The Right of the Fetus to be Born Free of Drug Addiction

A baby is born; its lusty cry signifies the first breath of life. But shortly after birth, the healthy cry will become shrill, the normally relaxed body will begin to twitch and convulse as the baby begins to experience the effects of withdrawal. The newborn baby is a heroin addict.

This child's mother was addicted to heroin during the baby's development and birth, and the mother's addiction passed to the child as it developed in her womb. This article will deal with the effects on the fetus of drug addiction during pregnancy, discussing the rights of the unborn and the State's power and duty to protect the fetus so that it is born drug-free.[1]

I. DRUG ADDICTION: A SPECIFIC AREA OF CONCERN

Improper care during pregnancy can adversely affect the developing fetus:

> Too many babies come into the world deformed in ways that could have been prevented. *Half of the children treated in our hospitals are there because their parents did not exercise reasonable care during pregnancy.* Fully 50% of all mentally defective children were exposed to an abnormal prenatal environment.[2]

To understand the importance of proper care during the third trimester in particular, it is helpful to understand the stages of development through which the fetus is going. In the seventh and eighth months, cerebral brain development is being completed.

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[1]For the purposes of this article, only the rights of the fetus in the third trimester, the last three months of pregnancy, will be considered. The U.S. Supreme Court has held that State interference in the first and second trimester may violate the rights of the mother. Roe v. Wade, 410 U.S. 113 (1973). However, the author maintains that by the third trimester, the State not only has a compelling interest in the potential life (*Id.*) but also the mother has made a commitment, if only by her inaction, to bear the child. Having made that commitment, she owes the same duty of care to the developing fetus that she would owe to her children who are already born.

[2]R. RUGH & L. SHETTLES, FROM CONCEPTION TO BIRTH 140 (1970); emphasis in original [hereinafter cited as RUGH & SHETTLES].

Memory, personality, imagination, reasoning power, voluntary muscular movement coordination, and coordination between the brain and the nervous system are being developed. The ninth month is a preparatory time: the fetus gains strength and re-positions itself into a head-downward posture for birth.[3]

A particular area of concern is the effect of drug addiction on the fetus. When a pregnant woman takes any drug, it will affect the fetus if the drug is capable of crossing the placenta. "Drug transfer increases with the increased rate of both fetal and maternal blood flow through the placenta, and with placental age."[4] Heroin readily passes through the placenta,[5] and thus, during the third trimester, more heroin will flow through the placenta, building the baby's need for narcotics in the same way that an addict's habit increases with larger doses of drugs. When the baby is born, it is cut off from the placental transfer and experiences the symptoms of withdrawal. The longer the mother has been on heroin, the more severe the withdrawal will be. The larger the dose the mother is taking, the more severe the withdrawal. The closer to delivery the mother takes her last dose, the more severe the withdrawal.[6]

Empirical medical studies in the area are sparse, primarily because it is only recently that drug addiction among pregnant women has become a pressing problem.[7] However, it is commonly reported that there is a uniformly high prematurity rate among babies born to addicted mothers. One study reported that 33% of births to addicted mothers were premature;[8] another study reported a rate of 56.5%[9] as compared to a prematurity rate of 7.7% for non-addicted babies.[10] Prematurity itself causes many problems,[11] and when the

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[3]*Id.* at 76.
[4]J. Marx, *Drugs During Pregnancy: Do They Affect the Unborn Child?*, 180 SCIENCE 174 (April 13, 1973).
[5]*See, e.g.*, JOHNSON AND JOHNSON, NARCOTIC ADDICTION IN THE NEWBORN 1 (1972).
[6]S. Burnam, *The Heroin Babies: Going Cold Turkey at Birth*, N.Y. TIMES, Jan. 9, 1972, Magazine 18; *see also* M. Stone, L. Salerno, M. Green and C. Zelson, *Narcotic Addiction in Pregnancy*, 109 AM. J. OBSTET. GYNECOL. 716 (1971) [hereinafter cited as Stone, *et al.*].
[7]Stone, *et al.*, *supra*, note 6, reported that at New York Medical College-Metropolitan Hospital Center, for example, the ratio of total deliveries to addicted deliveries in 1960 was 164:1; in 1969 the ratio was 47:1.
[8]G. Blinick, R. Wallach, and E. Jerez, *Pregnancy in Narcotics Addicts Treated by Medical Withdrawal*, 105 AM. J. OBSTET. GYNECOL. 997 (December 1969).
[9]J. Perlmutter, *Drug Addiction in Pregnant Women*, 99 AM. J. OBSTET. GYNECOL. 569 (October 1967) [hereinafter cited as Perlmutter].
[10]A. GUTTMACHER, PREGNANCY, BIRTH, AND FAMILY PLANNING 151 (1973).
[11]Premature babies are subject to anemia, asphyxia, blood problems, and because of these stresses on the underdeveloped system, there is a high probability that the infant will contract hyaline membrane disease (HMD). This results from too much stress on weak lungs causing respiratory failure. It is the biggest cause of infant deaths, claiming 20,000 lives a year. T. Berland, *Giving More of Our Infants the Lives They Deserve*, 49 TODAY'S HEALTH 16, 17 (August 1971).

inherent weaknesses caused by premature birth are coupled with the strains of narcotic withdrawal, the resulting impact upon the tiny child is overwhelming.

Heroin withdrawal symptoms, primarily affecting the central nervous system and the gastro-intestinal tract, usually begin ten minutes to forty-eight hours after birth.[12] The infant has tremors, is irritable, hyperactive, and sleepless, and has a characteristic shrill, high-pitched cry, quite different from the lusty yell of a healthy infant. These symptoms last two to three months. Coupled with the immaturity of the infant's central nervous system, they cause dehydration, nasal stuffiness, sneezing, twitching, yawning, lacrimation, protracted vomiting, diarrhea, and excessive sweating, all leading to an electrolyte imbalance. These are much the same conditions experienced by an adult going through withdrawal. Severely affected infants suffer convulsions, shock, apnea (absence of respiration), respiratory depression, and cyanosis (a condition caused by deficient oxygenation of the blood).[13] The average mortality rate for addicted infants receiving medical attention is about 9%,[14] as compared to an average of 2.2% in non-addicted babies.[15] Some studies have reported a mortality rate as high as 34% in infants receiving medical attention and 93% in untreated infants.[16]

A woman who does not seek medical care when she is pregnant is passively risking harm to herself and her child;[17] one who takes heroin is actively causing harm to herself and the infant. The stresses and life-endangering conditions are imposed upon the newborn baby by affirmative acts of the mother. If she were providing doses of heroin to her children, it would manifestly be considered child abuse.[18] Yet no law specifically prohibits the abuse of the fetus, who has no choice but to take the drug and suffer the agonies of withdrawal at birth, possibly coming into the world prematurely with a less-than-average chance of survival. The author submits that, in such situations, the State must provide legal and medical assistance to protect the rights of the fetus.

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[12] M. Desmond, R. Schwanecke, G. Wilson, S. Yasunaga, I. Burgdorff, *Maternal Barbiturate Utilization and Neonatal Withdrawal Symptomatology*, 80 J. PEDIATR. 190 (February 1972).
[13] W. Henley and G. Fisch, *Newborn Narcotic Withdrawal Associated With Regional Enteritis in Pregnancy*, 66 N.Y. ST. J. MED. 2565, 2566 (October 1966) [hereinafter cited as Henley & Fisch].
[14] *Id.*
[15] Perlmutter, *supra* note 9, at 571.
[16] Henley and Fisch, *supra* note 13.
[17] "The likelihood of miscarriage or infant mortality is always much higher without professional help, and many mothers as well as their babies may be lost in the process." RUGH & SHETTLES, *supra* note 2, at 114.
[18] CAL. PEN. CODE § 273a (West 1970).

II. DEVELOPMENT OF THE RIGHTS OF THE UNBORN

In early English common law, the fetus had certain property rights from the time of conception:

> An infant *en ventre sa mere* [in the mother's womb] is supposed in law to be born for many purposes. It is capable of having a legacy, or surrender of a copyhold estate, made to it. It may have a guardian assigned to it; and it is enabled to have an estate limited to its use, and to take afterwards by such limitation, as if it were then actually born.[19]

When the fetus became quickened,[20] common law recognized that its life had value to the state. Killing a quickened child was a crime, although not considered murder unless the child was born alive and later died as a result of the prenatal infliction.[21] A pregnant woman, quick with child, could not be executed.[22]

The term "quickened" has since been replaced by the more definitive "viable." In *Keeler v. Superior Court*,[23] Justice Burke's dissenting opinion expressed one advantage to the change in terminology: "viable" is a more satisfactory term to express the medically determinable point at which the fetus can survive independently from its mother.[24] The United States Supreme Court has determined that it is at this viable stage, at about the beginning of the third trimester, when the State acquires a compelling interest in the fetus. The Court reasoned that the fetus is capable of life outside the womb and therefore it is logically and biologically sound for the State to begin protection at that point.[25]

Although the fetus was considered a separate entity for many purposes, early American cases held that there was no cause of action for prenatal injuries, even if the child subsequently were born alive.[26] In 1946, *Bonbrest v. Kotz*[27] reversed the trend, allowing recovery, for "injuries sustained by the infant when it was allegedly taken from its mother's womb through professional malpractice."[28] Now all states follow this notion, allowing recovery for prenatal injuries if the child later is born alive.[29] However, there is still a split

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[19] BLACKSTONE, COMMENTARIES *130.
[20] When its movement could be felt by the mother, usually in the second trimester. People v. Barksdale, 18 Cal. App. 3d 813, 96 Cal. Rptr. 265 (1971).
[21] COKE, 3 INSTITUTES *58.
[22] *See* BLACKSTONE, COMMENTARIES *395. Vestiges of this remain today in California. *See* CAL. PEN. CODE §§ 3705, 3706 (West 1970).
[23] 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).
[24] Keeler v. Superior Court of Amador County, 2 Cal. 3d 619, 641, 470 P.2d 617, 631, 87 Cal. Rptr. 481, 495 (1970) (dissenting opinion).
[25] Roe v. Wade, 410 U.S. 113, 163 (1973).
[26] Dietrich v. Inhabitants of Northhampton, 138 Mass. 14 (1884).
[27] 65 Fed. Supp. 138 (D.D.C. 1946).
[28] *Id.* at 139.
[29] PROSSER, TORTS 335 (1971).

in the courts regarding actions for wrongful death if the child is stillborn.[30]

California takes the minority view, not allowing the cause of action. *Bayer v. Suttle*[31] is the most recent California case denying recovery. A woman in her eighth month of pregnancy was in an auto accident and miscarried four days later. Recovery was denied on grounds that the legislative intent in California Civil Code section 377, the wrongful death statute, was to exclude the unborn from the definition of "person."[32]

Although it denies recovery to a stillborn infant because it is not a person, California statutory authority gives the unborn the rights of a person insofar as its interests require in the event of its subsequent live birth.[33] By statute and common law,[34] California recognizes the right of the fetus to be healthy and free of injury if born alive.

III. THE STATE'S ROLE IN THE PROTECTION OF THE RIGHTS OF THE UNBORN

A. THE STATE'S POWER AS *PARENS PATRIAE* TO PROVIDE MEDICAL CARE FOR CHILDREN

Invoking the doctrine of *parens patriae*,[35] the State may act to protect children and others in need of protection. The doctrine was well-stated by the New Jersey Supreme Court:

> This *parens patriae* jurisdiction is a right of sovereignty and imposes a duty on the sovereignty [*sic*] to protect the public interest and to protect such persons with disabilities who have no rightful protector.[36]

The *parens patriae* notion is based upon the idea that the government

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[30] Minnesota was the first state to grant a cause of action. Verkennes v. Corniea, 299 Minn. 365, 38 N.W.2d 838 (1949). Here, the mother's uterus ruptured during labor because of medical malpractice. The baby was stillborn and its personal representative was allowed to maintain an action against the doctor on behalf of the decedent's next of kin. For a list of states granting a cause of action and those not granting a cause of action, *see* Bayer v. Suttle, 23 Cal. App. 3d 361, 363, 100 Cal. Rptr. 212, 213 (1972).

[31] 23 Cal. App. 3d 361, 100 Cal. Rptr. 212 (1972).

[32] *See also* Norman v. Murphy, 124 Cal. App. 2d 95, 268 P.2d 178 (1954).

[33] CAL. CIV. CODE § 29 (West 1954) states in pertinent part: "A child conceived, but not yet born, is deemed to be an existing person, so far as may be necessary for its interests in the event of its subsequent birth. . . ."

[34] *See e.g.*, Scott v. McPheeters, 33 Cal. App. 2d 629 (1939).

[35] J. Cardozo defined the power as derived from English common law: "The chancellor . . . acts as *parens patriae* to do what is best for the interest of the child. He is to put himself in the position of a 'wise, affectionate, and careful parent' and make provision for the child accordingly. He 'interferes for the protection of infants, *qua* infants, by virtue of the prerogative which belongs to the Crown as *parens patriae*'." Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624 (1925) (Citations omitted).

[36] Johnson v. State, 18 N.J. 422, 114 A.2d 1, 5 (1955).

is the supreme protector of its citizens.[37]

The *parens patriae* doctrine has been invoked to protect society as a whole[38] and to protect individual adults.[39] However, it is more commonly applied to children, to protect their welfare, even to the extent of mandating medical care against the wishes of the parents.[40] The United States Supreme Court recently stated:

> [T]he power of the parent, even when linked to a free exercise [of religion] claim, may be subject to limitation . . . if it appears that parental decisions will jeopardize the health or safety of the child, or have a potential for significant social burdens.[41]

There are three possible situations where medical care for children may be mandated against the wishes of the parents: 1) treatment to safeguard public health; 2) life-saving medical treatment; 3) treatment for non-fatal physiological conditions. Case law concerning compulsory medical care for children is sparse, but consistent trends are emerging from those cases which have considered the issues.[42]

The first situation in which the State will interfere in the parent-child relationship is to safeguard public health. This is widely accepted; for example, vaccinations and immunizations may be required over parental objection of all children as a condition for entrance to school.[43]

In life-saving situations, the child is to be given medical care even though the parent will not consent. For example, a class action on behalf of minor Jehovah's Witnesses was brought against a hospital, asking that it be permanently enjoined from giving blood transfusions to the plaintiffs. The court denied relief, citing *Prince v. Massachusetts*,[44] for the power of the State to mandate care under the *parens patriae* doctrine.[45] Those courts faced with the issue have declared the child to be neglected under the relevant state statute[46] and have appointed a guardian for the purpose of consenting to

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[37] *See, e.g.*, Massachusetts v. Mellon, 262 U.S. 447 (1923).
[38] Jacobson v. State, 197 U.S. 11 (1904) (compulsory smallpox vaccinations); State *ex rel.* Holcomb v. Armstrong, 239 P.2d 545 (Wash. 1952); *In re* Milstead, 44 Cal. App. 239, 186 P. 170 (1919) (compulsory examination for veneral disease).
[39] J.F.K. Memorial Hospital v. Heston, 58 N.J. 576, 279 A.2d 670 (1971); Application of the President and Directors of Georgetown College, Inc., 331 F.2d 1000 (D.C. 1964), *cert. denied* 377 U.S. 978 (1964). (Both cases compelled an adult to undergo life-saving medical care against the adult's wishes.)
[40] Prince v. Massachusetts, 321 U.S. 158 (1904).
[41] Wisconsin v. Yoder, 406 U.S. 205, 233-234 (1972).
[42] *See* KATZ, WHEN PARENTS FAIL 10-12.
[43] Mannis v. State, 398 S.W.2d 206 (Ark. 1966); McCartney v. Austin, 57 Misc. 2d 525, 293 N.Y.S.2d 188, *aff'd.* 31 App. Div. 2d 370, 298 N.Y.S.2d 26 (1968).
[44] 321 U.S. 158 (1904).
[45] Jehovah's Witnesses of Washington v. Kings County Hospital, 278 Fed. Supp. 488 (W.D. Wash. 1967), *aff'd. per curiam* 390 U.S. 598 (1968).
[46] *See e.g.* CAL. WELF. & INST. CODE § 600 (West 1954).

the necessary medical treatment.[47] When considering a case in which the parents refused to consent to blood transfusions for their child, the Illinois Supreme Court stated:

> We entertain no doubt that this child, whose parents were deliberately depriving it of life or subjecting it to permanent mental impairment, was a neglected child within the meaning of the statute.[48]

It is not nearly as well-settled that a court may interfere in a non-life-saving situation. Two key cases have recently arisen in this area. In *In re Sampson*,[49] a fifteen-year-old boy was suffering from Von Reckinghausen's disease, which caused massive disfigurement of his face and neck. In addition to his physiological impairment, he suffered psychological harm from his grotesque condition; because of his appearance he did not attend school and, as a result, was virtually illiterate. The court ordered the treatment necessary to correct the condition, even though the child's life was not endangered.

In *In re Karwath*,[50] the court was faced with three children, ages ten, eight, and six, whose severely inflamed tonsils and adenoids threatened to cause deafness and rheumatic fever. The father objected to the necessary operations on "religious grounds," but none were specified by him at trial. The court, in holding that the children must undergo treatment, stated:

> The legal custodian's statutory duty to provide ordinary medical care presupposes a right to do so in appropriate circumstances over parental objections even in the absence of immediate risk to life or limb.[51]

The emerging trend, then, is that treatment to safeguard public health or to save an endangered life and in some cases to remedy non-fatal physiological conditions, where there are no physical dangers, will be ordered to protect the welfare of the child.

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[47] *See* N.J. v. Perricone, 37 N.J. 463, 181 A.2d 751 (1962); Santos v. Goldstein, 16 App. Div. 2d 755, 227 N.Y.S.2d 450 (1962); Application of Brooklyn Hospital, 45 Misc. 2d 914, 258 N.Y.S.2d 621 (1965); *In re* Clark, 21 Ohio Ops. 2d 86, 90 Ohio L. Abs. 21, 185 N.E. 128 (1962).

[48] People *ex rel.* Wallace v. Labrenz, 411 Ill. 618, 104 N.E.2d 769, 773 (1952).

[49] 65 Misc. 2d 658, 317 N.Y.S.2d 641, *aff'd. per curiam* 37 App. Div. 2d 668, 323 N.Y.S.2d 253, *aff'd. per curiam* 29 N.Y.2d 900, 328 N.Y.S.2d 686, 278 N.E.2d 918 (1972).

[50] 199 N.W.2d 147 (Iowa 1972).

[51] *Id.* at 150. *But see In re* Green, 448 Pa. 338, 292 A.2d 387 (1972), involving parental objections to medical treatment on clearly stated religious grounds. The Green child, age sixteen, suffered from polio as a youngster, which resulted in a 96% curvature of the spine. He was medically termed a "sitter"; he could not stand or lie down. An operation could correct this condition, and although the parents did not object to the surgery, they did object to the blood transfusions which necessarily accompanied the surgery. The court stated that compelling treatment in this case would conflict with the free exercise clause of the First Amendment, and the case was remanded to determine the child's views on the matter, since he was old enough to be able to make a decision.

B. THE STATE'S POWER AS *PARENS PATRIAE* TO PROTECT THE FETUS

The protection of the fetus can be viewed through four lines of analysis: 1) recognition of the State's interest in care for the fetus in the third trimester; 2) protection in life-saving situations; 3) the right of the fetus to necessary medical care; 4) the right of the fetus to be born drug-free.

In the third trimester, the fetus is subject to the State's protection; the United States Supreme Court declared in one of the major recent abortion decisions, "[In the third trimester] a state may properly assert important interest in safeguarding health, in maintaining medical standards, and in protecting potential life."[52]

In life-saving situations, courts have declared the fetus to be neglected and have appointed a guardian for the fetus, *in utero*, to consent to medical treatment. In *Hoener v. Bertinato*[53] a Jehovah's Witness with an Rh factor conflict refused to allow an *in utero* transfusion for her fourth pregnancy. The court had ordered such a transfusion for her second pregnancy and the child was healthy. She refused a transfusion for her third pregnancy and the infant died. The court ordered the transfusion for the fourth pregnancy, stating that failure to have the treatment would be child abuse.

This *in utero* medical treatment is generally for *erythroblastosis fetalis*, a disease caused by the conflict between the mother's and the fetus' Rh types. Before intrauterine transfusions were developed in 1963, doctors would either deliver the baby prematurely and transfuse its blood, risking the often fatal problems of prematurity, or let it go full term, in which case the mother's blood often poisoned it before birth. Now, with intrauterine transfusions, the child can be saved with no appreciable danger to the mother or the fetus.[54]

The right of the fetus to be provided with necessary medical care is recognized in California. California Penal Code § 270 provides in pertinent part:

> If a father of either a legitimate or an illegitimate minor child wilfully omits, without lawful excuse, to furnish necessary . . . medical attendance . . . he is guilty of a misdemeanor. . . . *A child conceived but not yet born is to be deemed an existing person insofar as this section is concerned.*[55]

The language of California Penal Code § 270 is similar to that of

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[52] Roe v. Wade, 410 U.S. 113, 154 (1973).
[53] 67 N.J. Super, 517, 171 A.2d 140 (1961). *See also* Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson, 42 N.J. 421, 201 A.2d 537 (1964), *cert. denied* 377 U.S. 985.
[54] D. ZIMMERMAN, RH: THE INTIMATE HISTORY OF A DISEASE AND ITS CONQUEST (1973).
[55] CAL. PEN. CODE § 270 (West Supp. 1973). Emphasis added.

California Civil Code § 29: both expressly give the fetus the rights of a person. Formerly, California Penal Code § 187, the murder statute, did not expressly include the fetus in its scope. In *Keeler v. Superior Court*,[56] the California Supreme Court concluded that it was the intent of the Legislature not to include the fetus. The Legislature responded by amending the statute to expressly include the fetus. [57] The criminal child abuse statute[58] does not expressly apply to the fetus, and the issue has not yet come before the California courts.

The State has a compelling interest in protecting the welfare of the fetus in the third trimester.[59] The fetus has the right to be born healthy if born alive[60] and to be provided with necessary medical care.[61] Killing a viable fetus is murder.[62] Considering these principles, it would be consistent with the Legislative trend to interpret the code section which forbids the commission of acts which injure or endanger a child's health[63] as including abuse of the fetus.

If the laws referred to are not sufficiently explicit, they should be made explicit so that the unborn has a definite right to be born drug-free. Currently, it appears that a doctor or social worker can try to persuade a pregnant addict to undergo treatment, but cannot compel her to do so. Although the Food and Drug Administration recently passed a regulation giving special considerations to pregnant women in methadone programs,[64] the increasing number of babies

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[56] 2 Cal. 3d 619, 470 P.2d 617, 87 Cal. Rptr. 481 (1970).
[57] CAL. STATS. 1970, ch. 1131, § 1, p. 2440.
[58] CAL. PEN. CODE § 273a (West 1970) provides:

> (1) Any person who, under circumstances or conditions likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health is endangered, is punishable by imprisonment in the county jail not exceeding 1 year, or in the state prison for not less than 1 year nor more than 10 years.
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> (2) Any person who, under circumstances or conditions other than those likely to produce great bodily harm or death, willfully causes or permits any child to suffer, or inflicts thereon unjustifiable physical pain or mental suffering, or having the care or custody of any child, willfully causes or permits the person or health of such child to be injured, or willfully causes or permits such child to be placed in such situation that its person or health may be endangered, is guilty of a misdemeanor.

[59] Roe v. Wade, 410 U.S. 113 (1973).
[60] CAL. CIV. CODE § 29 (West 1954).
[61] CAL. PEN. CODE § 270 (West 1970).
[62] CAL. PEN. CODE § 187 (West 1970).
[63] CAL. PEN. CODE § 273a (West 1970).
[64] 21 C.F.R. 130.44 (April 1973). Methadone programs are drug maintenance programs where methadone takes the place of heroin. Detoxification as used in this article is supervised withdrawal resulting in a totally drug-free condition.

born addicted to heroin[65] indicates that some pregnant women do not shed their drug habit, despite the fact that their babies will share their addiction. And methadone programs are not a satisfactory answer. Some studies indicate that infant withdrawal from methadone is even more severe than from heroin.[66]

While there is no statute dealing with pregnant addicts, there is a provision for the involuntary commitment of narcotics addicts:

> It is the intent of the Legislature that persons addicted to narcotics, or who by reason of repeated use of narcotics are in imminent danger of becoming addicted, shall be treated for such condition and its underlying causes, and that treatment shall be carried out for non-punitive purposes not only for the protection of the addict, or person in imminent danger of addiction, against himself, *but also for the prevention of contamination of others* and the protection of the public.[67]

As *parens patriae*, the State thus compels treatment to protect the addict and society as a whole. To compel the pregnant addict to enter the detoxification program would prevent the contamination of the defenseless fetus. As in the compulsory blood transfusion cases,[68] a guardian could be appointed for the fetus to represent its interests, if necessary. The statutory provisions for compulsory detoxification of one who has committed a crime[69] and requiring medical personnel to report evidence of child abuse[70] could serve as authority to compel detoxification of the pregnant addict, using criminal abuse or neglect to trigger the application of the detoxification statute. The physician would be required to report the addiction, and the mother, who had abused her unborn child, would undergo detoxification.

California Welfare and Institutions Code §§727 and 739 provide that medical care may be ordered for children deemed neglected. [71]

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[65] Stone, *et al.*, *supra* note 6.

[66] B. Rajegowda, L. Glass, H. Evans, G. Maso, D. Swartz, and W. Leblanc, *Methadone Withdrawal in Newborn Infants*, 81 J. PEDIATR. 532 (September 1972). The reason for the severity could be because methadone is stronger than heroin or because its different chemical properties cause greater placental passage.

[67] CAL. WELF. & INST. CODE § 3000 (West 1972). Emphasis added.

[68] *Supra* note 53.

[69] CAL. WELF. & INST. CODE § 3050 (West 1972).

[70] CAL. PEN. CODE § 11161.5 (West Supp. 1973).

[71] CAL. WELF. & INST. CODE § 727 (West Supp. 1973) provides in pertinent part: "When a minor is adjudged a dependent child of the court, on the ground that he is a person described by Section 600, the court may make any and all reasonable orders for the care . . . including medical treatment, subject to further order of the court." CAL. WELF. & INST. CODE § 739(a) (West 1973 Supp.) provides in pertinent part: "Whenever any person is taken into temporary custody under the provisions of Article 6 (commencing with § 625) of this chapter and is in need of medical . . . care, the probation officer may, upon the recommendation of the attending physician . . . authorize performance of such medical . . . care. . . . [I]f the parent . . . objects, such care shall be given only upon order of the court in the exercise of its discretion."

Like the criminal abuse statute, the language of the statutes is not specifically extended to the fetus, but California Civil Code §29, giving the fetus the rights of a person, could be read into the statutes. Further, the same arguments regarding the legislative trend to protect the fetus could apply to the California Welfare and Institutions Code sections as apply to the criminal abuse statute.

But rather than having the court fit the present statutes into the pigeonholes of the present drug program statute, it would be a more workable solution for the Legislature to add a new section to the drug treatment statute, providing for compulsory detoxification of pregnant addicts within the third trimester so that the mother and infant are drug-free at the time of delivery.[72] When the mother imposes her addiction upon an unborn child who cannot choose otherwise, the State cannot leave the child unprotected.

IV. CONCLUSION

The fetus has the right to be born healthy, and this right is protected by the State, under statute and common law. When the mother has made the decision to bear the child, she has the obligation to care for it. Failing in this obligation, the State steps in, declares the fetus to be neglected or abused, and appoints a guardian to consent to the necessary care. This right to care could, and should, be extended to the area of drug detoxification, compelling the mother to be free of narcotic addiction prior to delivery so that the newborn infant will not have to suffer the pains and dangers of withdrawal.

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[72]This may raise a question of due process, but it is not insurmountable. Within the nine months, and even within the third trimester, there is sufficient time for a hearing, if necessary. Furthermore, the State has exercised its power as *parens patriae* to compel treatment in life-saving situations discussed earlier. Considering the above-average mortality rate for addicted infants, this is potentially a life-saving situation in which the mother may be compelled by the State to undergo treatment to protect the life growing inside her.

Although there is not much medical information on *in utero* withdrawal (Perlmutter, *supra* note 9, at 572), when one balances the supervised medical withdrawal and pre-post natal care proposed against the present situation, the proposed program comes out ahead. On the side of the present situation, there is a 9% mortality rate if it is known that the baby is addicted. This may rise as high as 93% if addiction is undetected (*supra* note 17). Even if there were no other advantages, at least the mother is compelled to have medical supervision in her third trimester of pregnancy.