What's Changing in Prosecution?

Report of a Workshop

Committee on Law and Justice

Philip Heymann and Carol Petrie, *Editors*

Division of Behavioral and Social Sciences and Education

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Preface

Recently, America has seen a dramatic decline in rates of most violent crimes. Property crime rates have been slowly declining for over twenty years. Regardless of whether crime is rising or falling, however, public concern about crime remains high. Over the last twenty years, we have learned a great deal through research about crime, law enforcement, the courts, sentencing, and corrections. Prosecution is notable in this context for the lack of rigorous social science research that has been conducted on it, in contrast to these other sectors of the criminal justice system. While some data are regularly collected on the prosecution function, only a handful of quantitative studies of prosecution or its impact on crime, justice, or community safety have been conducted since the late 1970s. The literature that does exist consists mostly of descriptive case studies of functions and the implementation processes associated with new programs. There is an almost equally sparse, legal literature on prosecution that has been summarized in review articles. The same could be said about the defense function. While this report focuses on prosecution, research on the defense bar is also lacking.

To many, prosecution is a pragmatic function—one component of a larger process designed to hold accountable those who break the law. The benefit of conducting social science research on prosecution has not been well defined, and many prosecutors at this workshop viewed the potential application of research findings with considerable skepticism. Other criminal justice agencies once viewed research in this way. But to learn of the

benefits of research for criminal justice agency operations generally, one has only to ask police, judges, and correctional officials.

This workshop arose out of the efforts of the Committee on Law and Justice to assist the National Institute of Justice in identifying gaps in the overall research portfolio on crime and justice. It was designed to develop ideas about the kinds of knowledge needed to gain a better understanding of the prosecution function and to discuss the past and future role of social science in advancing our understanding of modern prosecution practice. The Committee on Law and Justice was able to bring together senior scholars who have been working on this subject as well as current or former chief prosecutors, judges, and senior officials from the U.S. Department of Justice to share their perspectives. Workshop participants mapped out basic data needs, discussed the need to know more about recent innovations such as community prosecution, and discussed areas where one would expect to see changes that have not occurred. The resulting report summarizes these discussions and makes useful suggestions for learning more about prosecution.

Many people made generous contributions to the workshop's success. We thank the authors of the papers presented—Brian Forst, American University; Candace McCoy, Rutgers University; Michael E. Smith, University of Wisconsin Law School; and Christopher Stone and Nicholas Turner, Vera Institute of Justice—for sharing their insights with the group. We thank the scholars and prosecutors who provided formal commentary on the papers: Noel Brennan, U.S. Department of Justice; Michael Bromwich, U.S. Department of Justice; Todd Clear, John Jay College of Criminal Justice; Roger Conner, National Institute of Justice; Jeffrey Fagan, Columbia University; David Ford, Indiana University; Bruce Green, Fordham University School of Law; Raymond Marinaccio, Manhattan District Attorney's Office; E. Michael McCann, chief prosecutor, Milwaukee, Wisconsin; Robert S. Meuller, United States Attorney, Northern District of California; Andrew Sonner, Maryland Court of Special Appeals.

We thank editor Lorraine Ferrier for her invaluable support and Karen Autrey, senior project assistant, for organizational assistance and logistics support. We also thank the workshop chair Phillip Heymann, Harvard University School of Law, and Carol Petrie, director of the Committee on Law and Justice, for their work in organizing the workshop and editing this report.

This report has been reviewed in draft form by individuals chosen for their diverse perspectives and technical expertise, in accordance with pro-

cedures approved by the Report Review Committee of the National Research Council (NRC). The purpose of this independent review is to provide candid and critical comments that will assist the institution in making the published report as sound as possible and to ensure that the report meets institutional standards for objectivity, evidence, and responsiveness to the study charge. The review comments and draft manuscript remain confidential to protect the integrity of the deliberative process.

We thank the following individuals for their participation in the review of this report: Joel Garner, Joint Centers for Justice Studies, Inc., Shepherdstown, West Virginia; Peter Reuter, School of Public Affairs, University of Maryland; Debra Whitcomb, Grant Programs and Development, American Prosecutors Research Institute, Alexandria, Virginia; and Franklin Zimring, Earl Warren Legal Institute, University of California, Berkeley.

Although the reviewers listed above have provided many constructive comments and suggestions, they were not asked to endorse the conclusions or recommendations nor did they see the final draft of the report before its release. The review of this report was overseen by James Q. Wilson, professor emeritus, University of California at Los Angeles, and Reagan professor of public policy, Pepperdine University. Appointed by the National Research Council, he was responsible for making certain that an independent examination of this report was carried out in accordance with institutional procedures and that all review comments were carefully considered. Responsibility for the final content of this report rests entirely with the authoring panel and the institution.

Charles Wellford, *Chair*
Committee on Law and Justice

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1

Introduction

The most fundamental and traditional responsibility of the prosecutor in the United States has had two facets, both highly infused with moral judgements. First, the prosecutor was to see that "justice was done" to those who engaged in conduct that was both reprehensible and illegal. Both Emile Durkheim (1964)[1] and James Fitzjames Stephen (1883)[2] have argued that the effect of a just result on common morality and social control was the important part of criminal punishment. Second, the prosecutor was to impose an independent judgement between arrest and prosecution. The purpose was to ration both the scarce time of the courts and the scarce space of prisons and also to assure that not only punishment, as to which the judge and jury imposed a check, but even the burdens of trial were imposed on defendants fairly and only when justified.

Beyond that, of course, the prosecutor was to present the government's case at trial and to bargain over guilty pleas that could reflect the likely outcome of a trial without requiring the costs to prosecution and defense of an actual trial. In terms of role, the prosecutor was traditionally expected to think of himself as something much more than an avenger and an order maintainer. He was to have an equal concern about the justice of the system that imposed punishment, most clearly illustrated by the rule that

[1]See especially Durkheim (1964:108-109).

[2]See especially Stephen (1883:81-82).

requires the prosecutor to turn over any evidence in his hands that might benefit the defendant at trial.

There have been significant changes in prosecutors' offices, but few that called these traditional visions into question. There are new uses of technology. It has also become extremely common for prosecutors to develop specialized units intended to address some form of wrongful behavior that has become too common and therefore requires special attention to be stopped, such as drunken driving or welfare fraud. And there has been an increasing use by prosecutors of a variety of civil remedies such as asset forfeiture or eviction orders for drug dealers. Not these innovations, but other demands have challenged the traditional picture.

First, since the 1960s, the power of the prosecutor in the United States appears to have increased with few checks on his increased influence over criminal trials. We trust to his or her restraint and fairness in exercising new capacities. Our prosecutors can undertake a variety of investigative steps that are prohibited in most of Europe, Latin America, and East Asia, including wire taps, undercover operations, compelling testimony, and much more. Our prosecutors have, during the same period, been given a set of statutes that substantially aid prosecution, most notably the RICO and money laundering statutes. Finally, and most important, the elimination of much of the discretion that judges have enjoyed to temper justice with mercy has left prosecutors in a position to threaten very severe consequences with new certainty to those who decline to plead guilty and are convicted after insisting on a trial. Indeed prosecutors can now go far toward controlling the punishment that follows conviction. The prosecutor has been made the central player in a process of fighting crime that has become firmer and tougher over the last three decades.

These developments have caused questions to be raised from two contradictory directions. On the one hand, people familiar with the remarkable developments in policing over the last two decades and with the openness of the police to serious study and evaluation argue that prosecutors must also assume more responsibility for results and accept more accountability in the form of evaluation and transparency. In particular, those pressing on prosecutors from this side ask why prosecutors should not be involved in more problem-solving and less handling of individual events, as has become accepted strategy for police throughout the country (Roth and Ryan, 2000). They also ask why prosecutors should not be taking their direction from communities or neighborhoods, as the police have been trying to do in many places.

From the other side, a growing awareness of the immense powers that have been given to prosecutors suddenly accelerated with the widespread criticism of the Independent Counsels investigating President Clinton, HUD Secretary Cisneros, and Agriculture Secretary Espy. The Independent Counsels responded that they were doing only what prosecutors do and are allowed to do in the United States. That they were right about this shifted the question to the general practices of prosecutors. What, if any, checks are there on the capacity of a prosecutor to disrupt and even to destroy the life of an individual? Surely, public opposition is not much of a check at a time when elected prosecutors see their popularity tied to the strength of their image as crime fighters.

The paucity of research on the prosecutor's function makes it very difficult to answer these kinds of questions.[3] Despite their pivotal position in the criminal justice system, prosecutors have been largely ignored in both the social science and the legal literature. To cite only a few examples there is little in the legal literature that describes the prosecutor's function and no data in the social science literature on how prosecutors make decisions such as whether to charge in a case, what charges are appropriate and why, or whether there is any consistency in decision making within or across jurisdictions. There is little information about cases that are bargained versus those that go to trial. There is no information about the impact of reforms such as sentencing guidelines on the prosecutor's function, and no systematic information about failed prosecutions or appellate reversals for prosecutor error, or about prosecutor misconduct.

Electoral politics provide a central context for local prosecutors. Most chief prosecutors are elected rather than appointed, and so can function independently from mayors and county leaders, and to some degree from other criminal justice system officials as well. However, there is no systematic research on how politics influences the setting of priorities and policies within prosecutors' offices, the handling of high-profile cases, and relationships with other criminal justice actors such as the police and the judiciary or members of the community. There is no research on whether case outcomes or prosecution policies influence elections of prosecutors.

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[3]Notable exceptions to this lack of research include: Forst (1995); Forst and Brosi (1977); Ford and Regoli (1993); Tonry, 1991; and, for special units, Moore et al. (1985).

SCOPE OF THIS REPORT

The lack of research on prosecution, especially in contrast to other sectors of the criminal justice system, led the Committee on Law and Justice to convene a one-day workshop on these issues as part of its ongoing mission to identify gaps in specific areas of criminal justice research. This workshop was designed to discuss how social science has advanced our understanding of changes in modern prosecution practice and how it might do so in the future. The committee had four specific goals:

1. To describe, and discuss the ability to measure, recent innovations in prosecution practice;
2. To examine the themes—political and professional—associated with the invention and evaluation of the movement toward community prosecution and to explore how it differs from traditional prosecution;
3. To examine whether and in what ways the discretionary power of the prosecutor has been increased over the last two decades, and the impact of that increase on the system of justice;
4. To describe and discuss the effectiveness of ethical, administrative, and legal controls on prosecutorial discretion.

Workshop participants represented a range of disciplines including law, criminology, psychology, sociology, public affairs, statistics, law enforcement, and prosecution. Four senior scholars were commissioned to write papers in advance to pull together research findings reflecting the workshop's goals. Equally capable discussants for each paper were drawn from both academe and practice, to bring the best of social science research to bear on prosecution related issues, and to ground the discussion in real world concerns (the workshop agenda and the list of participants can be found in Appendixes A and B). Participants also included policy-level representatives from federal research, program development, and litigation offices within the U.S. Department of Justice and from private organizations such as the National District Attorneys Association and its research arm, the American Prosecutors Research Institute. Several Committee on Law and Justice members in attendance had also participated in extended discussions over several years about the role of the prosecutor at Harvard University's John F. Kennedy School of Government.

This mix of academics and prosecutors had the salutary effect of broadening the workshop's focus well beyond its original goals. Using the papers

as a starting point, the workshop chair guided the discussion to illuminate the ways in which rapid changes in technology, law, and community involvement in justice issues have and have not influenced the traditional ways of doing the work of prosecution. Through these presentations and discussions, the participants:

- Explored the role, powers, and responsibilities of the prosecutor and discussed whether they have changed over the past 30 years (Chapter 2);
- Examined changes in practice brought about by technology, changing priorities, new applications of law, and changes in other parts of the justice system that have had an impact on prosecution (Chapter 3);
- Considered the absence in prosecutors' offices of management improvements and new approaches that have been introduced in other sectors of criminal justice practice, and discussed how measures of accountability could be established for prosecution (Chapter 4);
- Discussed new taxonomies for prosecution that would better support the prosecutor's substantive legal and managerial responsibilities through a discussion of the broadest conception of the prosecutor's role (Chapter 5);
- Discussed the need for and parameters of further research on prosecution (Chapter 6).

The discussion reflected concern with both federal and local prosecution functions, with the heaviest focus on the local level, since it is there that the vast majority of cases are prosecuted. There was some comparison of prosecution standards and practices in the United States versus those in other countries, mostly to underscore the more powerful array of investigative tools available to U.S. prosecutors to collect evidence and make cases. Finally, the tension created by the need to protect the discretion of the prosecutor on the one hand and the greater transparency that would ensue from social science research on the other received a good deal of attention in the discussion.

This report attempts to capture the many insights and impressions offered at the workshop. Perspectives on prosecution research and practice varied widely. There were differences among participants about the value of standard social science approaches and their ability to capture appropriately and accurately the full range of prosecution activities and experience, especially given the ways in which factors outside of a prosecutor's control

may influence the formation of a prosecutor's priorities and the outcome of cases. Workshops are not designed to review past research, but rather to gain insights from the collective knowledge of experts—although this report draws on the criminal justice literature where it adds to the discussion. Participants focused on what has changed in prosecution recently and on what social science can tell us about those changes. The report provides details of important issues that were discussed at the workshop but, under National Research Council rules for workshop reports, does not draw definitive conclusions or make recommendations. The Committee on Law and Justice hopes that this report will stimulate interest among scholars, prosecutors, and policy officials regarding future research needs in this important policy area.

2

The Role of the Prosecutor

The prosecutor is the principal representative of the state in all matters related to the adjudication of criminal offenses. He has a hand in virtually every decision made in the legal course of every case that comes before the criminal courts. The prosecution function is organized differently at the local and federal levels. In all but two states, each county in the state elects a local prosecutor and, in keeping with the notion of equal access to justice for all citizens, pays the prosecutor from public funds. Most chief prosecutors have complete authority and control over the prosecution policies and practices in their jurisdictions, constrained only by the broad outlines of criminal justice statutes, case law, and court procedures that are under the authority of the judiciary (McCoy, 1998).

U.S. Attorneys serve as the nation's principal federal litigators, under the direction of the Attorney General. They are appointed by the President and confirmed by the Senate. One United States Attorney is appointed to serve in each of 93 judicial districts. As the chief federal law enforcement officer of the United States within his or her jurisdiction, the U.S. Attorney has the responsibility to prosecute criminal cases brought by the federal government; to prosecute and defend civil cases to which the federal government is a party; and to collect debts owed to the federal government that cannot be collected administratively (U.S. Department of Justice, 2001).

The powers of a district attorney (DA) or federal prosecutor arise broadly from statute, case law and procedure, and more specifically from the duties traditional to the prosecutor's office. These activities include

reviewing the charges against any person arrested by the police, deciding whether to charge an individual with an offense and determining what that offense should be. The prosecutor has the authority to offer plea bargains—reducing the seriousness of a charge in return for a guilty plea or for other forms of cooperation with the prosecution. He also conducts the trial for the state and makes sentencing recommendations.

The prosecutor may also play a role at the investigative stage in two important ways. He may provide advisory assistance to the police in an investigation to make sure that the evidence required for conviction is present and that investigators have access to certain tools that the prosecutor controls, such as the grand jury or requests to the court for warrants for searches or electronic surveillance. The prosecutor may also assume some responsibility for the lawfulness of investigative activities.

Using these powers, a traditional prosecutor would say that his chief responsibility is to "see that justice is done" by convicting those who have violated the law by conduct that is widely recognized to be very harmful or immoral. Part of this responsibility is to help create safety for citizens by convicting and thereby isolating those who are dangerous, and to make sure that only the guilty are tried and punished. Only slightly less important is the prosecutor's responsibility to ensure that the investigative and trial processes are lawful and fair. This is especially a responsibility for prosecutors in the United States.

INVESTIGATIVE POWERS

Workshop participants noted that in most civil law countries, the powers enjoyed by U.S. prosecutors traditionally have been divided among several functions within the justice system. For example, most civil law jurisdictions require prosecution if the evidence is sufficient, and require that a judge approve a decision to charge an individual with a crime. Until recently, it was the police who decided what cases to bring in England. In the United States, the decision to either charge or dismiss the case by declining to bring formal charges is within the prosecutor's power and discretion.

In addition, most civil law countries deny investigators powers that we in the United States permit to strengthen evidence in a case. Here, investigators may offer to engage in crime to collect evidence against suspected criminals—for example offering to buy or sell drugs or to engage in prostitution. The United States also permits the use of participant informants, who may themselves be criminals, in the investigation of ongoing criminal

activities; the use of electronic surveillance; offers to provide immunity from prosecution in exchange for testimony; and the compelling of testimony at the investigative stage through the use of the grand jury.

The grand jury is a particularly powerful tool at the disposal of prosecutors in about half of U.S. jurisdictions. A grand jury consists of a group of citizens that hears complaints and accusations brought by the prosecutor in criminal cases. Its duty is to determine whether probable cause exists that a crime has been committed and to decide whether a person should be tried in a court of law for that crime. Secrecy is a requirement of grand jury deliberations in order to protect both the safety of witnesses and the reputation of accused persons in cases where the evidence may not be sufficient for an indictment. In most jurisdictions it is the prosecutor who manages grand jury proceedings and instructs its members in the law's requirements; he thus exerts considerable influence over grand jury decision making.

Countries that forbid these kinds of activities or lack these kinds of powers pay a high price, in that very important types of cases can rarely be made. In the United States, these activities are frequently used in the investigation of organized crime cases, large scope white-collar crimes, and cases of government corruption. One workshop participant described the kind of investigative work conducted by the Manhattan District Attorney's office to investigate, solve, and then prosecute cases related to major frauds in the financial industry. These can be domestic or international cases, often involving billions of dollars, where U.S. banking or securities laws have been violated. Without the investigative tools and other powers at the disposal of the prosecution in this country, many such cases would go undetected.

SETTING PRIORITIES

Workshop participants noted that with the exception of recent technological and scientific advances, the tools that prosecutors use and the way that prosecutions are conducted have changed little over the past 30 years. Changes have occurred, however, in the types of criminal behavior that are seen as warranting substantial attention from prosecutors. Because most chief prosecutors are elected, the political climate in a community plays a large role in their day-to-day activities, and virtually always demands attention to the most serious, generally violent, crimes. But recently, other categories of crime have become priorities too; for prosecutors have the power to influence both public and private conduct through the priorities they

set. In recent years they have used this power to address a variety of social problems, some involving violent street crime, and some previously treated as private or civil matters. Prosecutors' attention to these issues has been stimulated by local advocacy, national policies accompanied by the sudden availability of federal resources, and, occasionally, research. Prominent examples include illicit drug use, youth gun violence, family violence, and drunk driving. Many prosecutors have established special units within their offices that deal solely with these kinds of problems or offenses.

Elected prosecutors also must establish a management framework within their offices that allows these priorities to be carried forward in an orderly and efficient way. In many jurisdictions this requires the ability to supervise a full-time staff of mostly inexperienced, young attorneys. Legal training, however, is not designed to develop this set of skills. Supervision of their support personnel and the development of procedures to guide decisions and activities of both lawyers and staff take management skills and tools. Traditionally, prosecutors have used their intelligence and creativity not to manage, but rather to handle complex matters of law and justice—matters that may be further convoluted by competing community attitudes and local politics. This and their engagement in the U.S. adversarial legal culture persistently orients them to the individual case at the expense of more efficient management strategies.

Prosecutors, however, have a responsibility to think beyond the big case. Several workshop participants asserted that chief prosecutors must be able to elevate their focus to all of the matters under their control that have large consequences for the community and the broader society. Achieving this goal requires attention, not just to individual case organization and management, but also to procedures and office management, including the development and analysis of performance assessment systems, and the development of policies for setting priorities that reflect the public's concerns about community safety and justice. In order to guide selection of management strategies, research is needed on caseloads and other basic, constitutive parts of the prosecutorial function. Moreover, research on the impact of all of these prosecution activities is needed to distinguish policies that result in real improvements from those that may be popular or politically salient but are otherwise ineffective or even harmful.

In thinking about our ability to conduct research on these matters, a number of workshop participants noted that the most dramatic changes in what prosecutors do usually occur in large jurisdictions, or in federal judicial districts that have significant crime, a wide array of social problems

associated with crime, and the prosecution resources to invest in the pursuit of crime. For example, according to the Bureau of Justice Statistics (1998b), in 1996 half the prosecutor's offices nationwide reported employing nine or fewer people. In Indiana over half of the counties with elected prosecutors have a population under 30,000. These counties do not have a lot of crime. Many have only part-time prosecutors. Seemingly new practices such as vertical prosecution (having a single prosecutor handle a case from charging through trial and disposition), or community prosecution, discussed below, are not changes or innovations in these places. They have always had them. These prosecutors are interested in innovation, but they are looking for help with the few but difficult and longstanding problems in their counties, such as domestic violence, or help with rare cases such as a high-profile murder or sexual assault case.

Workshop participants noted that prosecutors have not been in the vanguard of change in criminal justice. When new policies are created they may be introduced incrementally and without a great deal of planning in response to political and public pressures such as follow a wave of violent crime. Two relatively major but unevaluated policy shifts have crept into prosecution practice nationwide in this way beginning in the early 1980s: the trend in plea negotiations to charge the most serious offense that the evidence will support in both adult and juvenile cases; and the practice of shifting local cases, especially drug cases, into the federal system to take advantage of harsher penalties or more lenient trial procedures (Bureau of Justice Statistics, 1998a). Social science is only beginning to explore the implications of these practices, or the impacts of other more superficial changes, such as: the use of new technologies, the creation of special prosecution units, the use of civil remedies in criminal cases, and new models of prosecution based on concepts of community justice. These changes are discussed in the rest of this report.

3

What's Changing in Prosecution?

Despite their reputation for resisting change, prosecutors do have specialized expertise, and they get invited—or sometimes pushed by political forces—to use that expertise in new areas or in new ways to both solve problems and seek justice. Which problems they select to solve often depend on whether what they can do is consistent with what they are used to doing. Workshop participants pointed out that rather than initiating a fundamental change in what he does, the prosecutor may simply be setting new policy, using new management or investigative tools, or expanding his domain into a new area. These changes, seemingly superficial, nevertheless can have a large impact on the efficiency, effectiveness, and broader social impact of prosecution practices, especially an influence on safety and the evolution of community norms.

NEW TOOLS AND THE GROWING ROLE OF SCIENCE AND TECHNOLOGY

Workshop participants noted that scientific and technological advances appear to have had the greatest impact on how the work of prosecution is performed and managed. The development and use of office computers and new software systems, for both the tracking of cases and the generation of the many documents associated with a case, have vastly improved the prosecutor's ability to process cases quickly as the courts and the constitution require. Before the introduction of this computer technology, the

ability to analyze and, in many jurisdictions, even describe what was happening in criminal litigation was virtually nonexistent. There also was no means of establishing accountability for decisions, case processing delays, or case outcomes, and in fact, the new technology was at first resisted because of the specter of accountability and its potential for eroding the prosecutor's discretion (Forst, 1999).

Today, prosecutors have access to sophisticated systems capable of supporting overall office as well as individual case management. Data on arrests, caseloads, and conviction rates can be developed and used for short- and long-term planning and resource allocation. Evidence can be quickly gathered from computerized records within prosecution or law enforcement agencies (i.e., fingerprint records and case files), and from outside sources such as records of drivers' licenses, telephone calls, retail sales, credit information, and banking transactions. Defendant criminal histories can be easily retrieved to support sentencing recommendations.

Technology on a broader scale holds promise for supporting successful prosecution. Video cameras in banks, retail establishments, and entertainment venues record robberies and assaults. Investigators and prosecutors can improve problem-solving through the use of computerized mapping systems to analyze the ways in which crime clusters in certain neighborhoods, or around residences or hangouts of known offenders (Mammalian and LaVigne, 1999). Emerging technologies in optical scanning, multimedia, and artificial intelligence may also provide further support for solving crimes and identifying and convicting offenders (Forst, 1999).

DNA profiling is the premier scientific advance that has affected what prosecutors do. The development of DNA profiling has revolutionized 20th century forensic science as well as the criminal justice system. It frequently enables prosecutors to conclusively establish the guilt of a defendant, particularly in sexual assault and homicide cases, where an offender is most likely to leave his genetic signature, in the form of skin, hair, or bodily fluids, at the crime scene (National Institute of Justice, 1999). Moreover, DNA evidence is even more likely to exonerate a wrongly accused suspect than to identify a guilty one. This helps prosecutors to avoid unjust prosecutions that may carry high human, financial, and political costs. In recent years, DNA profiling has proven valuable in exonerating wrongly convicted persons whose trials took place before DNA profiling became available. By 1996, it had been instrumental in correcting injustices in 28 convictions, obtained by using less discriminating identification methods

that failed to exclude the defendant as the guilty party (National Institute of Justice, 1999).

More than a decade after its introduction, DNA profiling is still only selectively used. The costs of DNA testing remain high, and case-processing backlogs in the relatively few laboratories currently qualified to conduct DNA tests number in the tens of thousands. This can be expected to change, however, as research develops less costly and time consuming DNA evidence collection and profiling methods. Currently, every state in the nation is in the process of implementing a DNA index of individuals convicted of certain crimes such as rape, murder, and child abuse. Their DNA profiles are entered into a DNA database (CODIS, or Combined DNA Index System), against which DNA evidence from crime scenes can be compared. This system will increase the possibility of eventually, correctly identifying suspects in cases where there are no witnesses and the perpetrator is unknown (National Institute of Justice, 1999).

Workshop participants noted that the prosecutor's chief responsibilities in the use of this valuable, new forensic tool are, again, traditional ones that involve both case and administrative management. Prosecutors need a detailed understanding of DNA technology and its appropriate uses so that DNA evidence is both credible and clearly presented at trial. Several recent cases, most notably the O.J. Simpson trial, have established the importance of implementing clear and specific evidence collection, storage, and chain-of-evidence guidelines and procedures for investigators. Prosecutors have a responsibility to ensure that DNA profiling is accessible to defendants in cases where its use will serve justice. Social science research can improve the human interface with the technical capabilities of DNA profiling by developing information on the kinds and number of cases where the use of DNA evidence benefits the prosecution or the defense. It is also important to document the nontechnical reasons for success or failure, for example, by tying procedures to collect and preserve DNA evidence to case outcomes.

EXPANDING THE PROSECUTOR'S DOMAIN

During the past two decades, prosecutors have increasingly signaled new priorities by developing special units or creating task forces within their offices to target specific classes of offenders or types of crime. These units can be created in response to a number of stimuli:

- Political advocacy related to a specific type of misconduct such as child abuse or a neglected victim group, such as women in domestic violence cases;
- High-profile or unsolved cases such as the Jon Benet Ramsey case;
- Media attention to behaviors that affect the community as a whole such as environmental, certain white collar, and drunk driving offenses.

Such a specialized unit can grow into a major category of activity as in drug crime prosecution, but they are generally considered somewhat less important and less prestigious than the prosecution of major felonies such as robbery, rape, and homicide.

Specialized units do two things. First, they are able to marshal sufficient resources to focus scarce prosecution resources intensely on one problem or a set of related problems. Second, they create the additional and specialized capacity to investigate cases—in collaboration with police who may be assigned to their unit—to ensure that the needed evidence is properly identified, collected, and analyzed, and prepared for presentation at trial. This kind of collaboration between the police and prosecutors may contribute to a unit's overall success not only by improving the quality and handling of evidence, but also by addressing the needs of all interested parties—police, prosecutors, victims, and witnesses—participating in the process. The following brief examples provide some insight into the operations of special units created to solve specific problems.

POLITICAL ADVOCACY: THE CASE OF DOMESTIC VIOLENCE

In the early 1980s, victim advocacy organizations brought new attention to the problem of family violence, especially partner assault and homicide. Their political activism, together with a number of successful lawsuits against the police, and more recently, the availability of hundreds of millions of dollars in federal assistance, convinced many local and federal prosecutors' offices to develop special units to handle family violence complaints.

The innovation in the case of domestic partner violence has two aspects. The most important is that prosecutors are now prosecuting cases that they once preferred not to prosecute, and are developing an expertise in the dynamics of such cases. Special units learn why the victim, usually the woman, may have stayed in the relationship. They know that a possible

reason for her failure to appear as a witness at trial is that she has been physically prevented from doing so by the accused. They understand why she may at first decide to press charges and then change her mind, and why she may feel safer doing so, even though the prosecutors believe it to be inimical to her interests.

The second aspect is the development of new case management practices to support the policy of prosecuting these cases. For domestic violence cases, a set of mostly unevaluated procedures, collectively known as mandatory prosecution, has been widely adopted. Mandatory prosecution most often features a no-drop policy and victimless prosecution. For misdemeanor assaults, these practices virtually eliminate the victim's influence over the case, and (in the name of ensuring the victim's safety) also make modest inroads on the usually unlimited discretion of the prosecutor to decide which cases should be charged. This also generally means that prosecutors rely on other witnesses and circumstantial evidence, documented by police or special unit investigators, including hearsay evidence in the form of excited utterances.

Technology—the videotaping of injuries and of initial police interviews with victims, and the ability to quickly retrieve computerized records of prior complaints and protective orders—facilitates the building of evidence, obviating the need for victim testimony. Some workshop participants saw these practices as a fundamental change because of their clear criminalization of behaviors that were once treated as civil matters. Others saw them simply as an application of rigorous prosecution practices to a class of crime that traditionally had been ignored.

An important point made at the workshop was that because domestic violence prosecution practices have not been evaluated, it is not clear that they are achieving the goal of increasing the safety of women. For example, though the number of murders has declined substantially for both male and female victims of intimate violence, it is the male homicide victimization rate that has decreased most sharply (5 percent per year since 1976). In contrast, the rate of decrease in the rate for women has been at about 1 percent per year during that period. The percentage of female murder victims killed by an intimate has remained at 30 percent since 1976, and there is some evidence of a slight increase in the rate of white females killed by a boyfriend (Bureau of Justice Statistics, 1998b). Evaluations of prosecution practices that followed case outcomes longitudinally over a period of several years might help to pinpoint which practices are related to or can prevent such outcomes.

OFFENDERS AND COMMUNITY SAFETY: SPECIFIC UNITS

Some other special units are created to target particular types of offenders whose crimes have a widespread effect on the community. Examples include youth gangs, drug traffickers, drunk drivers, serious and habitual juvenile offenders, firearms dealers that sell to youth, and adult career offenders. Again, prosecutors in these units develop expertise about these types of offenders and what kinds of prosecution, or in some juvenile cases, diversion or prevention and intervention strategies work with them. Most offender-focused special units are found only in large jurisdictions that have greater numbers of these special classes of offenders and sufficient resources for targeting them.

While some offender-specific prosecution units participate in prevention and diversion programs, they have grown, for the most part, out of the "get tough" or "zero tolerance" policies that have been adopted by federal and state legislators and prosecutors since the mid-1980s. Prosecutors tend to use aggressive prosecution strategies against these offender groups. Youth gang and career offender units frequently use offender profiles that examine criminal histories and offense methods when making judgements about what strategy to pursue in a particular case (for example, see Gramckow and Tompkins, 1999, on the Serious Habitual Offender Comprehensive Action Program). Most use vertical prosecution. Other aggressive strategies include: tailoring charges to meet legislative standards for sentencing enhancements; waiving certain cases to adult court or federal jurisdiction; imposing pre-trial detention through the setting of high bail; restricting plea bargaining to the most serious offense that the evidence will support; and utilizing appropriate victim/witness protection from intimidation strategies.

Effects of these practices in terms of crime reduction, deterrence, impact on incarceration rates, and future outcomes for offenders and communities remain unexplored by social science. Prosecutors may need to be persuaded that that it is worth evaluating their policies in these areas to determine which ones work; which are the most protective of victims and under what circumstances; which create a deterrent effect; and which reduce crime and result in greater community safety and satisfaction. Evaluation research on the impact of prosecution practices that target special crime types and special offender groups presents perhaps the best chance to improve our understanding of prevention and control.

NEW APPLICATIONS OF LAW: CIVIL REMEDIES AND PROSECUTION

The use of the civil law by prosecutors as a remedy for crime and the problems created by it is considered by some scholars to constitute a very fundamental change in the way cases are prosecuted. Justice Byron White expressed strong reservations about the abandonment of the clear dividing line between civil and criminal remedies, fearing that it would create novel problems where none had previously existed and might "infect" many different areas of the law (Mann, 1992). At the heart of this view is the notion that criminal and civil law have different purposes and procedural rules. The first is intended to punish; the second to compensate. Different standards of proof apply depending upon whether a case is tried in criminal or civil court. Historically, these paradigms have shaped legal principles and even the legal profession, for example, with respect to the specialization of attorneys, the definition of procedural rules, and the division of authority among the courts (Mann, 1992).

In today's legal atmosphere, with plaintiffs seeking (and obtaining) substantial punitive judgements in civil cases, the concept of the punitive civil sanction has been repeatedly affirmed, and a new jurisprudential area, called the "middle ground" by Mann, is being recognized. Middle ground sanctions include any form of legal process that combines elements of both criminal and civil law, for example, punitive sanctions in civil procedural settings, and remedial sanctions in criminal procedural settings.[1] Important to the new paradigm is the concept of the state-invoked civil sanction—that is, a case involving civil punitive sanctions in which the government, rather than a private entity, is the moving party. Among other issues, this raises the specter of abuse of the sovereign's prerogative and police power, and the possible circumvention of needed procedural protections in criminal matters to protect citizens from unreasonableness. Unfortunately, there is little research on how the prosecutor uses this new legal mechanism and on its effects.

[1]For a more detailed description of the middle ground, see Mann (1992).

Injunctive Relief

Since the mid-1980s, there has been a growing use of civil sanctions by prosecutors. Generally, these sanctions have been used in cases where the criminal law is seen as ineffective in improving community safety. For example, in Boston, restraining orders, whose violation is a criminal offense, were used under the authority of the state's civil rights laws to deter certain hate crimes. The civil injunction could be invoked against a pattern of behavior, where criminal charges for each individual act would have been far more cumbersome and difficult to prove. The sanction for violating the restraining order was, in this case, more severe than the criminal sanction for the targeted behavior (usually repeated window breaking or other forms of vandalism thought of as minor acts). This process was perceived by the victims and prosecutors as creating more of a deterrent than the rarely invoked criminal sanctions for these acts. In these cases, use of the punitive civil sanction was easier than trying to bring criminal charges in courts crowded with cases viewed as more serious. Injunctive relief has been used to address anti-abortion protests, youth gang activities, and drug-related crime, among other matters. Because there has been no systematic evaluation of these practices, what is known about their effects lies in the realm of the anecdotal account.

Asset Forfeiture

More controversial than the above examples have been is the use of asset forfeiture in a wide variety of both felony and misdemeanor cases. Civil forfeiture is authorized in every state, in many local ordinances, and in numerous federal statutes. It has been used in labor picketing, anti-abortion protest, youth gang, and drug and gambling cases. Civil forfeiture is easy to use and offers procedural advantages to the seizing authorities. In recent years, it has raised substantial revenues for law enforcement agencies investigating drug cases in cooperation with federal prosecutors. The fairness of these procedures has been called into question, however. In a recent study of 146 federal drug cases in one U.S. district, researchers found a concentration on seizing real property with a high value, and that such high value seizures were pre-planned and commonly made under a controversial "facilitation" statute (Warchol and Johnson, 1996). The cases frequently resulted in a settlement or forfeiture, but also had the highest dismissal rate among all property types. There is some evidence that forfei-

ture of valuable assets can become the basis for selection of drug cases, even though prosecuting the case offers little or no social benefit, and, in many instances involves offenders who are not engaged in serious criminal activity (Miller, 1996).

Two recent U.S. Supreme Court decisions affect the ways in which law enforcement can use civil forfeiture. In one case, the issue of double jeopardy was resolved in favor of law enforcement, with the court finding that civil forfeiture is remedial rather than punitive enforcement. The Court ruled that the government could use, in combination, the criminal law to prosecute someone and the civil forfeiture laws to confiscate that person's property, even where both actions were based on the same underlying criminal offense (*United States* v. *Ursury*, 1996). The second case addressed the fairness of the law (*Bennis* v. *Michigan*, 1996). Here, the Court "balanced the increased responsibility for property owners against the need to deter criminal conduct and decided in favor of law enforcement" (Schroeder, 1996). The Court made clear, however, that this decision should not be construed as permission to bring forfeiture actions against known innocent parties.

Recently, Congress passed a bill to provide innocent owners with an exception to federal forfeiture laws, and to require agencies to notify owners of their rights in forfeiture proceedings. While it is clear that forfeiture laws have been a financial boon to many law enforcement agencies, their efficacy in reducing or deterring crime has not been measured.

Civil Abatement Procedures

The Manhattan District Attorney's Office has been a pioneer in the use of civil abatement procedures to close down illegal drug businesses operating out of privately leased residences within the city. Workshop participant Ray Marinaccio, a Deputy Bureau Chief in the Manhattan District Attorney's Office, described the program as based on civil statutes that give landlords the right to evict tenants for using their premises for illegal business. In New York, there is a provision in the law that specifically allows law enforcement to initiate these proceedings by insisting that the landlord evict the offending tenant. If the landlord fails to comply, he can then become a defendant in a civil petition, and can be forced to pay various fines, as well as the cost of the eviction.

This program started out slowly for a number of reasons, not least, the need to explore the constitutional issues surrounding this use of the law by

prosecutors. The process that developed involves prosecutors obtaining search warrants executed from criminal cases to determine whether a particular location is associated with a given narcotics case. The premises are searched, and if enough evidence is collected, a notice is sent to the landlord of the building demanding that he bring an eviction proceeding against that tenant.

The object of this program is to return stability to the building and its law-abiding residents. It seems to work best in buildings that have mostly stable, long-term renters, with only one or two tenants who are selling drugs from their apartments. In these cases, the building dynamics are permanently improved by the eviction, because the tenancy no longer exists and the drug dealer cannot return "home" to the building when he gets out of jail. Buildings where there are many drug dealers have more intractable problems that cannot be addressed successfully through civil punitive sanctions.

There is a lack of evaluation on civil abatement programs, as well as other uses of civil law to address crime problems. More research on civil punitive sanctions and their impact on different crime types, offender types, and community/neighborhood settings might lead to increased understanding of how these sanctions can best be used to prevent and control certain crime problems.

4

Accountability and Management

Given the major changes that have taken place in other parts of the criminal justice system, especially in policing and corrections, there are a number of innovations that one would expect to see in prosecution that have not taken place. One of these is the failure of most prosecutors to establish research-based systems of accountability. The principal use of technology is to solve crimes and to build evidence in cases, rather than for more sophisticated management of the prosecution function. Generally, prosecutors have been unsuccessful in making changes in office management to deal with the extent to which power is concentrated at relatively low levels. A second limitation on innovation is the reluctance of many to accept their role as community leaders by engaging in activities other than bringing criminal (and occasionally civil) charges in court as a response to community crime problems. Finally, prosecutors have only recently begun to think of new ways to address the concentration of serious crime problems in specific neighborhoods through problem-solving approaches and partnerships with residents and other public agencies and private organizations.

ACCOUNTABILITY

The large caseloads that characterize many prosecutors' offices today, coupled with changing workplace technologies and other scientific advances, call for administrative leadership as well as legal proficiency. Forst

(1999) believes that many prosecutors have been slow to learn and apply modern principles of management and measures of accountability that seem warranted by their position of public power and responsibility. In the 1970s and 1980s, prosecutors implemented computerized case tracking and management systems in their offices, but few have used these capabilities to develop systematic information about case outcomes or management issues.

Part of the reason for this, as expressed by workshop participants, is a sense on the part of prosecutors that statistics cannot pick up what is important. For example, a great deal of work may go into a major financial fraud case that results in only a small number of indictments; yet the case may be very significant in terms of the further harm that would have been caused had the fraud gone unchecked. Also, as was once the case for police, the determination of what is actually being measured is an issue for prosecutors. Case outcomes, after all, are influenced not only by what the prosecutor does, but by the quality of the police investigation and the decisions of witnesses, juries, and judges.

As a result of these kinds of concerns, little systematic data on prosecution exists at the local or national level. For example, there is hardly any systematic information about prosecutor caseloads, number of crimes charged, cases bound over for trial, ratio of plea bargains to trials, or conviction rates. The National Judicial Reporting Program (NJRP), conducted by the Bureau of Justice Statistics, collects the most systematic data on conviction rates that we have today in the United States (Forst, 1999). The Bureau of Justice Statistics (BJS) has assembled conviction rates biennially from courts in about 300 counties around the country since 1986. However, these rates are not constructed from case tracking statistics, and so may distort the relationship between arrest and conviction for the six categories of crime covered, especially when the numbers of crimes are changing (Forst, 1999). BJS also conducts a National Survey of Prosecutors. Designed as a biennial series, the most recent available data were collected in 1996. The survey collects data on resources, policies, and practices of local prosecutors from a nationally representative sample of 308 chief litigating prosecutors in state court systems. It obtains basic information on staffing and operations and on current topics such as the use of innovative prosecution techniques, intermediate sanctions, juvenile cases transferred to criminal court, actions against prosecutors and other professional staff, and work-related assaults and threats (Bureau of Justice Statistics, 2000). In addition, BJS develops special reports on selected topics such as its re-

port, *Prosecuting Criminal Enterprises: Federal Offenses and Offenders* (Abt Associates, 1993). Because of resource constraints, these efforts are less systematic than NJRP reports in terms of periodic coverage, sampling design, and the bottom-line relationship between arrest and conviction. Monitoring is hampered because there are no benchmarks or common denominators across prosecutors' offices nationwide against which success and failure can be measured and compared. For example, the numbers for conviction rates will be very different depending upon whether convictions are measured against a denominator of cases involving any arrest, only arrests based on strong probable cause, or only arrests that result in a charging decision by the prosecutor (Forst, 1999).

With regard to research, no information exists that addresses such critical questions as how prosecutors establish supervisory authority within their offices; how they set priorities; how they establish a culture of ethical and professional behavior; how they train new prosecutors to manage large caseloads; or how they keep track of successes and failures. This lack of monitoring and research data is striking, especially in considering the importance and indeed the power of prosecution in the criminal justice system.

COMMUNITY LEADERSHIP: ACCEPTING THE ROLE

As elected public figures, prosecutors potentially have a huge influence over the administration of justice in a community. It was pointed out that the prosecutor has a unique perspective in that he represents the only part of the criminal justice system that touches every other part, and therefore can really think about crime control strategy and not be confined to one part of the system. Some workshop participants expressed surprise that most prosecutors only rarely involve themselves in anticrime and community problem-solving activities other than bringing cases to trial.

At the workshop, the vision of the prosecutor as a policy maker, who should possess some sense of strategy for what the office should be doing, was characterized as somewhat at odds with the more traditional primary focus on individualized justice. E. Michael McCann, the District Attorney in Milwaukee, also suggested that this is in part an issue of resources. Many prosecutors are continually strapped for enough resources just to hire assistant district attorneys to conduct cases. Moreover, given the roles of other, parallel criminal justice entities such as the police and the judiciary, taking the leadership in crafting policy can be something of a political gamble.

One former prosecutor, who tried to develop what he saw as sensible drug prosecution policy in his jurisdiction, was able to get everyone to go along except the police. The police fought back in the media by saying that implementing the prosecutor's proposed policy would be like putting a sign at the state border saying "come to our state to do drugs."

The adversarial context in which prosecutors operate also contributes to the tension between doing justice in individual cases and adopting a community or policy leadership role, in that the community may be looking for a different outcome than is available through an adversarial process. They may want the prosecutor to help them control neighborhood teens on the one hand, but not want their children to carry the onus of a criminal conviction on the other. Routine case processing is thus a safe harbor for prosecutors. Nevertheless, many workshop participants expressed the opinion that prosecutors are integral to models of community justice, and noted that a policy leadership role is feasible if prosecutors negotiate with other interested parties as equal and parallel entities. It is also important to take on manageable issues where cooperation will have tangible positive outcomes for all of the justice system actors and the community. These ideas are further explored in Chapter 5 of this report.

MANAGEMENT OF DISCRETION

Criminal justice reforms during the second half of the 20th century imposed limits on the exercise of discretionary power that affect the police, the courts, and corrections officials. Police became constrained by numerous cases involving Fourth Amendment rights, regarding whom could be stopped, under what conditions, and how arrests were to be made. Decisions under the Fifth and Sixth Amendments, such as Miranda, also imposed significant restraints. Various changes in criminal justice practice followed these reforms. Judges both at the federal level and in some states must adhere to, in some cases, stringent sentencing guidelines that were created to reduce disparity in sentencing decisions. Parole boards were abolished in many jurisdictions, essentially eliminating correctional discretion over sentence length. These changes were motivated by the notion that greater visibility and accountability were needed in the criminal justice system to ensure both effectiveness and fairness of criminal justice processes and sanctions. The discretionary powers of prosecutors, however, were virtually untouched by these earlier constitutional and policy reforms (Vorenberg, 1981; McCoy, 1998).

Given the broad discretion historically available to prosecutors in selecting cases for prosecution, determining charges, and influencing whether cases are bargained or go to trial, the extent to which sentencing and other reforms may have increased the prosecutor's power and the desirability of this have become matters of scholarly and policy debate (McCoy, 1998). Some scholars have observed that the discretion of the prosecutor appears to have expanded in terms of its impact on case outcomes. Stith and Cabranes (1998), for example, note that in federal cases where the defendant has provided substantial assistance to law enforcement authorities—one of only two circumstances permitting a departure from strict Federal Sentencing Guidelines—the departure authority is limited to cases where *the prosecutor requests the court* to depart downward (Stith and Cabranes, 1998: 76). The judge cannot initiate such a departure on his own authority, nor can the defense attorney file a motion requesting it. They conclude that the U.S. Attorney's discretionary power now appears to be greater *relative* to that of judges than it was in the past. This conclusion may apply in relation to police and correctional reforms as well. At issue for workshop participants was the relative absence of management controls over the exercise of these discretionary powers by individual prosecutors.

Several workshop participants expressed concern that discretionary decisions that may profoundly affect the lives and futures of individuals and their families are frequently in the hands of young and relatively inexperienced attorneys who must decide whether to bring charges under broadly written and vague statutes defining the elements of an offense. As stated previously, beyond these statutes, few guidelines and virtually no controls exist over whether and what to charge, and on what terms to bargain. Vorenberg (1981) has observed that the prescribed checks on the improper exercise of the charging decision, such as the grand jury and the preliminary hearing, rarely generate a critical review of the prosecution decision. Internal controls such as formal guidelines or internal statements of office policy also may be inadequate in many jurisdictions, although many discretionary practices within an office may be "sufficiently routine and well understood" that serious deviation would be likely to attract negative attention (p. 1545).

The workload, especially in the nation's largest prosecutors' offices (those serving one million residents or more), and the sheer numbers of assistant prosecutors making decisions in individual cases may interact with a paucity of internal and external controls to further complicate a chief prosecutor's ability to manage discretion. In recent years, the accelerated

rate of change in legislation creating new crimes or new sanctions for old ones also may be playing a role. For example, the Bureau of Justice Statistics has reported that in 1996, over 7400 assistant prosecutors worked in the 34 largest prosecutors' offices. In these jurisdictions, some 7000 cases were brought against juveniles in adult criminal court. Only about half of the offices had written guidelines about proceeding against juveniles in criminal court or a specialized unit or designated attorney that handled such cases (Bureau of Justice Statistics, 1998b).

The potential for misjudgements or errors in such an environment is important, but is not the sole argument for more systematic review and management of prosecution decisions. Largely unfettered discretion can also provide a milieu for misconduct, which, even if only occasional, can raise serious doubts about the legitimacy of the criminal justice system. Dwyer and colleagues (2000) reported that prosecutorial misconduct played a role in 26 out of 62 cases in which convicted defendants were later exonerated based on analysis of DNA evidence. One workshop participant talked about a study, under way at the time and now completed by researchers at the Columbia University School of Law. The research team examined rates of reversible error in 5760 death penalty cases. They found that prosecutorial suppression of exculpatory evidence (that the defendant was either innocent or not deserving of the death penalty) or other forms of law enforcement misconduct were responsible for appellate reversal of convictions in 16-19 percent of the reversed cases though this did not necessarily lead to subsequent acquittals. In 22 of the 5760 cases, retrial resulted in an acquittal (Liebman et al., 2000).

Despite these kinds of problems, legislatures and courts historically have been reluctant to tamper with the discretionary powers of prosecutors, and there is scholarly debate about whether external controls such as legislated guidelines would result in benefits or harm. Some prosecutors argue that even internal guidelines may have the potential to do harm and are not needed. The deterrent effect of criminal statutes may be undermined by guidelines if defense attorneys and others know that for certain first offenses—minor crimes such as shoplifting, or even felonies—plea bargains to lesser charges are office policy (Vorenberg, 1981). One prosecutor at the workshop pointed out that in many jurisdictions, the known proclivities of individual judges to give specific sentences for specific crimes provide a very real check on the prosecutor's discretion. Several workshop participants pointed out that there is no easy remedy for the absence of management controls over discretion, noting that a key lesson from the experience

with the Federal Sentencing Guidelines is the need for flexibility within any system designed to regulate professional judgement (in addition, please see Stith and Cabranes, 1998). Several participants observed that improving the management of discretion is an important topic for future research on the prosecution function.

5

Alternative Conceptions

Whether or not one believes that the discretion of the prosecutor has increased or is out of balance with the influence of other criminal justice system officials, it was clear workshop participants believed that prosecutors have extraordinary authority to confront criminal offenders. They have the power to make offenders accountable for their actions, and to "do justice" in a way that balances the state's interest, including victim concerns, with the individual rights of the offender. Less clear is their power to resolve crime problems generally, let alone the societal problems that underlie them.

Even if strong research had been supported over the years, making the link between what prosecutors do case-by-case, and its effect (if any) on neighborhood crime and disorder would be difficult (some believe impossible). The mid-1980s ushered in a serious drug epidemic accompanied by a wave of lethal and often random violence by juveniles and young adults in poor urban areas that lasted for almost a decade. Incarceration doubled during that period, not as a result of strategic planning on the part of prosecutors or other law enforcement officials, but more in a piecemeal fashion because of popular and political pressure for offender accountability. The sum of law enforcement efforts by prosecutors and police to stem these problems, however, seemed, in Zachary Tumin's words, "to have left neighborhoods not much safer, the vulnerable and weak no less fearful, relationships broken by crime no more restored, and to have created few new bonds of citizenship" (Tumin, 1990: 2). While possessing

all of the necessary tools to make a difference in these areas, prosecutors appear at best to be able to make only limited headway.[1] Many scholars and criminal justice executives have begun to question both the wisdom and the justice of the blanket incarceration strategy that ensued from this dilemma, although some argue that it may account for much of the reduction in violence since 1993.

In 1986, at the request of several prominent prosecutors, the John F. Kennedy School of Government established an Executive Session for State and Local Prosecutors at Harvard.[2] Over a four-year period, supported by research papers, case studies, and reports from the field on strategic issues nominated by its members, the session developed a series of models of what prosecutors feel (or should feel) responsible for, and what kinds of actions they are authorized to take. The Executive Session examined the question of whether prosecutors could reposition their agencies in an effort to make greater inroads against disorder and crime, or whether their traditional, dual mission of enforcing the state's interest on the one hand, and serving as the protector of the individual's interest in liberty and privacy on the other, is, essentially, incompatible with such a goal.

MODELS OF PROSECUTION

Several themes emerged from the Executive Session for State and Local Prosecutors that workshop participants felt were consonant with their own discussions. One was that prosecutors have an ongoing and important role in several areas: providing speedy and just dispositions; ensuring appropriate conduct on the part of other public officials, especially police; and controlling crime by "setting its price" during plea negotiations. These themes are accommodated within the prosecutor's traditional functions as described in Chapter 2 of this report. Themes that would broaden the traditional

[1]Much of the material in this chapter is taken from a summary of the proceedings of the Harvard Executive Session for State and Local Prosecutors, written by Zachary Tumin (1990), a research fellow in the Kennedy School Program in Criminal Justice Policy and Management, and from a dissenting paper written by Michael Tonry (1991), the ideas of which were further delineated in Tonry (1991).

[2]The Executive Session is a consulting technology developed at the Kennedy School to provide the leaders of public professions and "industries" such as law enforcement with structured opportunities to examine and revamp current industry strategy.

role of prosecutors also emerged. The most far reaching were regulating the disordered relationships of offenders and communities, brokering new arrangements among neighborhoods' public and private institutions, taking the lead in fashioning strategic community responses to crime and disorder, and adding new sanctioning capacity to that which currently exists to ease the strain on an overburdened justice system (Tumin, 1990). The Executive Session arrived at five definitions of a prosecutor's possible role that embodied these various themes.

Case Processors

Doing justice case-by-case is the embodiment of the prosecutor's traditional role as discussed throughout this report. Whether a case is selected for prosecution depends on the nature (heinousness) of the act, the strength of the evidence, and the character and probable future dangerousness of the defendant. The goal is to handle each case in an efficient and equitable manner to meet standards of justice, rather than to pursue larger social goals such as crime control, or creating more vital local commercial districts, or making schools safer.

Case Processors: Sanction Setters

In addition to achieving a speedy, equitable, and just result, most prosecutors believe that setting sanctions as "the price of crime" during plea negotiations can achieve certain social purposes of punishment such as deterrence, retribution, and rehabilitation. This adds a strategic element to case processing by emphasizing particular outcomes for offenders, victims, and the community. This goal of prosecution is limited, however, by police arrest policies and strategies, upon which prosecutors must depend for cases, except in certain high-profile matters where they conduct investigations on their own. Prosecutors may get around this problem in some cases by taking the lead in targeting dangerous offenders.

A second constraint is the lack of information about whether prosecution policies actually result in deterrence, general or specific; whether crimes are in fact reduced or offenders rehabilitated; and whether new offenders simply step in to replace incapacitated ones. Better information is available through political processes about the vindication of community norms by means of retributive sanctions. The sanction-setting prosecutor may discover that limited data narrows his policy options (Tumin, 1990). It is not

surprising, therefore that the retributive purposes of punishment seem predominant in the sanction setter's policy arsenal.

Problem Solvers

The Executive Session defined the problem solver as "concerned to control crime at its source and in its environment, and to marshal the full range of available tools in the enforcement and regulatory communities to do so" (Tumin, 1990: 5). Using a wide range of tools, the problem solver identifies the structural patterns of offenses and the individual characteristics of offenders, and devises ways to induce changes in them to reduce the risk and cost of future offending. It is a problem-solving strategy as much as a case processing one seeking a just result that often drives the actions of special units such as domestic violence or child abuse units in prosecutors' offices, for example. For these problems, the prosecutor is acceding to the public demand for a practical law enforcement response.

The question for prosecutors, then, becomes how wide should the objective be and what are the most appropriate tools for solving the problem at hand? To what extent should the prosecutor be responsible for dealing with the underlying causes of crime problems—broken families, intransigent drug abuse, failing schools—and what would be the outcome of taking on such a role? The Executive Session found that prosecutors in some cases have taken responsibility for coordinating publicly available help that falls outside of their usual realm in many cases, such as health and social service resources. Problem-solving prosecutors may develop a better sense of institutional resources and the potential their own actions may have on institutional functions and governance. They frequently use the coercive power of plea negotiations to try to rearrange disordered family relationships, for example.

However, the Executive Session also expressed concern that the prosecutor may lack the moral calculus and/or the political authority to discover and enforce the solution to these kinds of problems that "returns the most value to the public" (Tumin, 1990: 6). The problem-solving prosecutor has no special or consistent basis for deciding where to concentrate resources or for resolving conflicts among his many options for solving a given problem. Moreover, because of what some Session participants saw as a politically and ethically neutral approach to politically and ethically charged dilemmas, the problem-solving approach seemed morally thin to them. However, it may contain the seeds of a morally rich prosecution

strategy, given its requirement that the prosecutor learn about and act upon issues and relationships traditionally considered of little importance to his work. This strategy thus may work best when it operates within the context of a clear normative base. Community prosecution, discussed later in this chapter, provides a current example of how prosecutors are approaching problem solving.

Protector and Builder of Other Institutions

Because of the toll of drug-related crime on individuals, families, neighborhoods, and community institutions, Executive Session participants discussed whether prosecutors should consider the long-term interests of neighborhoods in selecting cases for prosecution. Recent research indicates that crime reduction may depend on maintaining the quality and character of neighborhood life, which in turn depends on the vitality of neighborhood institutions, such as schools and churches, and the many relationships sustained by them. Norms of conduct are established, as well as enforced, through the informal sanctions attached to these institutions.

When these institutions are destabilized by crime, it becomes both difficult and more costly for people to raise children in an atmosphere of safety, educate them, and help them make transitions into healthy adulthood. Other adult activities—engaging in commerce and going to and from work and church—also become dangerous and costly in the face of serious crime and disorder. The most significant effects of crime, then, might be invisible: weakened social ties, increasing personal perceptions of powerlessness, a reduction in individual participation in community life, and in part a cause of the collapse of supporting institutions (Tumin, 1990). The locus of an institution-building prosecutor is the shoring up of these institutions, by working within neighborhoods to develop solutions, and by using his office to defend these vital neighborhood assets from criminal disruption and disorder. The prosecutor's role here is to take a strategic view of neighborhood conditions and to shape and gather moral force and license around the important public problems that he, as an elected public leader, must confront and help resolve.

The Prosecutor as Strategic Investor

The activities of the prosecutor as a strategic investor constitute a major source of the innovations described in Chapter 3. The strategic investor

uses his discretionary power to: 1) add sanctioning capacity that may be missing; 2) use sanctioning capacity in new ways, by selectively targeting serious crime problems, or by filling in for a lapsed or nonexistent service that was once the province of some other failed or overburdened agency. The strategic investor looks for ways to expand the organizational boundaries of a prosecutor in whatever capacity is needed for fulfilling the role the prosecutor defines for his office.

CONSEQUENCES OF REENGINEERING PUBLIC PROSECUTION

Reconceptualizing the prosecutor's function is not a risk-free exercise. Workshop participants expressed strong reservations, echoed in the Executive Session summary, about a major overhaul in the way prosecutors go about their work (Tonry, 1991). As a result of participating extensively in the Executive Session, workshop participant Michael Tonry has distilled the above prototypes into four models of prosecution:

- The Manager—concerned with leading a complex organization and focused on achieving organizational objectives by keeping guilty plea rates, trial rates, and conviction rates to office standards.
- The Investigating Magistrate—motivated to see that justice is done in each individual case with management and other concerns subordinate to that goal.
- The Crime Control DA—seeking to maximize crime prevention by manipulating sanctions using all the tools and cleverness at his hand.
- The Minister of Justice—acting as a strategist and coordinator for all of the criminal justice agencies; bringing a proactive problem-solving approach to criminal justice policy; and protecting the institutions upon which the quality of social existence depends.

Tonry argues (and several workshop participants agreed) that although most prosecutors' offices evince properties of all of these models, it is not possible to pursue their objectives simultaneously. First, the models are incompatible, each possessing characteristics that contradict those of other models. Second, the models reflect fundamentally different ideas of what constitutes justice—ideas that require consideration of both normative and empirical arguments. Leaving hard-to-resolve normative arguments aside, Tonry argued that existing research in criminal justice suggests that even

major changes in what prosecutors do is not likely to have substantial, or even measurable, effects on crime rates. He points to research findings suggesting that so-called draconian policies, and in many cases innovations, are only adopted after overall crime has begun to decline. He further expresses his concern that, as crime control efforts reach ever further into the spheres of individual privacy and autonomy, core American values regarding liberty may be compromised. Not all workshop participants agreed with this controversial view.

Some workshop participants felt that what Tonry refers to as the "brave new roles" envisioned in these various models of prosecution lay outside of the capacities of most prosecutors. First, the training of prosecutors instills or reinforces core beliefs in the notion that individual justice will result in the protection of society generally. Second, many participants felt that in the real world the different constituencies and interests affecting criminal justice, social service, health, and other pertinent organizations would make an overarching leadership role for prosecutors unlikely, even if they wished to assume it. Third, several workshop participants pointed out that many citizens would not want the public prosecutor insinuating himself or herself into other spheres of their lives.

The tension here was between those who see the prosecutor's role as properly one of final resort—that is, as stepping in when other less formal means of control have failed—or as better serving the public in a preventive and strategic capacity, but possibly at the cost of eroding existing checks on the coercive power of the state. In the end, it may be more important that the public have a clear idea of the separate traditional roles of the prosecutor, the police, and the court in matters as frightening as the deployment of government force. This does not mean that prosecutors should not work to improve their efficiency, the quality of justice they deliver, or their problem-solving strategies in collaboration with public agencies and community leaders to solve problems. A recent innovation, community prosecution, appears to embody many of the ideas set forth by the Harvard Executive Session for State and Local Prosecutors, without crossing the well-established boundaries of governance that guide the prosecution function.

COMMUNITY PROSECUTION

Over the last few years, a small number of highly visible prosecutors have been implementing, at least on a pilot basis, a set of practices collectively called community prosecution. These efforts are being studied and

promoted by a small group of scholars and various parts of the U.S. Department of Justice (Stone and Turner, 1999). The term community prosecution is an adaptation taken from community policing, an innovation involving a series of reforms that swept through police departments during the 1980s and 1990s. This new policing philosophy grew out of a perceived crisis in law enforcement involving rising levels of crime and a general distrust of police by residents, especially minorities, in urban communities.

Community prosecution, like the community policing movement, is grounded not only in the problem-solving approaches we have described, but also in the theoty that involving ordinary citizens as co-producers of safety and public order will reap important benefits both for the community and for criminal justice agencies. It is at an embryonic level of development in comparison to that of community policing, however. Community policing concepts have been emerging in research and practice since the mid-1980s. Their recent, more widespread implementation has been driven by an historic and munificent level of federal funding (about $1.3 billion annually over 5 years) under the Violent Crime Reduction Act of 1994, which occurred simultaneously with the reduction in crime rates of the mid-1990s. In 1999, $100 million in federal funding from the Department of Justice became available for state and local community prosecution programs. Whatever its real success in reducing crime, workshop presenters Stone and Turner emphasized the clearly positive political effects of community policing, a success story that at least some urban prosecutors appear eager to emulate.

Indeed, the political nature of community prosecution has been duly noted by the scholars who study it. Boland has described it as . . . "above all else, a local political response to the grass-roots public safety demands of neighborhoods—as expressed in highly concrete terms by citizens who live in them" (Boland, 1998). Stone and Turner go further asserting that "community prosecution is not merely influenced by politics; it is politics," and that ". . . the prosecutors who advance it are engaged in the delicate, simultaneous pursuit of electoral politics, public service, and the advance of the legal profession" (Stone and Turner, 1999). In other words, politics is at the heart of community prosecution, but urban prosecutors also believe that the reforms being introduced will improve and advance justice for citizens (Stone and Turner, 1999).

At this nascent stage, community prosecution has been tailored to individual jurisdictional and even specific neighborhood needs. Some workshop participants therefore characterized it not as an innovation in the way

prosecutors function, but as specialization by geography, and as a series of tactics and strategies that are added on to what prosecutors traditionally do. Other scholars disagree with this assessment, however, finding that some common elements exist across current programs, and these support a number of mechanisms for taking guidance from neighborhoods and changing the way that prosecutors perform their work. The most universal ingredient is the addition to the prosecutor's mission of crime prevention, which involves seeking community input through a higher level of engagement of staff-level prosecutors with local residents and merchants. Engaging the community in this fashion carries an implication that community prosecutors intend to give up some discretionary power to residents in return for their trust and cooperation. In some community prosecution jurisdictions, this has included negotiating with the community about how cases are selected for prosecution, the kinds of cases selected, and the ways in which cases are charged and prosecuted.

For example, in cities such as Portland (Oregon), Manhattan, Indianapolis, and Boston, where community prosecution programs have been studied, the problems of most concern to residents and merchants involve quality of life and issues of disorder. Prosecutors, who usually must focus precious resources on serious felony cases, have, in the past, treated these behaviors as minor problems. In high-crime neighborhoods, however, citizens see disorder offenses as serious. They are perceived as the starting point for a whole constellation of behaviors related to the violence associated with gangs and the drug trade, or as the context in which offenses escalate from nonserious to extremely serious (Boland, 1998).

This perceived link between disorder and serious crime has been confirmed by social science research. Skogan (1990) and Wilson and Kelling (1989) provide arguments in favor of the linkage, but legal scholars have challenged it (Harcourt, 1998). District attorneys in community prosecution sites have had to decide, in cooperation with community residents, what their role should be in responding to disorder offenses, assuming they accept the linkage. Scholars have concluded that what is emerging from community prosecution efforts is a redefinition of the elected prosecutor's institutional role in crime prevention, crime control, and the maintenance of public order—a responsibility that seems to many practitioners far removed from their traditional focus on doing justice in individual cases.

Considering the almost total absence of research information on the topic, what is it about these fledgling community prosecution programs that leads us to believe they constitute a genuine or, for that matter, a posi-

tive reform? In many ways, these programs are trying to build on the accomplishments (or perceived accomplishments) of community policing, which appears to be serving as a sort of community justice prototype. Heymann has noted a new belief that policing can make a big difference in the amount of violent crime, property crime, and disorder in a community. In several major cities where the new forms of policing have been prominent, police have used various and novel problem-solving strategies that target gangs and other groups engaged in violence to create deterrence and establish social control (Heymann, 2001). Through community prosecution, prosecutors hope to play a similar role in establishing new social control mechanisms in their communities.

The police, in their attempt to reduce community crime problems, have used their traditional powers in new ways, in cooperation with citizens in most cases (Heymann, 2001). For example, instead of pursuing random patrol strategies, they have focused their patrol resources on the places and times that have the most crime (Sherman and Weisburd, 1995). They have targeted specific serious behaviors of known offenders such as gun violence, while ignoring less serious drug possession offenses, and have clearly and specifically communicated their intentions to those offenders to enforce the laws with regard to the targeted behavior (Kennedy, 1999). They have made youth access to guns more difficult by enforcing laws against carrying weapons on the street and by cracking down on various types of illegal gun sales. They have struck agreements with some parents (in public housing) not to arrest their children for illegal possession of firearms in return for being invited in to search for and confiscate guns. They have identified previously unknown drug marketplaces through a combination of citizen cooperation and computerized mapping.

Similarly, some prosecutors and scholars believe that forging a closer working relationship with the community will help prosecutors to deliver better justice because their actions will reflect residents' concerns and values and will be perceived as more fair. The kinds of measurable activities and outcomes possible in policing, however, are much harder to define in community prosecution. For one thing, prosecutors still have multiple visions of community prosecution. For some, the goal is to build a relationship of trust in a neighborhood in order to solve their own prosecution problems, such as witness noncooperation or witness intimidation. For example, jury nullification—that is, juries refusing to convict patently guilty persons because they dislike or distrust the police or prosecution, their witnesses, or the judicial system as a whole—is seen as a growing problem by

some prosecutors. Other prosecutors see community prosecution as an opportunity to bring private sector management skills to bear in their offices, with greater emphasis on service delivery or customer satisfaction.

Moreover, there is little consensus on how community involvement should be initiated or how formally residents should be involved (Stone and Turner, 1999). In Portland, Oregon, citizens' associations from the various neighborhoods were a driving force. They developed merchant/resident coalitions and organized public safety plans that almost uniformly called for intensified law enforcement (more officers) in their areas, and in some cases an assistant district attorney dedicated to prosecuting the crimes that affected their businesses and neighborhoods. They clearly wanted harsher punishments for these crimes. In Manhattan, and the District of Columbia, however, community involvement was initiated through outreach activities of the District Attorney's Office, to established community groups and neighborhoods (Boland, 1998).

Whether community prosecution is a movement involving a new set of goals for prosecution, or simply an array of new and more effective strategies and tactics to effectuate traditional goals remains an open question. Several workshop participants voiced a suspicion that it is only the latter and is why local level resources to implement community prosecution are so scarce. In addition, a real tension exists between the need for integrity and professionalism on the one hand—that cases get screened, selected, and tried according to some type of established criteria or office guidelines—and newer notions of service to the community on the other. The need to seek public office and to respond to the goals of citizens to improve justice in their communities adds to this tension, and, in the view of some workshop participants, makes defining and implementing community prosecution a difficult management challenge indeed.

Portland, Oregon, manages this tension by assigning neighborhood district attorneys the responsibility of solving problems by shaping responses and legal tactics to meet the needs of different neighborhood situations, but assigning them no litigation responsibilities. If litigation is needed, it is handled by a different DA in the downtown office, where the traditional rules—rules of evidence, statutory definitions of crimes and punishments, and policies about the level of seriousness of a case—that govern formal, adversarial case processing can be applied.

Manhattan created a Community Affairs Unit, made up of nonattorneys, within the DA's office to establish a conduit for communication between the DA's office and citizens, a channel if you will, to turn the

results of neighborhood problem solving into effective prosecutions. The Community Affairs Unit is careful to avoid becoming a political tool for particular communities that may have an interest in influencing the outcome of a particular case. Instead, they reach out to inform the community about the DA's resources to address their concerns. They educate the public about how the legal system works, especially with regard to youth, and they work directly with citizens on neighborhood crime and disorder problems. They have, in the words of Boland (1998), become "a consistent point of entry for complaints that do not fit the traditional, incident-based, 911-driven response to street crime" (p.54). What remains undone as this movement toward community problem-solving grows, and perhaps becomes a target of more generous federal funding, is a sound strategy for evaluating community prosecution programs.

6

Promising Areas for Future Research

Although some workshop participants expressed reservations about the ability of social science to measure what matters in prosecution, most felt that prosecution, as an important societal function, is worthy of the same kind of serious research attention that has been extended to other segments of the criminal justice system. Many suggestions for future research are sprinkled throughout this report. Participants stressed the need to ask the right questions. The underlying questions addressed by workshop participants were whether and how prosecution has changed, whether it should change, and how we might measure the impacts of changes in prosecution, or of changes in criminal justice policy on both crime and the sense of fairness in punishment on which society relies. Most participants agreed that what prosecutors do is but one element of the sum of patterns and events that affect the volume of crime; thus making the linkage to crime rates difficult. This is not to say that what prosecutors do has no influence on these patterns, or that prosecutors' policies and actions do not have specific effects. It is to say that there has been a far less vigorous effort to measure the effects of the prosecution function than has been true of other spheres of criminal justice, such as policing and corrections, or in other important areas of public policy. A research agenda could address these matters without ignoring the equally important expressive values of retribution and fairness.

DATA NEEDS

In his paper, Forst noted that the prosecutor is insulated by the virtual absence of a system of measured public accountability. Public perceptions of effectiveness are shaped almost entirely by a few high-profile cases in the news and by occasional public pronouncements by prosecutors asserting toughness. Conviction rates are not reported to a national agency or even locally by most prosecutors' offices, as arrest rates are by the police, for example. Such data while susceptible to misinterpretation, nevertheless would make the performance of prosecutors more transparent to those who rely on their work, especially the police, courts, and victim assistance organizations, and to the public.

Forst suggested, as a potentially useful solution, the annual reporting and publication of uniform office performance statistics. Professional associations such as the National District Attorney's Association and the American Prosecutor's Research Institute might be enlisted to help design such a system. Forst asserted that such an idea is no more far-fetched than that of the Uniform Crime Reporting System, which, over a period of several decades, has been able to get the cooperation of virtually all 20,000 independent police departments in the United States. Data also could be collected on the problems reported by prosecutors that may impede successful prosecution of cases, such as heavy caseloads, and more recently reported phenomena such as the true extent of witness intimidation, failure to appear at trial, or jury nullification. In addition, he suggests that a formal periodic survey could be designed and conducted of those who depend on prosecutors: victims, witnesses, judges, police, the defense bar, and the general public. Private sector organizations have long used such surveys to obtain systematic feedback about the effectiveness of service delivery. A possible downside of such a system may be that any set of comparisons may drive prosecutors to concentrate on whatever is measured rather than on what they see as a community priority.

EVALUATION

Much discussion focused on prosecutors' resistance to changes in their traditional role and their resistance to innovation. However, it was worry about resistance to evaluation that most frequently surfaced in the conversation. Much innovation has in fact occurred, but little is known about its impact on justice. Several participants who have been successful in getting

prosecutors to cooperate with evaluation impressed on the group the importance of simply asking for access and of working closely with prosecutors to improve prosecution outcomes and impacts as well as to improve research knowledge. Participants identified a number of areas where evaluation would be useful.

Setting Policy

The need to know how new policy is created by prosecutors and about its effects surfaced frequently in the discussion. For example, how do prosecutors develop and enforce priorities within their offices? What leads to "dangerous offender" initiatives or the creation of new, specialized units, and why are some problems given priority over others that may seem of equal weight or of equal political value to an objective observer? If there is a change in the way certain kinds of cases are treated, how deep is the change, how long lasting, what are its effects, and what are the mechanisms for reviewing policies that do not have the intended effects? Does theory or empirical evidence have any influence in policy decisions? As pointed out earlier, recent changes in the way prosecutors treat domestic violence cases do not appear to have substantially affected the death rates of abused women, despite the drop in other types of homicide and in the fatal victimization of men. How and on what basis do prosecutors develop new options in this type of situation and what impediments exist to their successful implementation?

Implementing Innovations

Participants discussed the fragile nature of most innovations, particularly in the politically charged atmosphere of prosecution, noting that evaluation is resisted because it will be seen as critical and will not give the innovative practice a chance at success. But, as highly promoted innovations such as community prosecution take hold, more than descriptive information is needed to determine the true nature of the change and to compare outcomes to those of more traditional approaches. For example, what are the outcomes of community prosecution and how are those outcomes related to the original goals of the innovation? Does the community really have an influence on case selection in community prosecution? Do resources really get re-directed to reflect community concerns that more—as with disorder offenses—or less—as with certain juvenile offenses—em-

phasis is placed on minor cases? What are the outcomes for individual offenders or neighborhood welfare? Is discretion applied differently in periods of high crime versus periods of low crime? Should it be?

Similar research is needed on the impact of other innovations such as special units, applications of technology, and procedural innovations such as prosecution-initiated waiver of juveniles to adult court. Such research information could be developed through community surveys, through observational studies, and through the collection of data on case outcomes of both new and traditional approaches. As with community policing, the information could be fed back to prosecutors so that improvements in innovative strategies can be made. There were other questions that several participants deemed important: Do innovations reap important "political" benefits for the prosecutor? For example, with community prosecution are there case outcome benefits in terms of better witness cooperation, fewer trials due to higher successful plea bargain rates, and fewer instances of jury nullification in the cases that come to trial? Do other innovations have these outcomes? How important are resources, including federal funds, to the acceptance and diffusion of such innovative practices?

Understanding the Politics of Prosecution

There is little understanding of the political processes that drive the election and re-election of district attorneys. Interesting research questions include: How do prosecutors perceive their constituents and how does this in turn influence their values, priorities, and selection of cases? How do prosecutors perceive the winning or losing of big cases as affecting their political fortunes? How has the victims movement influenced the politics of prosecution?

A judge who participated in the workshop reported a public quarrel with police over a proposed new prosecution policy for drug offenders in his jurisdiction. What role might this have played in his decision to not seek reelection? There is a similar lack of systematic information on whether party affiliation matters, how personal political and social contacts influence re-election, how activist groups influence elections through advocacy for an emerging cause, or how media coverage of crime affects election outcomes.

Because politics is so intrinsic to much of the prosecution function, several workshop participants noted the importance of having research information on these processes and on how they influence the policy and

management decisions of the district attorney. Such information could be obtained in a number of ways. The influence of big cases on reelection could be determined by systematic examination of such cases—capital cases, for example—within one or more jurisdictions. Information on the influence of big cases and of new policies or programs also could be collected by means of community and voter surveys, and by analyzing media stories and campaign polls. Finally, the influence of political processes on policy and management decisions could be discovered through systematic observational studies and structured interviews with district attorneys.

Evaluating Management

Some workshop participants decried the lack of information on how individual prosecutors make decisions and how organizational structures within offices may support or impede a prosecutor's work. For example, to what extent might enforcing office priorities or experimenting with different organizational structures deny needed discretion to line prosecutors? What resources exist to help prosecutors manage their offices, especially in large jurisdictions? What is the effect of current organizational arrangements, for example vertical processes that are built around crime specialty or seriousness, or horizontal processes that are built around case stages—charging, evidence gathering, plea bargaining, or trial—on case outcomes? How do these organizational arrangements relate to financial or personnel resource management, the successful implementation of office priorities, victim/witness or citizen satisfaction with case handling and outcomes, or the introduction and longevity of important innovations? How do they affect a chief prosecutor's ability to manage the exercise of discretion within his office? Without this kind of information, there may be little capacity for public accountability or freedom to think beyond the individual case. Observational studies might be able to answer these questions.

The management of systems of coordination between the prosecutor and other agencies, particularly the police, was also of concern at the workshop. Are there systematic processes for collaboration in investigations? Who is responsible for ensuring the appearance of witnesses at trial? How are processes and procedures that require the approval of the court developed and managed? What review mechanisms are in place for the retrospective review of the cases of innocent defendants who were convicted and then released on the basis of further evidence, of lost cases, or of cases that

resulted in a more severe sentence than the offense seemed to warrant? These issues might be addressed through survey research.

Ethical Issues

Most of the ethical issues discussed at the workshop focused on abuse of discretion. Recent research on capital cases has found that misconduct by prosecutors was a factor in 16 percent of erroneous convictions (Liebman et al., 2000). Several workshop participants felt there needed to be better information on the extent and nature of such abuses and on the conditions that foster them.

At issue in the discussion was whether there is adequate recognition of a shifting role between neutral fact finding, as the state's representative, and active advocacy as a prosecutor at different stages of a case. What, if any, kind of information would help prosecutors determine the appropriate balance between the quality of the evidence in a case and other factors, such as heinousness of the offense, or demonstrable bad character of the suspect, in deciding to bring charges or agree to a plea? Do the stakes in high-profile cases more frequently lead to greater care on the part of a prosecutor or do they foster an atmosphere where misconduct may occur? What part do training or individual characteristics of prosecutors play in ethically questionable behavior? Are the rules of conduct and the expectations for the behavior of prosecutors clear in most offices?

These questions could be addressed through periodic, objective, and thorough reviews of case files and court decisions on randomly selected cases, which might then be compared to targeted cases. The targeted cases would be selected from convictions that subsequently have been proven erroneous, from cases where ethical complaints were filed, and from cases where jurors have recanted their vote to convict, in order to develop information on who commits ethical errors or engages in misconduct, and under what circumstances. Social scientists and legal scholars working together on these reviews also may be able to uncover patterns or circumstances where such errors or misconduct are most likely to occur. For example, such information might shed light on the circumstances under which the prosecutor should look for exculpatory material or question the testimony of an investigator at a Motion to Suppress. Surveys of prosecutors about their knowledge and interpretation of the rules of conduct, the policies of their offices, and the pressures they feel to win cases might also be conducted to determine whether training is appropriate and adequate.

Finally, the need for better information on the abuse of discretion led workshop participants back to the broader issue of whether the balance of discretionary power has shifted to favor the prosecutor, and whether the quality of justice has suffered as a result. One participant noted that we cannot determine whether there is a serious problem caused by recent changes in policy related to prosecutors that has made them less accountable because we have neither the perceptual apparatus nor the data to do that. We need instead to begin asking the right questions—what is the evidence that a shift has occurred, and if it has, what has happened, good or bad, as a result? Is there a public perception, for example, that citizens' rights are being violated? In what percentage of cases do prosecutors in fact control the sanction that is imposed? These are researchable issues.

As the workshop discussions demonstrated, prosecution is not an undifferentiated monolith but a diverse activity requiring choices by policy makers who might benefit from systematic knowledge about the implications and effects of those choices. Participants noted the importance of heightening awareness of potential benefits. Repeatedly, workshop participants remarked on the striking, disparate research treatment of policing and prosecution. Police have been a subject of research for the last 35 years, since the work of the President's Commission on the Administration of Law and Justice. The police role in the urban unrest of the 1960s and concern about increasing violent crime rates in the late 1960s and early 1970s are probably principal factors explaining this. In addition, police are the visible arm of the law, a group whose past instances of poor management, corruption, and abuses of authority have been transparent to the public through the media, and have resulted in various investigations and major legal reforms over the years. Though skeptical at the outset, police have reaped many benefits from participating in research—improved relations with the communities they serve, a reduction in crimes targeted by law enforcement, and organizational improvements to mention only a few (Bayley, 1998; Sherman, 1998; Skogan et al., 2000). These events have further increased their openness to research.

The contrast with prosecutors could not be starker. Armed with law degrees and distant from any violence or street crime, the prosecutor's organizational or conduct problems have remained out of public view. Advances in identification technologies as well as intensified community demands and media scrutiny have begun to change this picture somewhat. In addition, the political success of community policing has prompted a greater awareness among prosecutors of the potential value of research.

In sum, there are a wide variety of potential benefits to prosecutors that may provide incentives for their participation in new programs of data collection and research. Most important is the potential for increasing the legitimacy of prosecution policies and priorities in the communities most affected by the prosecutor's work. Research information would also support better coordination within the criminal justice system, better understanding of community priorities, better management policies and practices, and improved ability to support requests for new resources. Finally, openness to research has provided greater visibility and, in many cases, increased public respect, for individual police agencies (Bayley, 1998). The chances are high that these kinds of political and professional benefits would accrue to prosecutors as well.

The research questions sketched here build on conceptual work done by prosecutors in the Harvard Executive Session and by scholars in the prosecution research field, many of whom participated in this workshop. Participants noted that attracting good scholars to this field in the future will require a considerable funding investment, so that a long-term, systematic, rigorous, and objective program, characterized by well-established peer review procedures, can be mounted. Such research attention to prosecution performance, and to due process, ethical behavior, and the appropriate allocation of discretion across the criminal justice system may be critical to maintaining and strengthening system legitimacy and to protecting the values of individual and social justice so important to American democracy.

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Appendix A

Workshop Agenda

WHAT'S CHANGING IN PROSECUTION: A WORKSHOP

COMMITTEE ON LAW AND JUSTICE

COMMISSION ON BEHAVIORAL AND SOCIAL SCIENCES AND EDUCATION

July 15, 1999

The Board Room
of the National Academy of Sciences

Thursday, July 15, 1999

8:30 – 8:45 **WELCOME (pastries and coffee available)**
Barbara Torrey
Executive Director
Commission on Behavioral and Social Sciences and Education

Carol Petrie
Director
Committee on Law and Justice

Professor Charles Wellford
University of Maryland and
Chair, Committee on Law and Justice

9:00 – 9:15 **INTRODUCTION—OBJECTIVES OF WORKSHOP**
Professor Philip Heymann
Law and Public Policy
Harvard University School of Law

9:15 – 9:35 **Prosecution's Coming of Age: Resistance, Exposure, Innovation**

Professor Brian Forst
Justice, Law and Society
American University

9:35 – 9:55 Comments

Professor David Ford
Department of Sociology
Indiana University – Indianapolis

9:55 – 10:15 Comments

Raymond Marinaccio
Deputy Bureau Chief
Special Projects Bureau/Narcotics Evictions Program
Manhattan District Attorney's Office
New York, NY

10:15 – 10:30 Break

10:30 – 11:00 Open Discussion

11:00 – 11:25 **COMMUNITY PROSECUTION**

Christopher Stone, Director
Vera Institute of Justice
New York, NY
Nicholas Turner
General Counsel
Vera Institute of Justice
New York, NY

11:25 – 11:45 Comments

Professor Todd Clear
School of Criminology
Florida State University

11:45 – 12:05 Comments

E. Michael McCann
District Attorney
Milwaukee, WI

12:05 – 12:30 Open Discussion

12:30 – 1:30 Lunch

Roger Connor
Visiting Fellow
National Institute of Justice

1:30 – 2:00 **Has the Prosecutor's Exercise of Discretion Changed?**
Professor Candace McCoy
Rutgers University

2:00 – 2:15 Comments

Professor Jeffrey Fagan
Columbia University

2:15 – 2:30	Comments Judge Andrew Sonner Maryland Special Court of Appeals
2:30 – 3:00	Open Discussion
3:00 – 3:15	Break
3:15 – 3:45	**THE MANAGEMENT OF DISCRETION: PROSECUTORIAL ETHICS** Professor Michael Smith University of Wisconsin Law School
3:45 – 4:05	Comments Professor Bruce Green Fordham University Law School
4:05 – 4:25	Comments Robert S. Mueller United States Attorney San Francisco
4:25 – 4:45	Comments Michael Bromwich Inspector General U.S. Department of Justice
4:45 – 5:15	Open Discussion
5:15 – 5:30	**WRAP-UP** Professor Philip Heymann Harvard University
5:30	Adjourn

Appendix B

Workshop Participants

Alfred Blumstein
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H. John Heinz III School of
Public Policy and
Management

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U.S. Department of Justice

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U.S. Department of Justice

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National Institute of Justice

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Rutgers University
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Cabell Cropper
National Criminal Justice
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Management and Program Development
American Prosecutors Research Institute

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Fordham University
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Board on Children, Youth, and Families and Forum on Adolescents

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School of Law

Robert Mueller
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Criminal Justice & Psychology

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Court of Special Appeals, 7th
Appelate Circuit

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