The Prosecutor as Problem-Solver
Leading and coordinating anticrime efforts

By RONALD GOLDSTOCK

There was a time when the primary focus of law enforcement was concentrated on discrete street offenses, and the role of the prosecutor was limited to presenting evidence gathered by others (normally the police or the sheriff) to a court and jury. For such purposes, the traditional division between police and prosecutor worked reasonably well.

During the 1930s, however, a few prosecutors came to understand that a different approach was required to deal with complex criminal activity such as organized crime, labor racketeering, official corruption, and fraud. In such cases there are often no immediate victims, or the victims and witnesses are too frightened to come forward. These cases call for proactive investigation and close cooperation between police and prosecutors.

Thus New York’s famous racket-buster, Thomas Dewey, found that it was essential to combine the skills of prosecutors and investigators—and even accountants—throughout the criminal process. The Rackets Bureau concept which evolved out of Dewey’s experience and that of his successor, Frank Hogan, spread across the country and ultimately led to the development of the Organized Crime Section in the Justice Department and to the Federal Strike Forces. (See, for example, G. Robert Blakey, Ronald Goldstock, and Charles H. Rogovin, Rackets Bureaus: Investigation and Prosecution of Organized Crime, xiii–xlv (National Institute of Justice, 1978); Organized Crime: Enforcement Strategies, 3 Encyclopedia of Crime and Justice 1107–9 (1983).)

The need to merge police and prosecutorial functions grew even more acute as investigations and prosecutions became more sophisticated and the relevant law more intricate. Legal rules concerning search and seizure, the right to counsel, electronic surveillance, and related issues are now so arcane that police must routinely rely on lawyers to determine what they may and may not do even in the earliest stages of a complex investigation. Moreover, Congress and state legislatures have formally given attorneys control over the sophisticated investigative techniques used in cases involving organized crime, official corruption, narcotics, and labor racketeering. Statutory law makes the prosecutor counsel to the grand jury, with the legal responsibility for resolving immunity questions. Prosecutors are also given the exclusive responsibility for applying for authorization to conduct electronic surveillance and are required to monitor and control its execution by the police.

But while the roles played by the prosecutor may have changed over time, the changes have taken place solely in the context of the criminal process. The prosecutor’s objective remains the conviction of defendants and the imposition of an appropriate penal sentence. This traditional concern with conviction and punishment of the guilty has multiple justifications. It vindicates the rule of law, while a just result also serves as society’s moral statement concerning the nature of the illegal act. Conviction and punishment function together to satisfy the victim’s desire, or need, for retribution and to incapacitate the dangerous offender. Finally, they may deter the defendant and others from future illegal activity. To the extent that general deterrence is seen as a goal of the criminal
process, the prosecutor's objective might be viewed as including the reduction of criminal activity in a broader sense.

This article argues that the primary goal of the prosecutor should be to reduce criminal activity. Having a role in the reduction of crime should be viewed as a central function and not merely an incidental result of being a case-processor who administers an office in the most efficient manner to produce the greatest number of just convictions. This article then describes the rich variety of remedies that can help to eradicate illegal behavior and a methodology by which those remedies may be employed effectively.

Some difficulties

Defining the prosecutor's function as helping to control crime may lead to an ironic result, however, because prosecutions often have served as the vehicle for worsening criminal problems. For example, corruption has long been pervasive in the Teamsters Union. Historically, the government's response was to prosecute the presidents of the union. From the exclusive point of view of prosecution, the remedy was successful, with a succession of union leaders investigated, and—with the exception of a couple who died while under investigation or indictment—convicted and imprisoned. From the point of view of removing organized-crime influence from the union, however, it was another story. Deep-seated corruption in the union not only continued but was clearly facilitated by the changes in leadership. The criminal process might thus be seen in this instance as having created a hostile environment in which natural selection removed the lame and the weak, allowing the more corrupt and more powerful to gain control.

Even when prosecution is not counterproductive, it may be ill suited for controlling certain types of systemic criminal activity. For example, the counterfeiting, forgery, and illegitimate use of credit cards remains largely unaffected by prosecution but has been minimized to a large degree by the adoption of holograms and PIN numbers. Similarly, hundreds of thousands of prosecutions of car thieves and joyriders did much less to deter automobile theft than did the installation of locking devices on automobile steering columns.

Prosecution alone has proven equally ineffective in mob-plagued industries such as construction (Corruption and Racketeering in the New York Construction Industry (The Final Report of the New York State Organized Crime Task Force) (New York University Press, 1990) [hereinafter Construction and Racketeering]) and carting (Peter Reuter, Racketeering in Legitimate Industries: A Study in the Economics of Intimidation 1, 81-83 (Rand Corporation, 1987) [report prepared in conjunction with New York State Organized Crime Task Force, hereinafter Racketeering]) and has apparently done little to affect burglary, theft, homicide, labor corruption, and even corruption in major police departments.

Why, then, given the availability of other possible remedial action, has the law-enforcement response to these problems been limited to investigation, prosecution, and sentencing? One answer is that we have given the responsibility for dealing with these "criminal" issues to the police and prosecutors, and investigation and prosecution are the powers which they have historically possessed. But the reason must also have to do with how we conceptualize the problem. The Department of Justice, a huge bureaucracy responsible for exercising the legal authority of the United States government, has for the most part been organized into divisions based on the type of remedy to be utilized. Suits for damages are assigned to the Civil Division, while murder that took place on a government installation goes to the Criminal Division. But there are exceptions. Civil rights violations, for example, are rightly viewed as a social problem that ought to be treated with a variety of remedies. Thus the department has established a dedicated Civil Rights Division which is not confined to either a civil or a criminal response. The same is true for antitrust issues. But other complex criminal problems are handled by the Criminal Division and, at least until the passage of the Racketeer Influenced and Corrupt Organizations Act (RICO, 18 U.S.C. §§ 1961 et seq.), the only remedies utilized were criminal in nature. Even though it is assigned to the Criminal Division, RICO was designed to bypass the organizational structure of the department and allow criminal attorneys to utilize civil actions.

The effect of this organizational arbitrariness can be vividly illustrated by analogy to the field of medicine. Suppose medical classifications were arranged by the remedies of surgery, chemotherapy, radiation, and so forth. Problems (diseases) would be assigned to one or another, and only that remedy would be employed. Such an arrangement would make little sense in the context of health; it makes hardly more sense when it comes to law enforcement.

Remedies

The following is a list of remedies that might be employed by law en-
forcement to reduce and control crime. It is not meant to be exhaustive; it merely illustrates what has not traditionally been considered to be within the province of those who have been given responsibility for dealing with the social problems we recognize as systemic criminal activity.

Opportunity blocking. Reasonable methods for reducing vulnerability to criminal activity are preferable to improved methods for catching and punishing those who would otherwise engage in that criminal activity. One method of reducing such vulnerability is to employ loss-prevention or opportunity-blocking techniques.

We have already noted that the illegitimate use of credit cards has been drastically reduced by the adoption of holograms and PIN numbers and that locking devices on automobile steering wheels and columns have deterred more theft than the prosecutions of joyriders. Legitimate industries design and implement internal controls to prevent loss, yet there can be no doubt that this remedy is severely underutilized. Every city has stringent fire codes for buildings, but how many have regulations relating to design of the use of materials that would inhibit burglars and violent offenders or would make them easier to catch? (See, for example, Oscar Newman, Defensible Space: Crime Prevention Through Urban Design (Macmillan, 1972).)

Forfeiture. Civil forfeiture statutes, enacted in a number of jurisdictions, permit suits to be brought to recover instrumentalities, proceeds, and the substituted proceeds of crime. These statutes are commonly in rem, brought technically against the property itself. Many of them permit law enforcement agents to obtain provisional relief such as attachment or a preliminary injunction to protect against the dissipation of assets pending the outcome of a case, which is a common problem where the assets are accumulated through criminal activity.

RICO and its state counterparts also contain potent criminal forfeiture provisions. Defendants convicted of RICO and "Little RICO" offenses may, for example, be required to forfeit not only the proceeds of their crimes but also their positions or interests in corrupted enterprises. Under these provisions, grand juries are authorized to utilize their subpoena powers to gather evidence, which permits the discovery of assets in a manner more familiar to prosecutors than are some civil procedures.

Perhaps no other remedy has forfeiture's potential to accomplish so many objectives simultaneously. Removal of assets interferes with the criminal activity, weakens the organization engaging in that activity, deters others by making the activity potentially less profitable, punishes the criminal, denies those who would have profited unjust enrichment and the enjoyment of the illegal fruits, saddles victim claims, and raises revenue for government programs, including law enforcement.

Damages for monetary loss or commercial injury. Private litigation can also effectively deter criminal activity. Penalties in a criminal DWI case, for example, can be dwarfed by the potential liability arising out of a civil suit. In recognition of the power of the plaintiffs' bar to serve as private attorneys general, RICO provides a private right of action for anyone injured by reason of a RICO violation, with the incentive of treble damages, court costs, and attorneys' fees. (18 U.S.C. § 1964(c).)

The government, like any other victim of fraudulent or corrupt activities, can generally seek monetary compensation for its injury or loss. Where, for example, an investigation uncovers fraud or corruption in the award of public contracts or the administration of state or local governmental affairs, damages often can be sought under state or federal law. Under New York law, where a government contract is obtained by bribery, the vendor can be made to repay all compensation it has received from the government without any offsetting allowance for the value of the goods or services it has provided. (S.T. Grand Inc. v. City of New York, 32 N.Y.2d 300 (1973).) PUNITIVE DAMAGES can be awarded if the jury finds that defendant's misconduct was malicious and directed at the public generally.

Furthermore, the federal Qui Tam Act (Act of March 2, 1863, 12 Stat. 696; United States ex rel. Marcus v. Hess, 317 U.S. 537 (1943)) has historically provided a private Attorney General mechanism by authorizing suits by private parties on behalf of the government. The Act, the title of which is short for qui tam pro domino rege quam pro se ipso in hac parte sequitur ("who suits on behalf of the King as well as for himself") provides incentive for bringing the litigation. A portion of the recovery due the government based on a finding of fraud is awarded to the plaintiff.

The forfeiture of profits on contracts won through fraud or bribery can also be effected through specific contractual provisions. Leaders of the House Armed Services Committee, for example, recently called upon the Pentagon to include such provisions in military procurement contracts as a matter of course. These leaders suggested that doing so would increase compliance with existing laws without requiring additional government auditors or new regulations. (Forfeiture of Profit in Pentagon Fraud Cases Urged, N.Y. Times, Aug. 24, 1988, at A15.)

Injunctions, divestitures, trustships, and receiverships. Certain unions, perhaps because of the nature of their membership and the nature of the industries in which they operate, have historically been dominated by the mob. (See generally Ronald Goldstock, G. Robert Blakey, and Gerard Bradley, Labor Racketeering: A Simulated Investigation. Teacher's Guide and Background Materials (Cornell Inst. on Organized Crime, 1979).) While prosecution has failed to solve the problem of these captive unions, court-ordered trustships have
been used to reestablish democratic processes and hence the possibility of a future free from labor racketeering. The first—and most carefully scrutinized—of these attempts involved Local 560 of the International Brotherhood of Teamsters in New Jersey. (United States v. Local 560 of International Brotherhood of Teamsters, Chauf fer, Warehousemen, and Helpers of America, 780 F.2d 267 (3d Cir. 1985).) There have been others, including Local 6A, Cement and Concrete Workers of the Laborers International Union, Local 54 of the Hotel Employees Restaurant Employees International Union, and Local 1804-1 of the International Longshoremen's Association.

Under RICO, injunctions may be sought against defendants and the enterprises they control, whether legitimate or illegitimate, to prevent future misconduct. (18 U.S.C. § 1964(a).) Courts are empowered to fashion, inter alia, orders requiring defendants to divest themselves of interests in tainted enterprises, imposing restrictions on their future activities, dissolving or reorganizing enterprises, suspending or revoking state or local licenses and permits, and revoking the right of a corporation to conduct business. (See United States v. Cappetto, 502 F.2d 1351 (7th Cir. 1974), cert. denied, 420 U.S. 925 (1973).)

Self monitoring. Private companies and industries may in some cases be willing to impose internal monitoring, or they may even be required to subject themselves to outside scrutiny. Banks, for example, have hired private firms to establish and monitor internal mechanisms designed to reduce the likelihood that cash transactions will go unreported in violation of the Bank Secrecy Act. The act (codified at 31 U.S.C.A. §§ 5311–5322 and 12 U.S.C.A. §§ 1829b, 1951–1959) requires financial institutions to maintain appropriate records and file reports, both of which are useful in criminal, tax, or regulatory investigations and proceedings. SEC regulations require corporations to hire outside auditors to inspect their books.

In its 1990 report to Governor Cuomo on the New York City construction industry, the New York State Organized Crime Task Force (OCTF) proposed the creation of a Certified Investigative Auditing Firm (CIAF) program. (Construction and Racketeering at 168, 205ff.) CIAFs were defined as licensed, independent private-sector firms having the investigative, auditing, analytic, loss-prevention, engineering, and other skills necessary to serve as “private inspectors general” to the corporations that hired them. CIAFs’ responsibilities include ensuring compliance with relevant law and regulations, and deterring and exposing unethical or illegal conduct. Although CIAFs are still in the process of development, the CIAF concept has already been used by OCTF and the New York City School Construction Authority in a variety of industries, including solid-waste disposal, construction, and finance.

Regulations, public benefit corporations, eminent domain, and other means of fostering competition. Historically, the mob has been able to dominate, influence, or monopolize a particular industry because it controlled an essential good or service. However, the state’s ability to purchase a critical piece of property through eminent domain (with just compensation) and allow equal access to it could deprive a syndicate of the instrument by which it extracts monopolistic profits. Similarly, if illicit control was achieved through the supply of essential labor or materials, the establishment of an alternative source might break the monopoly’s power.

Industries that have historically been the subject of cartels, bid-rigging, territorial allocation schemes, and other anticompetitive practices may be reformed by the use of public benefit corporations that disrupt such illegal agreements by competing against those who engage in them. For example, OCTF and the Rand Corporation have recommended the establishment of a public benefit corporation to reduce collusive behavior by mob-dominated private sanitation carters. Regulatory agencies in industries subject to corruption and racketeering—such as garbage collection, construction, liquor, gambling, and the waterfront—could be given a number of powers, including licensing, rate regulation, screening of potential union officials, and investigative or police authority.

Structural changes. Crimes are facilitated within certain institutions and industries because of particular organizational or structural attributes. The adoption or imposition of structural changes could therefore be beneficial. Examples of such changes are limits on supervisors’ spans of control in police departments, mandating “one person—one vote” rules in labor unions, and banning the “shape-up” on the waterfront.

The “shape-up”—the method by which union officials on the New York waterfront selected which stevedores worked each day and which did not—was one method by which organized crime maintained influence over the Longshoremen’s Union. Legislation was passed in 1953 permitting the Waterfront Commission of New York Harbor to administer and regulate the distribution of work on the docks.

Public hearings and reports. Public opinion often can be mobilized to weaken the resistance to change or at least to isolate those who are opposed to it. Public hearings, reports, and public information campaigns are therefore essential components of the reform process. The Knapp Commission hearings in New York, for example, have been credited by many with playing a key role in reforming the anticorruption practices of the New York City Police Department. Similarly, public information campaigns by anti-DWI and crime victims’ groups have resulted in significant legislative reforms.
Other remedial action. A number of other targeted solutions to “criminal” problems may be more efficacious than prosecution. Several innovative solutions to discrete problems were discussed at sessions held at the Kennedy School of Government, Harvard University, for state and local prosecutors from 1986 to 1990. (Summary of the Proceedings: Findings and Discoveries of the Harvard University Executive Session for State and Local Prosecutors at the John F. Kennedy School of Government, 1986–90 (unpublished research monograph, Nov. 1990).)

For example, an area of one city was overrun with street prostitutes. The traditional approach of using undercover officers and making arrests proved ineffective. In a change of strategy, uniformed officers began to systematically approach those suspected of being prostitutes and “johns” and sought to question them. Uniformed officers in marked cars also pulled abreast of cars whose occupants engaged prostitutes in conversation. In both situations, the police conspicuously took notes as they did so. This made for a “bad business atmosphere,” which was a key factor in virtually eliminating the problem.

Another nontraditional approach was taken by a prosecutor concerned about the quality of life in crime-plagued public housing projects in Florida. With support from local government, she began opening convenience stores in the ghettos’ worst areas, hiring people from the projects to work in them and arranging for day-care and preschool programs. The crime-free stores raised people’s hopes and became magnets for other self-improvement projects in their communities. (B. Stewart, Misson Implausible, Florida Magazine (Oct. 4, 1987).)

For certain categories of offenders, resources may be better spent making treatment available rather than prosecuting. One prosecutor helps local agencies apply for grants for treatment programs for juvenile offenders, child abusers, and drug and other offenders. Similarly, a district attorney in another jurisdiction made a conscious decision to reduce juvenile prosecutions by one third and referred thousands of young offenders to remedial reading programs, truancy programs, work programs, and wilderness programs. Although he was unsure that these programs would work, he was equally unsure of the efficacy of continuing merely to prosecute these young offenders.

Another prosecutor set up an “alert” system for local businesses designed to notify them as soon as an identifiable pattern of forgery or fraud was detected in their community. Yet another prosecutor who had obtained convictions against corporate environmental offenders sought and obtained sentences that included a requirement that the companies take out advertisements acknowledging that they had violated the law and had been caught—the corporate equivalent of the stocks. Similarly, some jurisdictions require convicted DWI offenders to display bumper stickers on their cars attesting to their convictions.

Analysis and strategic planning

The availability of nontraditional remedies does not guarantee their appropriate use. Even if prosecutors were to see their role as controlling crime and reject the historical limitations caused by exclusive reliance on prosecution, they would need guidance as to what remedy to use in what circumstance. Looking again to a medical analogy, the creation of a sophisticated crime-control strategy is much like the search for a cure for a disease. Each requires three sequential steps: recognition and description of the symptoms; analysis and understanding of the mechanisms through which the integrity of the system is compromised; and the development and implementation of a program of treatment using existing remedies or developing new ones.

This sequence is well understood in the context of medical research, and it has not gone totally unrecognized in the field of crime control. More than seventy years ago, the sociologist John Landesco urged a reasoned approach to systemic criminality:

One reason for the failure of crusades against crime and vice is they ... are seldom or never based on a study of the problem. What is needed is a program that will deal with the crime problem ... by analyzing the crime situation into its different elements ... and one by one working out a constructive solution. (John Landesco, Organized Crime in Chicago (Univ. of Chicago Press, 1929).)

Landesco’s approach is applicable to the challenge of industrial racketeering. Why are some legitimate industries—such as construction, auto manufacturing, and the garment trades—so deeply penetrated by organized crime while others are not? Why has prosecution failed to achieve reform? One answer to both questions appears to be that some industries provide enormous incentives and opportunities for corruption and exploitation by criminal syndicates. The analysis of industries therefore involves two related concepts: racketeering susceptibility, and racketeering potential. Racketeering susceptibility is measured by the degree to which an industry’s structure and organization create opportunities for racketeers both inside and outside the industry to control or influence critical industry components or to engage in racketeering. Racketeering potential is measured by the extent to which racketeers can profit from exploitation of an industry’s vulnerability. It takes into account such factors as the amount of money that industry participants can generate and make available to racketeers, the availability of jobs that can provide legitimate status.
and income to racketeers and their associates, and the potential for laundering dirty money or generating false business expenses to disguise illicit payments and avoid paying taxes. Once an industry's racketeering susceptibility and potential are understood, remedies can be designed to reduce those vulnerabilities and incentives.

Other types of analysis may prove useful in working out constructive ways to combat illegal businesses. Financial analysis of the interrelationship of bookmaking and loansharking, for example, suggests the adoption of strategies virtually the reverse of those that are now employed. (Ronald Goldstock, Operational Issues in Organized Crime Control, in Herbert Edelhertz, ed., Major Issues in Organized Crime Control (NIJ, 1987) at 82-3 [hereinafter Operational Issues]; Ronald Goldstock and Dan T. Coenen, Controlling the Contemporary Loanshark: The Law of Illicit Lending and the Problem of Witness Fear, 65 Cornell L. Rev. 127 (1980)). Structural analysis of the interrelationship of burglars and receivers of stolen goods suggests that reverse stings relating to stolen property (police sales to fences) may be more successful in reducing burglary than traditional sting operations (police buys from burglars). (See G. Robert Blakey and Michael Goldsmith, Criminal Redistribution of Stolen Property: The Need for Law Reform, 74 Mich. L. Rev. 1511 (1976)).) Historical analysis of heroin importation predicted the rise of ghetto-based minority-organized crime groups (Goldstock, Operational Issues at 83-5), and historical analysis of the New York City construction industry made it possible to understand the rationalizing role played by the mob today and by Tammany Hall at the beginning of the century, increasing the stability of a fragmented, fragile industry. (Construction and Racketeering at 73ff.) Economic analysis of the solid-waste-pickup industry made possible proposals that, if implemented, would probably reduce the mob's influence in the carting industry. (Reuter, Racketeering.)

Similar analyses and the creation of remedial strategies can be undertaken for virtually all varieties of systemic criminal activity, including crack street markets, spousal abuse, illegal possession of weapons, and specialty waste disposal; the role of the mob in the garment industry, fish market, food industry, and on the waterfront; and even the emergence and growth of criminal syndicates and street gangs.

The most modern law enforcement agencies now use attorneys, investigators, accountants, and tactical analysts in conducting investigations and prosecutions. In addition, however, the development of sophisticated strategies and the analyses on which they are based require strategic analysts trained to review broad data bases and analyze trends within areas of actual or potential criminal activity. Institutional relationships must be established between law enforcement and economists, sociologists, loss-prevention specialists, historians, political scientists, and industry specialists. Such relationships will prove critical if law-enforcement officials are to engage in the creation of social policy.

Why the prosecutor?

It is not intuitively obvious that prosecutors, rather than police, criminal justice coordinators, or even the chief governmental officer, should take the lead in developing and implementing strategies for crime control. Certainly, representatives of all four occupations have to some extent considered themselves to be engaged in problem-solving.

Indeed, some police departments have explicitly begun to take a problem-oriented approach to crime. (The catalyst for these programs was an article written by Herman Goldstein, Improving Policing: A Problem Oriented Approach, Crime and Delinqu., Apr. 1979.) A number of successful pol-

lice programs built on this model are described in David Anderson's 1988 study. (David Anderson, Crimes of Justice, 89–158 (Times Books, 1988) [hereinafter Crimes].) In two such programs, drug marketplaces were closed down by saturation arrests and other means. In another, an empty lot that had attracted drug users and other disorderly persons was cleaned up, fenced in, and decorated. A fourth program focused on Halloween vandalism, which was reduced after the police organized an outdoor party that flooded the streets with celebrants. A fifth involved problems posed by rowdy youths disturbing a residential neighborhood at night, which were eliminated when the police persuaded the owner of a nearby roller rink to provide free rides back home after the rink closed.

Police can play an important role in problem-solving, but the successes listed do not compel the conclusion that the police are the best situated to set law-enforcement policy. Virtually all of the programs described by Anderson had highly discrete objectives. While some involved nontraditional remedies, none involved the type of broad-based strategic approach discussed above. And unfortunately, if predictably, in time most of these police programs fell victim to budget cutbacks, changes in department leadership, or swings of the pendulum back to traditional police attitudes favoring apprehension of felons.

Mayors and governors must also be considered as leaders in crime control. These elected officials who have broad mandates, budgetary authority, and powers over a host of criminal justice and regulatory agencies appoint the people in charge of the police, probation, the jails, and other agencies. They are thus arguably best positioned to implement policies that cross agency lines. Indeed, some chief governmental officers have established directors or coordinators of criminal justice.

Still, there are a number of rea-
sions why prosecutors may be the best suited to assume the leadership or coordinating role. Many of the potential remedies involve litigation, legislation, or regulation, where legal expertise and the authority to utilize it appropriately are indispensable. All prosecutors are practicing criminal attorneys, and three out of four are explicitly vested with civil responsibilities. (Joan Jacoby, The American Prosecutor: A Search for Identity (Lexington Books, 1980).

Furthermore, much of the data essential to the analytic effort may be available only to the prosecutor. For example, the prosecutor is, by legislative mandate, the applicant for electronic surveillance and counsel to the grand jury, and it is the prosecutor who is generally responsible for maintenance and disclosure of the information obtained by those intrusive means of investigation. Moreover, prosecutorial discretion and plea bargaining often enable the prosecutor to obtain information from knowledgeable defendants who are willing to cooperate in exchange for leniency. Indeed, in forfeiture and civil damage cases where the location of criminal proceeds or other assets is sought, prosecutors' offices are beginning to assume a coordinating role in active investigations. Prosecutors may also have special power and authority because of their strategic position between the police and the courts. Their discretion to dispose of cases permits them essentially not only to control the traffic but to set the price on crime.

The prosecutor is, in fact, the nearest thing we have to a single, centralized law-enforcement official. Most prosecutors' jurisdictions comprise a dozen or many dozen different police departments and enforcement agencies. Unlike their counterparts in other Western societies, the vast majority of American prosecutors are independent elected local officials vested with extraordinarily broad powers and moral responsibilities. Because of this, especially in a society distrustful of centralized authority (see, for example, Anderson, Crimes at 94), a level of confidence and heightened expectations attaches to the office that is not likely to be enjoyed by others involved in anti-crime efforts.

Because of their authority and bureaucratic positions, prosecutors are also likely to have the ears of those in the executive and legislative branches whose assistance and support are essential. Such access to political support gives prosecutors opportunities to work quietly behind the scenes to influence the direction of policy and gather support for their objectives. To the extent that this new approach to crime control requires innovation, prosecutors may also have an advantage over some other candidates for the role of leader in crime reduction. Just as it was once said that only Nixon could go to China, perhaps only prosecutors, generally regarded as conservative, will be given the necessary latitude by the public to propose solutions that may appear unconventional and to experiment with novel programs.

**Implications**

A number of potential difficulties would flow from casting the prosecutor in an expansive role as problem-solver. Some are practical, involving issues of resources, social policy, and political reality. Some are more theoretical implications involving questions of responsibility, accountability, and the preservation of civil liberties. And some relate to legal rules formulated in a different age for a different set of social problems.

Traditional attitudes will persist, and a prosecutor's imagination might fall victim to others' expectations that only criminal penalties should be pursued. Superiors, public officials, and the press too often judge success by the number of arrests, indictments, and convictions. Such numbers, of course, are not an appropriate measure of effectiveness in dealing with most crime (see, for example, Michael Maltz, Measuring the Effectiveness of Organized Crime Control Efforts (1983)), and the pressure to produce quantity rather than quality can badly distort tactical and strategic goals. Public impatience can also be a factor. Whatever else might be said about criminal investigations and prosecutions, they are relatively swift, tending normally to require only a year or two before cases are disposed of. More varied and innovative techniques of crime control will require not only political leadership and creativity but also considerable time and persistence.

A different concern stems from the prospect of a prosecutor's using intrusive criminal investigative techniques to discover information for analytic purposes. The public might fear that evidence that is insufficient for prosecution might still support a public hearing or report. However, to the extent that problem-solving will result in removing incentives for criminal activity, the remedies will tend not to involve actions against individuals. Moreover, it is at least reasonable to suggest that an invasion of privacy that is ultimately used to stop someone from committing a crime has served the public as well as one that is used to sentence someone to a life behind bars in a harsh prison system.

Most important, the prosecutor probably will act more cautiously than others now authorized to engage in nontraditional remedial actions. It is the prosecutor, institutionally concerned about pretrial publicity and prejudice and bound by the ethical provisions of the Code of Professional Responsibility, who is likely to delay a public hearing or otherwise ensure that it is conducted in a manner designed to minimize prejudice. Moreover, as illustrated in the case of Oliver North, it is the prosecutor, rather than a legislative body, who would be most sensitive to the risks involved in granting even use and derivative use immunity, which protect the witness from having his or her
series of columns on the Bill of Rights and other major criminal justice issues, and generate interest among local and national TV and radio talk shows on important criminal justice issues. The Task Force on Criminal Justice Outreach will prepare resource kits and issue kits for use by state and local bar leaders and civic leaders and for presentations by our Section members in their local venues. It will build coalitions with state and local bar associations and citizens' groups to foster and promote projects for improvement of the criminal justice system, and it will sponsor forums and seminars for legislators and their staffs to discuss criminal justice funding and reform. By creating the Task Force on Criminal Justice Outreach, we are implementing strategies that were recommended by the Long-Range Planning Committee to achieve the goals of our Section. The task force will also supplement ABA President Michael McWilliams's theme of "Justice for All, and All for Justice" and will further the goals established by the 1989 Report of the ABA Task Force on Outreach to the Public and subsequent ABA efforts to undertake outreach and partnership programs. We are in a unique position to make these efforts successful. Our members are advocates who can present our case forcefully and effectively in their communities. Many are public officials or leaders in political, civic, and charitable organizations, whose views are sought and respected. We can help shape public opinion.

The Task Force on Criminal Justice Outreach will be a complex, long-term undertaking, but we have the leadership, talent, dedication, and commitment to make it meaningful and successful. I encourage you to join this ambitious effort to demonstrate that despite what some critics and skeptics suggest, the term "criminal justice" is not an oxymoron.

Prosecutor as Problem-Solver

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The term "prosecutor" has been used up to this point without differentiation, but the existence of prosecutors' offices at the federal, state, and local levels has implications for the broader approach because each has potentially different roles to play in formulating solutions. In traditional prosecutions, different roles for law enforcement at the three levels of government have begun to emerge in some areas. In narcotics enforcement, interference and prosecution of the largest-scale conspiracies have, by and large, been assumed by the federal government, while street-level enforcement has been left to local officials. Where statewide units exist, they have tended to assist and coordinate the efforts of local officials when problems cross city or county lines, by taking such multicontey cases to their logical conclusion beyond the local prosecutor's areas of geographical jurisdiction.

Similar roles will have to be carved out for prosecutors who act as catalysts for change, taking into account the availability of resources, the expertise residing in their own offices and in agencies at their level of government, and, perhaps most important, the legal and administrative remedies available at each level. Jurisdictional limitations on prosecutors, both geographic and subject matter, may also have to be reevaluated. For example, rational and historical forces combine to create an incredible maze of prosecutors' offices in the New York City Metropolitan area: three United States Attorneys' Offices (each of which contains a now-modified organized crime strike force), two state prosecutors' offices, more than fifteen district attorneys, and the Special New York City Narcotics Prosecutor.

It may be difficult to persuade prosecutors themselves that this approach has merit, because this broader approach requires a type of thinking to which many traditional prosecutors may not be accustomed. Assistant prosecutors may be even harder to bring along. Many of them are attracted to prosecution by the lure of trials and courtroom drama and by the television image of what prosecutors do. They may have little taste for analysis and innovation. Even if trucancy causes daytime burglary,
they will say, the prosecutor's job is to prosecute the burglar, not to deal with the truant.

Some may think it presumptuous for prosecutors to assume the planning and coordinating role. Agencies such as the police, the courts, probation, and parole are generally not within the prosecutor's control. Perhaps the greatest exception is the Department of Justice, headed by the Attorney General and containing the FBI, Bureau of Prisons, and other criminal justice agencies. Agencies involved in education, child welfare, and housing are even less in the prosecutor's bailiwick. Thus, under the current system, a criminal problem that affects different agencies and departments might be given to a "czar" so that the institutional barriers can be overcome. Even if it is true that cleaning up an overgrown vacant lot will reduce crime, is it not for the Sanitation or Parks Department to decide? If the expansion of community service is desirable, is it not for probation to decide? And if interviewing prostitutes' customers will improve the ambiance of neighborhoods, is this not for police to determine? Indeed, to the extent that problems involve other institutions, won't the prosecutor's intervention be regarded as meddlesome or threatening?

But bureaucratic strife may not be a problem of any significant magnitude because many new initiatives will not be antagonistic to existing programs or agencies at all. Often a program is not adopted merely because no one has considered it or has had the time or ability to set it up. Indeed, the more innovative agency heads may see the prosecutor as an ally in fortifying the social institutions over which they have primary jurisdiction.

There will undoubtedly have to be some changes in the structure of prosecutors' offices and a reallocation of resources. The design and implementation of truly effective strategies against crime require the application of specialized skills beyond those now normally possessed by prosecutors. A much higher premium will have to be placed on research. There is already increased demand from prosecutors and other criminal justice professionals for data and research, illustrated by the growth of special units such as the Bureau of Justice Statistics, the American Prosecutors' Research Institute, and the National Criminal Justice Reference Service. The assumption by the prosecutor of this new role will create an even wider market.

One example of research that had a significant impact on prosecutors was undertaken by the Rand Corporation on "career criminals" during the 1970s. While criminal justice professionals knew that some offenders committed more crimes than others, the magnitude of the disproportion revealed in the Rand research caused most major prosecutors' offices, in little more than a decade, to focus on these career criminals through special programs. That research involved a relatively simple technique: talking to offenders.

But the ultimate question may be whether or not prosecutors will want to assume the role, responsibilities, and accountability inherent in the concept of problem-solver. So long as conviction rates remain high and their offices are free of scandal, prosecutors tend to be secure in their jobs, respected by the public, headlined in the press, and not held responsible for the crime problem. Moreover, prosecutors inundated with an oppressive number of arrests, frustrated by limited resources, and hampered by bureaucratic interference might well reject the notion that they are well situated to take on the problem-solving role. One does not often seek to put oneself in a position where public failure is a possibility.

Yet prosecutors do have a unique opportunity to orchestrate a more effective set of criminal policies than are currently in place. With the crime problem continuing to grow in gravity and complexity, it may no longer be possible for the prosecutor to cling to the role of case-processor. Whether it be manifest destiny, evolution, or merely necessity, the role of the twenty-first-century prosecutor that is demanded, expected, and deserved by the public may well be that of the problem-solver.

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**Unwinnable War on Drugs**

(Continued from page 15)

Raymond Shafer of the National Commission on Marijuana and Drug Abuse in April 1971, the Section of Individual Rights and Responsibilities (IR&R) submitted a careful analysis of marijuana enforcement patterns. IR&R recommended decriminalization of personal possession of small amounts for personal use and suggested studying the feasibility of a licensed distribution system. "As lawyers we are especially cognizant of the need for the legal system to be just and to appear to be just."

IR&R's resolutions came up at the 1972 Annual Meeting, where they were debated in a remarkably illuminated exchange among some of the ABA's leading policymakers. The resolutions were amended to call merely for a review of existing penalties and the elimination of those that were unduly harsh. It passed by voice vote.

The following year, at the 1973 Annual Meeting, IR&R returned with an additional report, expanded to include findings by the Shafer