targets of "fetal protection" efforts.[181]

Such concerns can be allayed by the recognition that, as previously mentioned, abortion after fetal viability is already generally criminalized within the state of Ohio.[182] An individual may not perform an abortion after viability unless "the abortion is necessary to prevent the death of the pregnant woman or a serious risk of the substantial and irreversible impairment of a major bodily function of the pregnant woman," or the fetus in question later becomes unviable.[183]

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[177] *See* Linda C. Fentiman, *The New "Fetal Protection": The Wrong Answer to the Crisis of Inadequate Health Care for Women and Children*, 84 DENV. U.L. REV. 537, 540 (2006).

[178] Dawn E. Johnsen, *The Creation of Fetal Rights: Conflicts with Women's Constitutional Rights to Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599, 600 (1986).

[179] *Id.* at 608.

[180] Fentiman, *supra* note 177, at 539.

[181] *Id*. at 540.

[182] *See* OHIO REV. CODE ANN. § 2919.17(A).

[183] *Id.*

Even if a family member other than the mother attempted to use a CPO to prevent an abortion during these narrowest of circumstances, the text of O.R.C. § 3113.31(C)(1) would almost certainly prevent this from occurring. The statute states that "[t]he petition [for relief under the domestic violence statute] shall contain . . . [a]n allegation that the respondent engaged in domestic violence against a family or household member of the respondent, including a description of the nature and extent of the domestic violence."[184]

In other words, in order for another family member to abuse the CPO statute as a pretext for preempting an abortion vital to the health of an expectant mother, the family member would have to articulate to a court some form of previous "abuse" that the mother perpetrated on the fetus. Though the Ohio Supreme Court has held that pre-natal drug-use is a form of *per-se* child abuse, it made its ruling regarding situations *after* the birth of the child.[185] Petitioners would certainly have a very difficult time articulating any sort of tangible abuse beyond situations such as these. Dictum from the *In re Gloria C.* decision addresses these concerns regarding women's reproductive health rights head on. In his opinion, Judge Daniel D. Leddy Jr. states:

> In the case at bar, the State's interest in protecting the fetus is consistent with the petitioner mother's desire and right to give birth to a healthy baby and in no way conflicts with her privacy right to freely decide what to do with her pregnancy. Exclusion of the fetus from protection under a remedial statute "serves only to immunize a wrongdoer from liability"; it does not serve to further the woman's constitutional right to privacy. In an article 8 proceeding [New York's CPO statute], the court is solely concerned with the fetus for the purpose of effectuating the statutory protection of a person from harm by another member of the family or household. In a statutory context not involving the mother's privacy interest, "person" may have a different legal meaning than in the abortion context.[186]

Therefore, although in many circumstances, other, more intrusive "fetal protection initiatives" might impinge on the personal rights of a pregnant mother, reproductive health advocates should not be alarmed by a broad interpretation of the word "child" under O.R.C. § 3113.31. Such a broad interpretation will not hamper a woman's constitutional right to privacy.

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[184] *Id.* § 3113.31(C)(1).

[185] *See In re* Baby Boy Blackshear, 736 N.E.2d 462 (Ohio 2000).

[186] *In re Gloria C.*, 476 N.Y.S.2d at 997. The opinion continues:

> Furthermore, how could the mother's privacy right be invoked to insulate a third party's behavior from the court's family offense jurisdiction? The right to abort is the mother's not the father's. Invalidating a spousal consent provision of Missouri's abortion statute, the Supreme Court held, "the State cannot delegate authority to any particular person, even the spouse, to prevent abortion during that same period [first trimester]." Therefore, this court believes that a father should not be allowed, by violent actions against the mother, to cause such a result.

Id. (quoting Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 69 (1976).

VII. CONCLUSION

In *The Domestic Violence Civil Protection Order and the Role of the Court*, distinguished Domestic Court Judge Michael J. Voris plainly stated that rather than shirking from the challenges presented by domestic violence, "[a]dvanced societies take intra-family violence seriously."[187] He emphasized that Ohio judges have a unique "leadership role in enlightening and educating attorneys and the community in general about the severity of the domestic violence issues."[188] Furthermore, he stated:

> Because the language of the [domestic violence] statutes is broad, the response of the Court has a profound impact in protecting victims of domestic violence. Judges have the power and authority to implement the legislation. . . . Judges can communicate a *powerful message* about the justice system's view of domestic violence within their own courtrooms.[189]

Based on the foregoing arguments, it is clear that the prevailing interpretation of O.R.C. § 3113.31 unreasonably allows situations detrimental to the safety of newborn children to exist within the state of Ohio. Judges have the authority to remedy this problem without the need for further legislation. Ohio courts should interpret O.R.C. § 3113.31 so as to include viable, unborn fetuses as parties entitled to CPOs. Doing so will prevent exposing infants to perilous intervals without protective coverage. What better way to send a "powerful message" regarding the judicial system's stance on domestic violence?

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[187] Judge Michael J. Voris, *The Domestic Violence Civil Protection Order and the Role of the Court*, 24 AKRON L. REV. 423, 432 (1990).

[188] *Id.*

[189] *Id.* (emphasis added).