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The Prosecutor's Role in Solving the Problems of Prenatal Drug Use and Substance Abused Children

by
PAUL A. LOGLI*

The prosecutor has more control over life, liberty, and reputation than any other person in America. His discretion is tremendous This authority has been granted by people who really wanted the right thing done—wanted crime eliminated—but also wanted the best in our American traditions preserved.

Attorney General Robert H. Jackson, 1940.¹

America's prosecutors are caught in an avalanche of problems involving the overburdened criminal justice system: caseloads are high, courtrooms are packed, and prisons are holding more inmates than they were ever intended to house. The scourge of drug use has driven up the crime rate and made parts of our cities practically uninhabitable.

Although prosecutors do control whether particular cases will or will not be tried, they have little control over the volume and general nature of the criminal prosecutions that actually occur within their respective jurisdictions. Prosecutors exert even less control over the underlying social problems that translate into criminal events. Social ills such as poverty, illiteracy, homelessness, and lack of economic opportunity produce an environment within which despair controls and the victimization of others becomes a way of life. In the face of all this, citizens bring more pressure on the criminal justice system to respond forcibly

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1. John J. Douglass, An Address to Conference of U.S. Attorneys, *reprinted in* ETHICAL ISSUES IN PROSECUTION 9 (1988).

and effectively to the crimes that increasingly compromise our personal safety and rob us of our possessions.

It is in the midst of these powerful forces that prosecutors have been compelled to formulate a response to the issue of substance abused children. Dr. Ira Chasnoff's 1988 study, conducted by the National Association of Perinatal Addiction Research and Education,² quantified the problem of substance abused children. His survey of thirty-six selected hospitals located throughout the United States indicated that as many as 11% of all births, or 375,000 children per year were exposed *in utero* to illegal drugs.³ There can be no doubt the problem is grave. The question arises whether the criminal justice system is a proper place to address the problem of substance abuse during pregnancy, and if so, what is the prosecutor's role?

A. The Role of the Criminal Justice System

Physicians throughout the country are mandated by law to report suspected child abuse and neglect to either child protection agencies or local law enforcement authorities.⁴ Whether the abuse or neglect is physical, sexual, or medical a report must be filed under penalty of law. In many states these reports, after being reviewed and evaluated by child protection authorities or law enforcement officers, are passed on to a prosecutor to determine if penal action should be taken. Such action might involve the filing of charges in adult criminal court against the perpetrator of the abuse, or it might involve the filing of a petition in the name of the child in juvenile or family court. In either event, the prosecutor, by virtue of her position, serves as the gatekeeper to the criminal and juvenile justice systems.

The prosecutor does not have the luxury of declining involvement in cases simply because of a general lack of resources. There is no quota on the number of murders, armed robberies, rapes, or burglaries that can be handled by the local prosecutor. Similarly, such constraints cannot be invoked to justify prosecutorial neglect of cases involving addicted or damaged newborns.

2. *A First: National Hospital Incidence Survey and Substances Most Commonly Abused During Pregnancy and Their Risks to Mother and Baby*, NAPARE UPDATE (Nat'l Ass'n for Perinatal Addiction Research and Educ., Chicago, Ill.) (May 1989) [hereinafter NAPARE UPDATE].

3. See NAPARE UPDATE, *supra* note 2.

4. See, e.g., Child Abuse Prevention and Treatment Act of 1974, 42 U.S.C. §§ 5101-5107 (1982).

This is especially true given the high correlation between parental alcohol and drug abuse and the abuse and neglect of children. One study showed a correlation as high as 83% between drug and alcohol misuse and child abuse or neglect by the substance abusers.⁵ Cases of continuing child abuse or neglect due to the parent's drug use have been documented elsewhere. Medical examiners in Rhode Island have documented several cases of cocaine related deaths of infants.⁶ Cases cited include: malnutrition and dehydration in a seven week-old child during continuing cocaine abuse by the parents;⁷ and a teenage sibling's suspected cocaine lacing of baby milk ingested by a six week-old brother.⁸ Indeed, it is becoming clear that, if a prosecutor fails to respond with appropriate court action at the initial report of a substance abused infant, the child has a high likelihood of coming back into the system as a victim of parental abuse or neglect. Thus the prosecutor's involvement often is mandated by concerns beyond the mere use of drugs during pregnancy.

B. The Prosecutor's Role

With little research available and without the benefit of specific legislation or clear cut social, medical, and public policies, prosecutors have been called upon by concerned citizens and child welfare authorities to respond to the problem of substance abused infants. Whether the damage occurs after birth at the hands of a strung out parent or before birth by the transfer of drugs from mother to child in the womb, the result is the same—a child in need of protection from its own parents.

In July 1990, prosecutors, medical personnel, and treatment and social services professionals gathered in Chicago to discuss the issue of substance abused infants.⁹ The conference offered prosecutors and others their first major opportunity to gather for the sole purpose of discussing maternal drug abuse during pregnancy. While the conference produced no agreement on a single approach to the problem, we agreed that inaction would produce an enormous economic cost to society as drug affected children took their place in the health care and educational systems of our nation. The conference report indicated, in part, that

5. Robert W. ten Bensel, *Assessing the Dynamics of Child Neglect and Abuse*, JUV. & FAM. CT. J., Winter 1984-1985, at 37.

6. William Q. Sturner et al., *Cocaine Babies: The Scourge of the '90's*, 36 J. FORENSIC SCI. 34-35 (1991).

7. *Id.* at 36-37.

8. *Id.* at 37.

9. The conference was cosponsored by the American Prosecutor's Research Institute's National Center for Prosecution of Child Abuse and the Cook County State's Attorney's Office.

prosecutors have an important positive role to play in developing and implementing strategies to combat parental drug abuse, but that any approach must be multidisciplinary and should be directed at treatment, not punishment, of pregnant women.¹⁰ We also recognized that it would be necessary to correct the almost universal misconception that "prosecution" means "punishment" or "incarceration." In fact, prosecution may lead to a period of court supervision as the woman enters into the drug treatment and child protection systems.

Why, then, would a prosecutor get involved in the issue of substance abused infants? Most prosecutors are involved because they have to be. Faced with the actual presence of a damaged or dead child due to maternal substance abuse, the prosecutor is under a legal obligation to deter the conduct of the offending individual and protect the living child from future abuse. No prosecutor can stand by while a child is allowed to go home with an untreated and actively addicted parent. While a few prosecutors may be trying to grab a headline, most simply are fulfilling their statutory duty to advance the best interest of a child.¹¹

Although the social, legal, and medical debate continues over the appropriate response to the problem, prosecutors have started to build a body of case law, practical experience, and legislative initiatives that should guide the response of the criminal justice system. Although no response has met universal acceptance, certain trends are becoming apparent.

(1) The Need for Legislation

Although cases brought under existing criminal statutes have grabbed headlines, the results are clearly mixed. Prosecutors from several states have attempted to prove that criminal delivery of controlled

10. See *Substance Abused Infants: A Prosecutorial Dilemma*, 3 NCPA UPDATE (Nat'l Ctr. for Prosecution of Child Abuse) (Sept/Oct. 1990).

11. Our prosecution of 24 year-old Melanie Green in May 1989 began with the death of her two day-old daughter Bianca. Both mother and daughter tested positive for cocaine, and pathologists determined that the baby's death was the result of a prenatal injury related to the mother's cocaine use during her pregnancy. Had we taken no action, we would have ignored the drug related death of a person entitled to legal protection. This seemed hypocritical, in light of the fact that Illinois law imposes criminal liability on a person who inflicts harm on a pregnant woman that results in the death of the woman's child after a live birth. See *People v. Bolar*, 109 Ill. App. 3d 384, 389, 440 N.E.2d 639, 643 (1982).

Although the grand jury failed to hand down an indictment in the case, the arrest of Ms. Green ignited a national debate that remains unsettled. Although the deliberation and vote of grand jurors are secret under Illinois law, the questions the jurors asked the witnesses indicated that they were sympathetic to the grieving mother and not comfortable with charging involuntary manslaughter and criminal delivery of a controlled substance in the case of maternal drug use.

substances has occurred via the umbilical cord after birth but before the cord is severed. Although used successfully in Florida,¹² this argument was rejected in Michigan.¹³

Given the lack of consistent legal precedent, one role of the prosecutor in combatting the problem of substance abuse during pregnancy is to test the legal waters of her appellate jurisdiction. More importantly, by bringing such test cases, prosecutors encourage legislatures to address the issue directly. Having legislation upon which to base a charge is necessary to address claims that an accused lacked proper notice of the proscribed conduct under the existing statutes and that, therefore, such a prosecution violates a defendant's due process rights.

Most prosecutors believe, and political reality seems to indicate, that statutes specifically prohibiting drug use by pregnant women will have a greater chance of passage if they are primarily intended to foster rehabilitation rather than impose punishment. This kind of legislation is also consistent with the belief of most prosecutors that women who have engaged in prenatal substance abuse should be placed in available treatment beds, not prison beds.

A legislative scheme could mandate either a diversion or deferred prosecution philosophy.¹⁴ Courts, upon a finding or plea of guilty, could refrain from entering a judgment of conviction and instead order the defendant to participate in an appropriate drug treatment program. Successful completion of the program would then result in the dismissal of the original criminal charge. Punitive measures would be used only as a last resort. If the defendant refused to participate in the court ordered drug treatment program, or relapsed and failed to re-enroll or otherwise complete the program, the statute could authorize the court to impose a range of punitive measures including probation or imprisonment.

(2) Prosecutors' Use of the Juvenile and Family Court Systems

Prosecutors have frequently used abuse and neglect laws¹⁵ to bring children who are born substance abused into the protective confines of the juvenile or family courts. Our own experience in Winnebago County

12. *Johnson v. State*, 578 So. 2d 419 (Fla. Dist. Ct. App. 1991) (conviction affirmed by divided panel and question certified to Florida Supreme Court: whether ingestion of a controlled substance by a mother, who knows that it will pass to her child, is a violation of Florida law).

13. *People v. Hardy*, 188 Mich. App. 305, 469 N.W.2d 50 (1991).

14. Deferred prosecution is a system under which a prosecutor refrains from filing a formal criminal charge if the alleged offender complies with certain conditions, such as a drug treatment program or parenting class.

15. Illinois statutes provide, for instance:

has been that when we work with the Illinois Department of Children and Family Services (DCFS) in identifying drug exposed infants and then file abuse or neglect petitions in juvenile court, we are successful in gaining for the children protected status as wards of the court. This often acts as an incentive for the children's mothers to participate in appropriate drug treatment programs.

Some legislatures have facilitated this prosecutorial response by expanding the definition of an abused or neglected child to include those children born with controlled substances in their blood or urine.¹⁶ Even absent such legislation, prosecutors successfully have used general allegations of abuse and neglect to prove that a child showing signs of withdrawal or addiction deserves protection by the family court from future abuse.¹⁷

Proceedings within the family or juvenile court are not punitive in nature, but do authorize certain protective orders against both parents. Those orders may include parental drug or alcohol treatment, parenting classes, and continued supervision by appropriate state agencies. The effectiveness of juvenile court intervention is limited, however, by the availability of foster homes for those children who must be removed from their natural family for their own protection and by the accessibility of

Those who are abused include any minor under 18 years of age whose parent or immediate family member, or any person responsible for the minor's welfare, or any person who is in the same family or household as the minor, or any individual residing in the same home as the minor, or a paramour of the minor's parent:

(i) inflicts, causes to be inflicted, or allows to be inflicted upon such minor physical injury, by other than accidental means, which causes death, disfigurement, impairment of physical or emotional health, or loss or impairment of any bodily function;

(ii) creates a substantial risk of physical injury to such minor by other than accidental means which would be likely to cause death, disfigurement, impairment of emotional health, or loss or impairment of any bodily function . . .

ILL. REV. STAT. ch. 37, para. 802-3(c)(2) (1989).

16. See ILL. REV. STAT. ch. 37, para. 802-3(c) (1989).

17. See *In re Baby X*, 97 Mich. App. 111, 116, 293 N.W.2d 736, 739 (1980). In *Baby X*, the mother argued that her prenatal ingestion of narcotics did not constitute neglect sufficient for the Probate Court's assertion of jurisdiction. The Michigan court responded by holding that prenatal behavior can be probative of a child's neglect. It held that a newborn suffering narcotics withdrawal symptoms as a consequence of prenatal maternal drug addiction may properly be considered a neglected child. See also *In re Stefanel Tyasha C.*, 157 A.D.2d 322, 326, 556 N.Y.S.2d 280, 283 (N.Y. App. Div. 1990). In *Stefanel Tyasha* the respondent mother asserted that prenatal conduct could not form a basis for a finding of neglect of a living child. The New York Court disagreed and held that a family court petition alleging the mother's admitted use of drugs during her pregnancy, the child's positive toxicology for cocaine at birth, and the failure of the mother to enroll in a drug rehabilitation program was sufficient to state a cause of action for neglect in the Family Court.

drug treatment programs that will admit women, many of whom will be indigent.

C. Proposal

A multidisciplinary approach that protects children from substance abuse and establishes necessary treatment programs for women, especially those who are pregnant and addicted, should be implemented. This approach would involve professionals from the medical, legal, and treatment and social services fields.

Often the first professional to be alerted to a pregnant woman's substance abuse is her doctor. Unfortunately, legitimate concerns have been raised regarding what appears to be a racial and economic imbalance in the women being referred to the child protection system as substance abusing mothers.¹⁸ Since prosecutors have no control over the integrity of the medical reporting system, universal testing of newborns or a testing method using consistently applied objective protocols should be established. An objective protocol could include an examination of the following factors, a positive finding of which would give rise to infant or maternal testing for drugs: No prenatal care, abruptio placentae, intrauterine fetal death, preterm labor, intrauterine growth retardation, and previously known drug or alcohol abuse. These factors are clinical indicators of possible maternal drug use during pregnancy.

Confidential testing of pregnant women who may show evidence of obstetrical complications due to alcohol or drug use should be encouraged so that those women can be brought into available services dealing with drug education and treatment and be given special prenatal care. Reports would not be turned over to prosecutors or law enforcement authorities. The pregnant woman would maintain her confidentiality with the exception of her doctor, local health authorities, and persons to whom she has authorized the release of information.

Child welfare agencies and prosecutors would become involved only after the report of a live birth involving a drug exposed infant. Even then, the response would initially involve actions intended to protect the child from further abuse and encourage the mother, or other responsible parent, to engage in drug treatment and necessary parenting classes. All such efforts should be exhausted before attempts are made to incarcerate or otherwise punish the mother.

18. See Ira J. Chasnoff et al., *The Prevalence of Illicit Drug or Alcohol Use During Pregnancy and Discrepancies in Mandatory Reporting in Pinellas County, Florida*, 322 NEW ENG. J. MED. 1202, 1203-04 (1990).

Some critics of the prosecutor's role argue that coercing a woman into drug treatment by any means is bad public policy and largely ineffective. They would prefer what can only be described as gentle persuasion. In *Utopia*, persuasion may be preferred, but in reality some people will never be persuaded. If such women are not forced into treatment after the birth of their first drug affected child, other damaged children are likely to follow. If the first intervention is not successful, maybe the second will succeed. It is bad public policy, being both more damaging to children and more costly for society in the long run, to stand by while repeated attempts at gentle persuasion fail.

If a criminal court prosecution or a family court petition is intended to encourage drug treatment for women who have given birth to substance abused infants, then no prosecutor can be comfortable seeking such a conviction while treatment for those women is not readily available. Medical, legal, and social welfare authorities must work together in this area to encourage the allocation of public and private resources for the establishment or expansion of local drug treatment programs that deal with the unique issues involved in women's addiction to alcohol or drugs. Such programs must be prepared to accept indigents as well as financially secure individuals, and day care should be provided for those addicts who already have children. Finally, public aid policies should be revised to ensure that women who are away from public housing and in treatment do not lose previously awarded financial benefits.

Conclusion

Prosecutors have a positive and important role to play in representing the interests of the state in addressing the problems of prenatal drug abuse and substance abused infants. Much of the recent progress in combatting these problems is due to the increased public recognition resulting from high profile prosecutions. But prosecutors have become involved in this issue because they have no choice. They are obligated to protect children under statutes that mandate reports of child abuse or neglect to the state. Simply ignoring the drug related death of a newborn is unconscionable. Similarly, allowing a drug exposed infant to go home with an actively addicted mother is nonfeasance of a special duty to protect children.

At present, prosecutors are uniquely able to provide some protection to children and families. This will continue until the rest of society provides services that deal with the problem of substance abused infants in a proactive manner, rather than simply reacting to the damage done to a child after the fact. Choosing not to get involved only subjects substance

abused infants to further abuse and neglect within a dangerous environment. Until citizens and lawmakers deal with the issue of children at risk, and until society at large rids itself of damaging illegal drugs and the substance abuse that can deprive a child of the basic right to a healthy birth, prosecutors will have no real choice but to exercise the power of the state.

