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Public Prosecution and Hydro-engineering

Michael Tonry*

There are inherent tensions between conceptions of public prosecutors as elected officials who respond to public intolerance of crime and criminals and as officers of the court who answer to normative injunctions of fairness and dispassion. Discussion of prosecutors' roles has progressed little beyond recognition of inherent tensions. There is no literature on prosecutorial strategies. The empirical literature on prosecutorial operations is scant.

In recent years, however, two forums have emerged in which experienced state and local prosecutors and others have struggled to conceptualize the prosecutors' trade and consider its future. At Harvard's Kennedy School of Government, the Executive Session for State and Local Prosecutors has been meeting and discussing these issues since 1986. The participants have included many of America's most thoughtful prosecutors.¹ During the same period, the Prosecuting Attorneys Research Council (PARC), consisting of an overlapping group of state and local prosecutors, was created to serve as a forum for development of prosecutorial strategies and practice.

Prosecutors can conceptualize their roles in a number of ways — as system managers, crime fighters, or justice dispens-

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1. They have included Michael Bradbury (Ventura County, California), Kevin Burke (Essex County, Massachusetts), Richard M. Daley, Jr. (Chicago), Norman S. Early, Jr. (Denver), Peter S. Gilchrist, III (Charlotte), Stephen Goldsmith (Indianapolis), Ronald Goldstock (State of New York Organized Crime Task Force), Scott Harshbarger (Middlesex County, Massachusetts), Elizabeth Holtzman (Brooklyn), Dan Johnston (Des Moines), Thomas L. Johnson (Minneapolis), Norm Maleng (Seattle), Michael McCann (Milwaukee), John O'Hair (Detroit), William C. O'Malley (Plymouth County, Massachusetts), Cecil Partee (Chicago), Thomas F. Reilly (Middlesex County, Massachusetts), Ira Reiner (Los Angeles), Albert Riederer (Kansas City), Mike Schrunk (Portland, Oregon), Stuart Simms (Baltimore), and Andrew Sonner (Rockville, Maryland).

ers. Both the Kennedy School Executive Sessions and PARC have focused on alternate conceptions of public prosecution and considered whether changes in crime, technology, or public management should occasion radical changes in public prosecution. This Essay argues for fine-tuning of traditional approaches, but no overhauls. It does so by setting out a number of "models" of public prosecution, deploying evidence on the crime control limits of criminal justice policy, and identifying foreseeable undesirable effects of various proposals for reconceptualizing public prosecution.

The impetus for reconceptualizing public prosecution comes in part from recent changes in thinking about the police role. During the last fifty years, most urban American police departments adopted the "professional law enforcement" model under which police are nonpartisan, impartial, bureaucratic, technocratic, and somewhat distant from the citizenry. Recent criticism, however, has characterized the professional approach as ineffective at reducing crime and unhealthily distant from popular sentiments and community concerns.

In many cities, the professional law enforcement approach to policing has been displaced in part by "community-based" and "problem-oriented" policing.² Community policing aims to reestablish ties and open communication between police and neighborhoods. Impersonal, intimidating police in squad cars are partly replaced by more familiar police on foot patrol. The fortress-like central headquarters downtown is augmented by storefronts and neighborhood offices. Emphasis on crime fighting is expanded to encompass other local problems that citizens nominate for police attention. The overriding goal is for the police to work with local people to defend and strengthen local communities.

Problem-oriented policing takes a social engineering approach to law enforcement and looks for ways to address underlying causes of criminal behavior. For example, after a rash of convenience store robberies in Gainesville, Florida, police began systematically to analyze the circumstances of each robbery. They observed that robberies typically occurred in stores where the clerk was not visible from outside, and at night when only one employee was on duty. Their solution was to propose a local ordinance that required two employees to be on duty during nighttime hours and also mandated space arrangements

2. Moore, *Problem Solving and Community Policing*, in *MODERN POLICING* (M. Tonry & N. Morris eds. 1991).

to make the cash register visible from outside. After the ordinance passed, the number of convenience store robberies plummeted.³ Thus, the goal of problem-oriented policing is not only to respond to citizens' reports that crimes have occurred, but also to look for practical ways to prevent crimes from occurring in the future.

There are sizable literatures on both problem-oriented and community-based policing.⁴ I say nothing more about them here except to point out that parallel reconsideration of function may be appropriate for prosecutors. If it is sound policy for police to establish closer ties to neighborhoods and to look to local residents for insights on priorities and policies, perhaps prosecutors should do the same. If it is sound policy for police to adopt a social engineering approach to identifying and ameliorating criminogenic problems, perhaps prosecutors should do the same. The prosecutor is better situated in some ways than the police to think and act strategically and to mobilize a variety of public and private resources to address criminogenic conditions.

For these reasons, new approaches to policing have influenced thinking about new approaches to prosecution. This Essay, which examines various conceptions of the prosecutorial role, has four parts. The first introduces and comments on four different ways of describing prosecution, and concentrates on proposals that prosecutors move beyond case processing and dispensation of justice to act as coordinators of the criminal justice system's crime-fighting efforts. The second part discusses a variety of crime prevention efforts; it also develops the recurring findings that few crime control initiatives demonstrably reduce crime and that seemingly successful initiatives are often later shown to have resulted in substantial displacement of crime from one time or place to others. The third part describes a number of modern social trends toward increased state or collective intrusion into citizens' autonomy and privacy, and suggests that many crime control efforts exacerbate those trends. The fourth part urges that inherent limitations of crime prevention efforts and a congruence between privacy and liberty interests in individual cases and in society at large argue against converting prosecutors from justice purveyors to anti-crime czars.

3. See H. GOLDSTEIN, *PROBLEM ORIENTED POLICING* 80-81 (1990).

4. For a much fuller discussion and supporting references, see Moore, *supra* note 2.

The Essay concludes that, although prosecutors must change with the times and incorporate new technologies into their work, delivery of just outcomes in individual cases and management efficiencies should remain their primary objectives. Newer, more grandiose notions of prosecutors' roles are premised on unrealistic expectations of the capacity of policy manipulations to affect, prevent, or reduce crime, and threaten concentrations of power and sacrifices of substantive justice that should not lightly be risked.

I. MODELS OF PUBLIC PROSECUTION

Like theatre's mask, divided to reveal both comedy and tragedy, the American prosecutor's role has long been seen as divided. The prosecutor is both the stern enforcer of the state's interest in criminal law enforcement, and the solicitous protector of the individual's interest in liberty and privacy. Twenty years ago, the first American Bar Association Standards Relating to the Prosecution Function captured this duality as follows:

[T]he prosecutor is the leader of law enforcement in the community. He is expected to participate actively in marshaling society's resources against the threat of crime. . . . On the other hand, the office demands, and on sober thought the public expects, that the prosecutor will respect the rights of persons accused of crime. . . . Because of the power he wields, we impose on him a special duty to protect the innocent and to safeguard the rights guaranteed to all, including those who may be guilty.⁵

As a matter of rhetoric, few would deny the prosecutor's sometimes seemingly incompatible dual purposes. Due to the pressures of rising crime rates, the Nth war on drugs, and the apparent intractability of crime, coupled with the allures of improved information technologies and greater analytical precision about crime control strategies, some have urged reconsideration of the prosecutor's functions.⁶ Although few

5. AMERICAN BAR ASS'N PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION AND DEFENSE FUNCTIONS 19-20 (1971).

6. The most sophisticated analyses are contained in a series of unpublished papers prepared by fellows in the Program on Criminal Justice Management and Policy of the Kennedy School of Government at Harvard. *See, e.g.*, M. Kleiman, Remarks: Information Needs of State and Local Prosecutors, Transcript of October 11-13 Executive Session for State and Local Prosecutors, Harvard University, John F. Kennedy School of Government, Program in Criminal Justice Policy and Management (1990); Z. Tumin, Summary of the Proceedings: Findings and Discoveries of the Harvard Executive Session for

question the prosecutor's obligation to "protect the innocent," some would have prosecutors become much more active "leaders of law enforcement" than has been customary.

During the course of Harvard's Executive Sessions, a number of typologies were proposed for thinking about prosecution. They have varied in detail and nomenclature, but their core ideas are captured, I believe, in the following four models. They are described below in successively greater detail as they move away from conventional practice.⁷

The Manager

The Manager, although not unconcerned with substantive justice, is principally concerned with managing an organization in a complex multi-bureaucratic context. Prosecutors' offices are organizations. Staff must be hired, trained, and supervised. Budgets must be developed. Office rules and policies must be set. Conventions for working with police, courts, and defense counsel must be established and followed. Raw materials, principally complaints and indictments, must be processed into products, principally acquittals, convictions, dismissals, and diversions. Somehow all of these conventional management concerns must be reconciled so that organizational objectives are achieved: guilty plea rates, trial rates, and conviction rates must be kept to office standards.

The Investigating Magistrate

The Magistrate, although not oblivious to management concerns, is principally motivated to see that justice is done in each individual case. This requires skeptical consideration of complainants', police, and witnesses' accounts; continuing reappraisal of the soundness and integrity of the state's case; and magisterial indifference to outcomes adverse to the state. It is not whether the prosecution has won or lost, but how it has played the game that counts. The goal is substantive justice to alleged offenders; everything else is subordinate.

The Crime Control District Attorney (DA)

The Crime Control DA, although neither indifferent to justice nor oblivious to management, is a systems engineer seeking

State and Local Prosecutors, John F. Kennedy School of Government, Program in Criminal Justice Policy and Management (Oct. 12, 1990).

7. See, e.g., M. Kleiman, *supra* note 6; Z. Tumin, *supra* note 6.

to maximize crime prevention by manipulating sanctions. Within the constraints of data availability and information technology, the Crime Control DA monitors geographic and demographic patterns of crime victimization, crime-related indicators of human mortality and morbidity, individual criminal histories, and a variety of non-crime social indicators. The strategic goal is continually to readjust⁸ sanctioning policies to respond to changing crime patterns. If mugging increases in a district, increase the severity of sanctions for mugging in that district (but not elsewhere); if drug trafficking has moved indoors and become less objectionable in a district, alter charging and sanctioning patterns accordingly; if mass arrests in street sweeps will destabilize drug markets and reassure residents, do so even though most of the arrests will be dismissed for lack of individualized probable cause; if prediction devices identify an offender as a member of a group with a high base expectancy rate for committing future offenses, insist on a lengthy prison sentence even though the current crime is trifling in nature.

The Minister of Justice

The Minister quarterbackes the state's crime prevention team. The Minister asserts leadership partly because government abhors a vacuum and no other official or agency can provide system leadership. Police agencies tend to be conservative bureaucracies and are involved only at the front end of the criminal process; they have relatively little influence on courts and corrections. Judges control few resources and are expected to remain detached and impartial; their professional ideology focuses on individual outcomes, not system effects. Corrections officials operate principally at the post-adjudication back end of the system and by tradition do not operate outside their professional province. Governors and mayors have system responsibilities, but are distracted; crime is but one of many public policy subjects that compete for their attention and the resources they control.

In addition, the Minister asserts leadership because an independent electoral base gives autonomy. Unlike police and

8. Quantitative research on crime has become increasingly sophisticated in the last 20 years and serious efforts have been made to create mathematical models of crime and criminal careers that can be used to predict the incapacitative and deterrent effects of sanctions. *See, e.g.*, CRIMINAL CAREERS AND "CAREER CRIMINALS" (A. Blumstein, J. Cohen, J. Roth & C. Visher eds. 1986).

correctional managers who are accountable to elected officials, the Minister is accountable only to the electorate. Moreover, because the Minister has the political skills and savvy to be elected, the Minister may be more likely than other functionaries to build successful collaborations with other agencies and branches of government.

Finally, the Minister takes the leadership role because his institutional role makes him a bridge between police and courts. Through the courts' sanctioning powers, the Minister also works with corrections officials. The Minister is the only criminal justice official whose mandate encompasses the entire criminal process.

Besides managing an organization and seeking just outcomes in individual cases, the Minister has three functions. First, to act as a strategist and program coordinator for all of the criminal justice system agencies. Second, to bring a proactive problem-solving approach to criminal justice policy. Working with the police and other public agencies, the Minister searches for underlying physical, environmental, or social structural approaches to crime prevention rather than merely relying on a reactive prosecutorial strategy of handling cases that the police initiate. Third, the Minister is an institution-protector who recognizes that the quality of social existence depends on the healthy functioning of schools, shopping areas, and residential districts, and accordingly who works with other officials and agencies to devise programs for protecting the integrity of key institutions.

The preceding models are oversimplified and overlapping, and are to some degree pastiches. No doubt most prosecutors' offices possess properties of all four models. For purposes of discussion, however, it may be useful to isolate the models' central tendencies in order to consider whether prosecutors should shift their role conceptions toward purer versions of one or another of the models.

Unfortunately, it will not do simply to merge the four models and attempt to pursue all their separate objectives simultaneously. In their purer versions, they are incompatible. Even in less pure forms, each model implies values that contradict those of other models. At the most mundane level, for example, the Manager and the Magistrate will disagree about trade-offs between efficiency and individualized justice. Any time a defendant insists on his innocence, the Magistrate will want to

reach an informed, particularized judgment about the case; the Manager will (perhaps with misgivings) shelter behind a probable cause determination and routinely accept *Alford* and equivalent pleas.⁹ In effect, the Manager makes a decision to tolerate a predictable (if unknowable) level of convictions of innocents (or undeservedly serious convictions of comparative innocents) in exchange for greater system efficiency.

At a loftier level, some of the models reflect fundamentally different ideas about justice. The Manager's concern for regularity and predictability will argue for "going rates" and fairly consistent sanctioning policies. Part of the rationale for the Manager's approach is that it maximizes achievement of system goals, including efficient resource allocation and fairness to offenders. The Magistrate is likely to worry even more about fairness in sanctioning, and to attach considerable value to achievement of equality in prosecution and sanctioning between like-situated offenders and proportionality in sanctioning between differently-situated offenders. The Crime Control DA, by contrast, has little interest in fairness to offenders but is principally concerned to make sanctioning sensitive to predicted deterrent, incapacitative, and moral-educative effects. The Crime Control DA might be said to be primarily concerned with fairness to potential victims of crime because the objective of efficiency maximization is crime prevention and control. The Minister is also likely to give lessened concern to fairness to offenders. From an institution-protecting perspective, it may be much more important to impose tough sanctions in school (or school-proximate) cases, for example, and to countenance questionable police stop-and-frisk policies around schools, than to carry out prosecutions of comparable charges in areas less worthy of protection.

Choosing among these alternate conceptions of public prosecution requires consideration of both normative and empirical arguments. For purposes of discussion here, normative arguments are set aside, although for many people they may largely be dispositive. People who subscribe to retributive punishment philosophies likely will argue that concern for justice and accord equal concern and respect to each offender will preclude criminal justice policies that eliminate or attenuate links

9. See *North Carolina v. Alford*, 400 U.S. 25, 33-39 (1970) (judge may accept guilty plea from a defendant who asserts innocence but is entering plea to avoid imposition of a greater penalty). For a discussion of *Alford*, see, e.g., W. LAFAYE & J. ISRAEL, *CRIMINAL PROCEDURE* 808-09 (1985).

between the offender's culpability and his sentence. Prosecutors are in the justice business, they will argue, and concerns for consistency, equality, and proportionality are requirements of justice.

People who subscribe to utilitarian or consequentialist punishment philosophies may be less sensitive to trade-offs between crime prevention and fairness to offenders. However, as H.L.A. Hart has noted, even Jeremy Bentham struggled to find utilitarian rationales to justify legal doctrines like the insanity defense that link liability to punishment to moral responsibility.¹⁰ Hart himself, probably the most sophisticated modern philosopher of punishment, allows in his own views "some place, though a subordinate one, to ideas of equality and proportion in the gradation of the severity of punishment."¹¹

The problem with discussing models of prosecution solely from a normative perspective is that people tend to have strong views, generally visceral and instinctive, about such matters. Philosophers can devise cogent and insightful arguments about the philosophy of punishment. I take as given, however, a fictional character's comment (in a Robertson Davies novel) about philosophers addressing a fundamental question: "[they] answered it in ways highly satisfactory to themselves; but I never knew a philosopher's answer to make much difference to anyone not in the trade."¹² Consequently, with these comments, I temporarily abandon philosophical allusion and turn to the question of whether empirical grounds exist for believing that a shift from traditional conceptions of the prosecutor as Manager and Magistrate to those of Crime Fighter and Minister can be justified in terms of likely crime prevention gains.

II. CRIME AS A RIVER AND OTHER HERESIES

To begin at the end: Public officials can do relatively little that will directly reduce the volume of crime. Crime control efforts can move crime around, and marginally alter its forms, but there is little reason to believe that the actions of police, prosecutors, and judges can materially reduce the volume of crime. Crime might be thought of as a river that flows through a city or a state. Hydro-engineers can build levees and channel the river's flow; they can build dams and sluice gates and temporarily contain it. These are important accomplishments of

10. H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 18-20 (1968).

11. *Id.* at 233.

12. R. DAVIES, FIFTH BUSINESS 199-200 (1970).

considerable public benefit. What the city's hydro-engineers cannot do, however, is affect the river's volume. That volume is determined by things that happen upstream or by acts of nature like evaporation and climatic change and geological upheaval. Crime likewise moves to deeper patterns of norms and values, of social structure and social justice.

This is not to say, however, that the patterns and volume of crime do not change. There are plausible grounds for believing that life has become progressively safer over the centuries.¹³ Even within a period of decades, crime patterns change, but less than the public commonly believes. Uniform Crime Reports show rates of crime reported to the police steadily increasing during the 1970s to a peak around 1980, then declining until the mid-1980s, and gradually increasing since.¹⁴ The National Crime Survey findings from victim surveys, however, show a steadily declining proportion of households annually victimized by crime since 1975,¹⁵ and victimization for rape, robbery, and burglary that has fluctuated within narrow ranges since the mid-1970s.¹⁶ These changes in patterns and volume of crime, however, are due to underlying sea changes in attitudes, values, and behavioral norms, and not significantly to anything that public officials do.

These observations can be illustrated by reference to the different settings of the "wars on drugs" of the 1970s and 1990s. President Nixon and his Department of Justice launched a series of wars on crime and drugs and optimistically prophesied that crime would diminish.¹⁷ Unfortunately, America was then in the early days of a continuous fifteen-year increase in rates of reported crime. Poor Attorney General John Mitchell, after several years of watching crime rates increase seemingly imperious to the war against them, was driven to claiming victory in

13. See, e.g., Gurr, *Historical Trends in Violent Crime: Europe and the United States*, in *VIOLENCE IN AMERICA* 45-49 (T. Gurr ed. 1989).

14. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1988, at 427 (1989).

15. The percentage of households victimized by a violent crime, theft, or burglary fell from 32% in 1975 to 24.9% in 1989. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME AND THE NATION'S HOUSEHOLDS 1989, at 3 (1990).

16. Between 1973 and 1989, the rape victimization rate per 1,000 persons fluctuated between 1.1 and 0.6, the robbery rate fluctuated between 7.4 and 5.1, and the assault rate fluctuated between 27.2 and 22.3. *Id.* at 4.

17. See, e.g., *President Gives 'Highest Priority' to Drug Problem*, N.Y. Times, June 2, 1971, at 1, col. 8.

apparent "decreases in the rate of increase" in crime rates.¹⁸

President Bush's former drug czar William Bennett, by happy contrast, had the good fortune to be given command in 1988 of a war on drugs years after indicators of drug use in the general population began to show marked and continuous decreases in drug use. The National Institute on Drug Abuse's general population and student surveys showed decreases in the use of heroin and other common drugs of abuse (except cocaine) beginning in 1980, and began to show steady and continuing decreases in cocaine use around 1985.¹⁹

Czar Bennett was preordained to demonstrate year-to-year victories in the war on drugs by some measures (unless the campaign somehow reversed the existing trends toward decreased drug use). Even in high-risk and underclass populations, it is not unreasonable to hypothesize that changes in mainstream values and norms will percolate through and influence subgroup norms or that, influenced by mainstream normative change, the crack and cocaine "epidemics" will soon run their courses as did the heroin epidemic of the early and mid-1970s. Recent news reports of downturns in cocaine-related emergency room admissions²⁰ and in rates of positive urinalysis test results of current cocaine use among arrestees²¹ suggest that the attitudinal and normative trends that influenced general population behaviors have also influenced underclass groups.

No doubt combatants in the latest war on drugs would characterize the preceding analysis as cynical and claim that be-

18. Lydon, *F.B.I. Says Crime Rose 11% In 1970*, N.Y. Times, Mar. 29, 1971, at 1, col. 7.

19. NATIONAL INSTITUTE ON DRUG ABUSE, U.S. DEP'T OF HEALTH & HUMAN SERVICES, DRUG USE, DRINKING AND SMOKING: NATIONAL SURVEY RESULTS FROM HIGH SCHOOL, COLLEGE AND YOUNG ADULT POPULATIONS, 1975-1988, at 5-16 (1989).

To be sure, the NIDA surveys miss and under-represent high-risk and underclass groups. The National Institute of Justice's Drug Use Forecasting data (DUF), obtained from urinalyses of random samples of persons arrested in 22 major cities, to some extent better capture information on high risk groups. See NATIONAL INSTITUTE OF JUSTICE, U.S. DEP'T OF JUSTICE, 1989 DRUG USE FORECASTING ANNUAL REPORT 2 (1990). Because the number of arrestees in the samples who are charged with the sale or possession of drugs is limited, the DUF statistics are a minimum estimate of drug use in the arrestee population. *Id.*

20. See, e.g., *Downturn Seen in Drug Abuse*, Wash. Times, Sept. 10, 1990, at A3, col. 1.

21. See, e.g., *Drug Rate Declines Among D.C. Court Defendants*, Wash. Post, Jan. 6, 1990, at B1, col. 1.

havioral changes result from government drug control policies. While this debate is not to be pursued here, it is worth mention that historian David Musto demonstrated long ago that draconic drug laws and policies are often adopted only after drug use has begun to decline.²² If the Mitchell/Bennett comparison is set aside, however, there is plenty of other evidence that crime control efforts have relatively little direct effect on crime.

A. DETERRENCE AND REHABILITATION RESEARCH

The National Research Council Panel on Deterrence and Incapacitation concluded that empirical evidence does not convincingly demonstrate variable marginal deterrent effects from manipulation of sanction severity.²³ The National Research Council Panel on Rehabilitative Techniques concluded that empirical evidence does not convincingly demonstrate that correctional programs rehabilitate offenders.²⁴ These conclusions do not mean that some sanctions do not have deterrent effects nor that no one benefits from participating in correctional programs. What they do suggest is that the deterrent and rehabilitative effects of sanctions are much less universal and robust than many might wish, and that policymakers should hesitate to adopt policies premised on deterrent and rehabilitative arguments.

B. MANDATORY SENTENCING LAWS

Evaluations of mandatory sentencing laws demonstrate that such laws either do not observably deter crime or have modest and short-lived effects.²⁵ Research on drunk driving

22. See Musto, *America's First Cocaine Epidemic*, 13 WILSON Q. 59, 60, 61-62, 64 (1989); see also D. Musto, Changing Attitudes Toward Drug and Alcohol in the United States, Transcript of presentation to the National Academy of Sciences Conference on Drugs and Crime Research 38-39 (Dec. 18, 1986), reprinted in NATIONAL RESEARCH COUNCIL, DRUGS AND CRIME: WORKSHOP PROCEEDINGS (1987) (arguing that "the battle against a popular but dangerous substance appears to be a gradual accumulation of adherents so that when the crucial years arrive, the battle has been largely won already").

23. DETERRENCE AND INCAPACITATION: ESTIMATING THE EFFECTS OF CRIMINAL SANCTIONS ON CRIME RATES 7 (A. Blumstein, J. Cohen & D. Nagin eds. 1978).

24. NEW DIRECTIONS IN THE REHABILITATION OF CRIMINAL OFFENDERS 22-23 (S. Martin, L. Sechrest & R. Redner eds. 1981).

25. E.g., K. CARLSON, MANDATORY SENTENCING: THE EXPERIENCE OF TWO STATES 15-16 (1982); RESEARCH ON SENTENCING: THE SEARCH FOR REFORM (A. Blumstein, S. Cohen, S. Martin & M. Tonry eds. 1983).

and other "crackdowns" similarly demonstrates that such initiatives have few, no, or only transient deterrent effects.²⁶

C. POLICE PATROL

A variety of police patrol experiments have been performed. They demonstrate that variations in police patrolling practices have little or no effect on crime rates, though some experiments, such as the Newark foot patrol experiment, demonstrate reductions in citizen fear of crime.²⁷

D. "TARGET HARDENING"

Research on the crime-preventive effects of efforts to reduce the quality of criminal opportunities often shows that desired reductions in the targeted crime are offset in full or part by increases in other crimes. British research on the effectiveness of automobile steering column locks at reducing auto theft showed a shift from theft of new cars with locks to theft of old cars without them.²⁸ Use of target-hardening strategies to protect British post offices resulted in offsetting increases in robberies of vans making deliveries to post offices.²⁹ Other research on target-hardening techniques used in Britain to discourage theft of drugs from pharmacies showed that reductions in theft from pharmacies were offset by increases in drug thefts from hospitals, offices, and doctors' cars.³⁰ A police crackdown on subway robberies in New York City coincided with an increase in street robberies.³¹

My aim in citing these findings is not to argue that "nothing works," that attempts to deter crime are inappropriate, or that most crime prevention efforts are nullified by complete displacement to other crimes. Indeed the displacement evidence does support crime prevention efforts that deliberately attempt to move crime around in space or to motivate offenders to shift from more serious crimes such as armed robbery to less serious crimes like unarmed robbery. My aim is, rather, to argue that the available evidence and current theories provide no

26. Lawrence, *Police Crackdowns: Initial and Residual Deterrence*, in 12 CRIME AND JUSTICE: A REVIEW OF RESEARCH 1 (1990).

27. Sherman, *Policing Communities: What Works?*, in COMMUNITIES AND CRIME 343, 368-69 (A. Reiss & M. Tonry eds. 1986).

28. Barr & Pease, *Crime Placement, Displacement, and Deflection*, in 12 CRIME AND JUSTICE: A REVIEW OF RESEARCH 277, 287 (1990).

29. *Id.* at 290.

30. *Id.* at 289-90.

31. *Id.* at 290.

basis for believing that imaginable adjustments to crime prevention strategies are likely to have substantial net effects on crime.

The "War on Drugs" provides conventional wisdom to buttress skepticism about crime control efforts. First, there seems little reason to believe that arrests and convictions of street drug traffickers have any significant effects on the drug trade; there appear to be ample supplies of young people prepared to fill openings created by arrests of prior incumbents, notwithstanding the modest average compensation and high risks of imprisonment and violent, premature death that the positions offer.³² Second, although reasonable people differ about this point, many argue that "sweep" strategies to close open air or other drug markets simply move the trade from place to place. Now there may be social benefit to destabilizing the drug markets both by forcing continuous new recruitment and by keeping the markets moving and in flux,³³ but there is little reason to believe that these strategies will achieve sizable reductions in drug market activities.

Put together, what this evidence suggests is that the criminal justice system lacks the tools to effect more than modest changes in crime, and that larger claims are likely to be wrong and larger ambitions to be frustrated. This conclusion should come as no surprise to most people. The causes of criminality in modern America lie in deeper social pathologies than the criminal justice system can hope or pretend to address. Manipulations of policing, prosecution, or punishment strategies are unlikely to offset the social conditions that generate seemingly inexhaustible supplies of young underclass and disadvantaged youth to serve as foot soldiers in the netherworlds of crime and drugs.

III. LIBERTY AND PRIVACY

Assuming it to be true (or plausible) that prosecutors' actions cannot materially affect crime, the other of their paired obligations, to "protect the innocent," becomes of overriding importance. This obligation has at least two dimensions. First, proposals to sacrifice concern for justice in individual cases in the interest of crime-fighting in the larger community become

32. P. REUTER, R. MACCOUS & P. MURPHY, *MONEY FROM CRIME: A STUDY OF THE ECONOMICS OF DRUG DEALING IN WASHINGTON, D.C.* 83 (1990).

33. Kleiman & Smith, *State and Local Drug Enforcement: In Search of a Strategy*, in *DRUGS AND CRIME* 69, 102 (M. Tonry & J. Wilson eds. 1990).

more suspect and unsound. Second, concern for "protecting the innocent" can be extended from individuals to the liberty and privacy interests of the larger community.

A. PROTECTING INDIVIDUALS

The primary danger in transmogrifying prosecutors who see themselves as Managers and Magistrates into Crime Control DAs or Ministers is that the quality of justice delivered to individuals will suffer. The problem is more stark for Crime Control DAs than for Ministers; accordingly, this section focuses on the Crime Control DA in order to sharpen contrasts.

I am unaware of a literature on Crime Control DAs, and so rely on a presentation by Mark Kleiman for a portrait.³⁴ Kleiman's Crime Control DA would be

the quarterback of the crime control team. The job . . . is to manage the court system from without and other pieces of the system as well from without to try to minimize the total damage done by crime in some jurisdiction. And that seems to have two pieces to it.

One is incentive management for particular offenses. You want to convey to all potential offenders that there are different consequences of different sorts of offenses. . . .

[Another is] the function of the crime control DA's office as a price setter. Here is the price list for committing various offenses in this jurisdiction and we are going to modify the price list to take into account changes in offending patterns and to keep within the capacity of the matching [correctional] system.³⁵

Kleiman goes on to explain that the Crime Control DA will need extensive information about crime and victimization patterns, and extensive non-crime information about such things as trends in emergency room admissions for cocaine-related health problems, neighborhood-specific changes in fire insurance premiums, and trends in residential real estate prices. The Crime Control DA will also want very detailed information about disposition of former cases and about offenders' private lives. Each bit of information will serve a different purpose.

The information about crimes and victimization patterns will permit constant refinement in the price lists of sanctions for different crimes. Changing theft patterns can be used as an example. If theft is markedly up in one neighborhood and down in another, prosecutors will change their charging and sentence bargaining conventions to increase the number of

34. M. Kleiman, *supra* note 6, at 188-225.

35. *Id.* at 197-98.

counts per case and sentence severity in Neighborhood A, adhere to pre-existing conventions in Neighborhood B, and reduce charging and sentencing severity in Neighborhood C (because personnel and other resources are limited, toughened law enforcement in one setting inevitably means weakened efforts elsewhere). Significant changes in theft patterns in the next month will alter the prosecutorial price lists for that month. The rationale is primarily deterrent, but, it faces formidable conceptual and empirical problems in the absence of evidence that price list adjustments of any conceivable magnitude will affect behavior. Changes in sentencing patterns are at best imperfectly communicated, and accordingly, most would-be offenders will not know that the price list has changed.

Non-crime economic and social indicators will be used to inform price list adjustments, especially between different types of crime. Information about cocaine-related health problems may be relevant to varying enforcement emphases among drugs, for example, between cocaine and heroin; it may be relevant to price list adjustments (be tougher this month on cocaine, lighter on heroin); it may be relevant to changes of emphasis between drug crimes and non-drug crimes. It will also be relevant to inter-agency problem-solving initiatives as barometric information on the social and economic health of individual communities.

The offender-specific information will be of use principally for incapacitative purposes. General information about offenders' prior arrests and convictions has long been routinely compiled. The Crime Control DA will want much more detailed information about the reasons for earlier non-conviction case dispositions, about the nature of dismissed charges, and about the offenders' precise roles in different crimes. The Crime Control DA will probably also want to know things about alleged offenders' finances (e.g. Charlie's bank account is up, but he is not working; he must be dealing again) and private lives.

The problem with this brave new world of perfect prosecutorial information about crime, its effects, and its perpetrators is precisely the problem with *Brave New World*.³⁶ Our constitutional scheme celebrates individual liberty and limited state powers. The Crime Control DA would only incidentally be interested in individual liberty. Instead, charging and sanctioning decisions would often depend not on the offense the individual allegedly committed, but on the latest victimization

36. A. HUXLEY, *BRAVE NEW WORLD* (1932).

and emergency room admission data, or on the statistical probability that the offender will commit crimes in the future. Justice to offenders will be subordinated to computer algorithms, and the values of consistency, equality, and proportionality in state handling of offenders will be burked.

Kleiman concedes these problems but sets them aside as of little account:

[T]he fact that the offender is in the courtroom shouldn't blind you to the fact that the important equity problem in the society is that lots of people get victimized. Those are real injustices. People get victimized and their victimizers are never sanctioned for that.

Crime victimization is a major injustice. Trying to minimize those sorts of injustice may in fact take precedence over the horizontal and vertical equity questions for the tiny group of offenders who actually come into courtrooms in front of us.

I don't want to acknowledge that that's substituting utilitarian calculations for the calculations of justice, I want to say that's taking more important justice more seriously than less important justice . . .³⁷

"More important" and "less important" are not helpful modifiers in comparing two fundamentally different conceptions of injustice. The injustice or misfortune that results from the violation of an individual's interest in being free from takings of property or from assaults is a different kind of injustice than the injustice that occurs when the state takes power over individuals and treats them unfairly. This is a basic distinction that is expressed in the United States Constitution: It is unconstitutional for the state to take property or life without due process.³⁸ It is generally unlawful for private actors (that is, criminals) to take property or inflict physical injury but, as between the parties, these are private matters of civil injury and civil responsibility. Conflicts between a citizen and the state are public matters and implicate fundamental relations between individual autonomy and state power.

The characterization of "more" and "less" important kinds of justice may make sense in some settings, but not in the setting Kleiman provides. For example, due process has been interpreted to require more extensive procedural protections in criminal than in traffic courts or in cases in which incarceration is a possible sanction than in cases in which it is not. In a stark instance, the Supreme Court recently declared a law unconstitutional that permitted homicide victims' survivors to testify in

37. M. Kleiman, *supra* note 6, at 201.

38. U.S. CONST. amend. XIV, § 1.

a capital sentencing hearing to the effects on them of the crime.³⁹ In effect, the Court held that the injustice suffered by the survivors at the hands of an offender is not conceptually parallel or legally "equal" to or "more important" than the injustice suffered by an offender who is denied fair process.⁴⁰ For example, the jury's vicarious identification with the survivors' grief could easily predispose the jury to choose the death penalty when without the inflammatory evidence they would not.

The problem with the Crime Control DA model is that the very mode of thinking invites prosecutors to forget their basic obligation to see justice done in individual cases. Kleiman's language about the "more important" generalized injustice of crime victimization and the "less important" concrete injustice of unfairness to individual offenders may simply be an unfortunate choice of words, but it probably exposes a psychological truth. Prosecutors who see themselves primarily as social engineers who specialize in crime fighting likely would soon forget that their primary constitutional role is to serve as an instrument of justice to individuals.

B. LIBERTY AND PRIVACY IN THE COMMUNITY

The American constitutional scheme is designed to protect the individual from the state by setting conditions that the state must honor if it is to take away liberty or property or invade privacy. The Crime Control DA probably will be inclined often to give short shrift to individuals' liberty and privacy interests; the aggregate effect of many such decisions about individuals would diminish civil liberties.

The seemingly more benign Minister of Justice might also pose a serious threat. The Minister model is premised on the desirability of enhancing coordination between agencies, achieving more consistent policies among agencies, developing and implementing comprehensive governmental anticrime strategies, and generally "overcoming" the inefficiencies that derive from the constitutional separation of powers and the political dispersion of fiscal and political powers that characterizes American government. The problem, however, is that those inefficiencies and multiple power centers may be important to maintaining traditional American liberties.

Lord Acton's axiom that "[p]ower tends to corrupt and ab-

39. *Booth v. Maryland*, 482 U.S. 496, 509 (1987).

40. *See id.* at 508-09.

solute power corrupts absolutely"⁴¹ is probably true. The preservation of American liberties may result less from public officials' commitment to abstract ideals of liberty than from the combination of those ideals with structural inefficiency and wide power distribution. It has been very difficult for criminal justice officials to amass the power that a Minister would wield. The Minister's aim would be to create a powerful anticrime machine with the Minister at the controls. Americans may be better off without such a machine. Crime fighting inefficiency and more crime victimization may be among the prices we pay to preserve traditional liberties.

The argument can be developed in at least two ways. The first is to identify numerous ways in which social and economic forces have already diminished the value of liberty and autonomy and to argue that further diminution should be resisted wherever possible. The second, more grandiose, way is to invoke Michel Foucault's argument that Western culture has for centuries been moving toward a surveillant society of "controlled" individuals through means not unlike creation of a Minister of Justice.⁴² The two arguments are blended in the following few paragraphs.

In *Discipline and Punish*,⁴³ Foucault attempts to explain why criminal punishments shifted from corporal and capital punishment to imprisonment, from the body to the soul. His interests are larger, but he uses the emergence of the prison as a focus for considering how power operates in modern society. The aim of institutions like the prison (and the army and the factory) is to mold people into conformity, to control them through a process of "normalization."⁴⁴ Normalization operates in part through "surveillance."⁴⁵ David Garland recently summarized some of Foucault's basic arguments:

The location and functioning of the prison in a more general surveillance society is most clearly brought out when Foucault describes the extensive network of normalizing practices in modern society. He describes how the frontiers between judicial punishment and the other institutions of social life, such as the school, the family, the workshop, and social welfare institutions came increasingly to be blurred by the development of similar disciplinary techniques in all of

41. Letter from Lord Acton to Mandell Creighton (Apr. 5, 1887).

42. M. FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (1977).

43. *Id.*

44. Garland, *Sociological Perspective on Punishment*, in 14 *CRIME AND JUSTICE: A REVIEW OF RESEARCH* 137 (M. Tonry ed. 1991).

45. *Id.*

them. . . . The process of punishing is not essentially different from that of educating or curing and it tends to be represented as merely an extension of these less coercive practices, with the consequence that the legal restrictions that once surrounded the power to punish — tying it to specific crimes, determining its duration, guaranteeing the rights of those accused, etcetera — tend to disappear. Penal law in effect becomes a hybrid system of control combining the principles of legality with the principles of normalization.⁴⁶

American constitutional values are the product of seventeenth and eighteenth century thought. Foucault may be right in his description of nineteenth and twentieth century societal trends. Nonetheless, if we are to preserve traditional individualistic values, we must resist the intrusion of the tentacles of control and surveillance into everyday life. Modern trends permit much less autonomy and privacy for individuals than in earlier times, and turning prosecutors into Ministers of Justice would exacerbate those trends.

Many existing anticrime and, in the commercial sector, risk reduction measures have already had subtle but pervasive effects on individual autonomy and the quality of life. Urban buses and other mass transit vehicles became safer for drivers when exact change rules were established, but they also became less friendly, personal, and convenient for riders. Similarly, post offices are less vulnerable to vandalism and burglary if the outer doors are locked when service windows close, but they also become less “public” and less convenient for patrons. Office buildings become more secure when entry and circulation controls are imposed, but they also become more anonymous, sterile, and forbidding. Widespread urban use of burglar alarms may reduce affected households’ probability of burglary victimization, but it also heightens people’s anxieties and distrust by offering constant reminders of the risk of burglary.

If we shift from risks of criminal victimization to risk reduction in general, American life has changed greatly. Since the advent of credit cards, it has become impossible to check into a hotel without “establishing one’s credit” by providing a plastic card that will be verified for currency and creditworthiness by electronic communication with the issuer. It is impossible to buy a house without disclosing intimate personal and financial information to a lender, under conditions that authorize the lender to provide the information to credit agencies that then make it available to any financial institution or commercial organization that requests it. It is impossible to obtain life

46. *Id.* at 139.

insurance policies without providing intimate personal and medical information to the insurance company under conditions that allow it to disclose the information to health information companies that may then disclose it to any other insurance company that requests it. As these examples demonstrate, Americans retain very little privacy and are under unceasing surveillance.

Converting the local district attorney into a Minister of Justice would be more of the same, yet worse because of the awful powers of the law that a Minister could deploy. A remarkably high proportion of Americans experience an arrest during their lifetime. Among black American males, as many as half acquire criminal records,⁴⁷ and all would be candidates for surveillance by the much more efficient criminal justice agencies the Minister of Justice would coordinate. Power corrupts and absolute power

IV. PRESCRIPTION FOR THE FUTURE

The evidence and arguments marshaled to this point suggest that reconceptualizing public prosecutors as Crime Control DAs or Ministers of Justice is a bad idea, for at least three reasons. First, as the humbling results of research on the effectiveness of changes in police practices, correctional programming, and crime prevention programs suggest, no imaginable changes in the techniques employed by prosecutors are likely to have substantial effects on crime. Second, in numerous ways, existing crime control efforts have impoverished the quality of American life, and other societal changes increasingly intrude into ever diminishing spheres of individual privacy and autonomy. A more monolithic or single-minded criminal justice system is likely to aggravate those trends. Third, both new prosecutorial models threaten core American values without offering offsetting benefits. The Crime Control DA explicitly rejects the importance of fairness and consistency in public prosecution and of equity and proportionality in sanctioning, sacrificing fundamental values in pursuit of laudable but chimerical goals. The Minister of Justice threatens to concentrate power in a way that poses dangers of abuse and overreaching, were it foreseeably workable. In the real world, however, the different constituencies and systems for accounta-

47. Farrington, *Longitudinal Research on Crime and Delinquency*, in 1 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 289, 296 (1979).

bility of prosecutors, judges, police, and corrections officials make it unlikely that prosecutors could become Ministers of Justice even if they wished to do so.

Prosecutors would be best advised to continue to think of themselves as public officials who struggle to balance the best traits of Managers and Magistrates, but who abjure any temptation to become Ministers of Justice or Crime Control DAs. Of course, prosecutors should work to improve their efficiency as managers and the quality of justice they deliver as magistrates through use of state-of-the-art information and communication technologies. Of course, prosecutors should work with criminal justice and other public agencies to solve problems, to seek structural solutions to endemic criminogenic conditions, and to direct the river of crime into channels where it will do the least harm. Perhaps the best way for prosecutors to be institution-protectors is to think of themselves as hydro-engineers attempting to channel crime to times, places, and actions that will produce the least harm. It may be possible to channel criminality from more to less serious forms, for example, from armed to unarmed crimes. It is no doubt possible to move crime around geographically. The problem, however, is that crime is probably already distributed in the politically least unacceptable way; a program to "democratize" crime victimization by distributing its burdens more evenly across neighborhoods, social classes, and races is imaginable but hardly likely. At the very least, the crime displacement hypothesis and the hydro-engineering analogy suggest that criminal justice officials, including prosecutors, should always take the criminogenic effects of crime prevention efforts into account as they ponder alternate strategies.

At day's end, the prosecutor's fundamental responsibility is to see justice done in individual cases. Any conception of the prosecutor's role that denies or obscures that fundamental responsibility denies or obscures the fundamental values of liberty and justice on which our governmental system rests.