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EFFECTIVE LAW-ENFORCEMENT TECHNIQUES FOR REDUCING CRIME

JOHN N. GALLO*

In their article *Asymmetrical Causation and Criminal Desistance*, Christopher Uggen and Irving Piliavin discuss "devising theoretically relevant interventions."¹ As a white-collar criminal defense attorney and a former federal prosecutor, I have been asked for my personal perspective on what law-enforcement techniques, a type of "relevant interventions," have been effective in reducing crime. Given my background, it seems I am most qualified to comment on that question from the perspective of law-enforcement, and in particular from the vantage point of federal law-enforcement. Viewed from this perspective, the question I address in this article is whether federal law-enforcement has played a significant role in reducing crime and, if so, what law-enforcement techniques have been effective in that regard?

In summary, my experience has been that law-enforcement has had an impact in deterring and/or reducing criminal activity, but that the type of deterrence generally varies depending on the nature of the criminal activity. Specifically, in the case of white-collar crime, where the actors are generally rational, informed individuals, enforcement of criminal laws generally deters additional criminal conduct of the kind at issue; in other words, the prosecution of one will deter others from committing similar criminal conduct. On the other hand, in the case of violent crime, the prosecution of an individual is far less likely to deter others from engaging in the same criminal conduct, either because such actors do not act rationally or because they

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¹ Christopher Uggen & Irving Piliavin, *Asymmetrical Causation and Criminal Desistance*, 88 J. CRIM. L. & CRIMINOLOGY 1399, 1413 (1998).

are unaware of the punishment for their conduct. At times, prosecution of violent offenders may individually deter criminal conduct, that is, prevent the same individual from committing similar acts again. Some violent offenders, however, if given the opportunity, will repeat their criminal conduct regardless of how many times they are prosecuted. In these cases, the only effective law-enforcement tool is incapacitation of that individual, usually through incarceration.

These principles, if validated, have significant implications for the way our society allocates its law-enforcement resources and for the way it punishes criminal offenders. In particular, in the case of white-collar offenses, law-enforcement is most effective and efficient if it targets particular types of criminal conduct and publicizes prosecutions. For violent offenders, on the other hand, law-enforcement will by necessity be generally more reactive; in this case, however, once society prosecutes an individual, it is vital that society aggressively supervise (including drug test) that individual as part of some probationary sentence served after any period of incarceration. Finally, in the case of corrupt, violent organizations, law-enforcement is most effective if it targets for prosecution the leaders of those organizations, causes their long-term incapacitation, then identifies and targets their successors.

I. WHITE COLLAR CRIME

For purposes of this commentary, "white collar crime" refers to non-violent criminal offenses committed in an institutional or commercial context.² Examples include fraud of all kinds (including wire, mail, and bank fraud), public corruption, commercial bribery (including payment or receipt of kickbacks), antitrust violations, and environmental offenses. White-collar offenders generally are motivated by profit, and are usually rational, informed actors who will assess the risks versus the bene-

² Black's Law Dictionary defines white-collar crimes as "unlawful, non-violent conduct committed by corporations and individuals including theft or fraud and other violations of trust committed in the course of the offender's occupation (e.g., embezzlement . . . , antitrust violations, price fixing . . . , and the like)." BLACK'S LAW DICTIONARY 1596 (6th ed. 1990).

fits of engaging in criminal conduct. As further discussed in the examples below, white-collar crime is more prevalent in areas where law-enforcement has not devoted resources or has not been effective. When, however, law-enforcement is effective in enforcing the criminal laws against a small number in a white-collar area, oftentimes the result is that the larger group in that area conform their conduct to the law.

To highlight this principle, what follows are a series of examples of white-collar prosecutions and a discussion of the observed impact of the same on the conduct of those in the affected area.

A. OPERATION GREY LORD

Perhaps one of the most notable examples of the impact of targeted law-enforcement on white-collar crime is "Operation Greylord," a federal probe of corruption in the Circuit Court of Cook County, Illinois³ that began with an undercover investigation in the late 1970s. At the start of the probe, the Circuit Court was notorious for its corrupt judges and attorneys, and bribery and extortion were rampant. At the end of the probe, fifteen judges and forty-nine lawyers had gone to prison for bribery and/or tax-related offenses; a total of 103 attorneys at one time or another faced charges of criminal or unprofessional conduct.⁴

The investigation resulted in the creation of a commission to investigate how the Circuit Court functioned. That commission recommended a series of changes, many of which were adopted by the Circuit Court. Those changes included judges being rotated through various branches of the Court every eight to twelve months; cases being assigned on a random basis, frequently by computer; new judges receiving ethics training; and attorneys having to sign in at the courthouse and list their cases (thereby reducing the possibility that they will solicit or "hustle" cases).⁵ The result of the investigation and subsequent court-

³ Cook County encompasses all of Chicago and some of the surrounding suburbs.

⁴ Abdon M. Pallasch, *Chicago Lawyer Special Report: Greylord Update*, CHICAGO LAWYER, Sept. 1995, at 14.

⁵ *Id.* at 18.

reforms has been that the Court no longer is reputed among lawyers to be a bastion of corruption.

B. BANKRUPTCY FRAUD

A recent example of the impact of a single white-collar prosecution on a much wider group arose in the area of bankruptcy law. The federal prosecution in Milwaukee, Wisconsin, of a former partner of a large New York law firm sent ripples throughout the bankruptcy bar of the United States, and resulted in widespread attention to what had formerly been a fairly routine required series of filings for a lawyer seeking to represent a debtor in a bankruptcy proceeding.

Specifically, in December, 1997, a federal grand jury returned an indictment charging John Gellene with having failed to make material disclosures to the bankruptcy court in 1994 in connection with the process by which the bankruptcy court ultimately appointed Gellene's law firm to represent a Milwaukee company, the Bucyrus-Erie Company, in a proceeding pursuant to Chapter 11 of the United States Code.⁶ In particular, the bankruptcy rules require a law firm seeking court appointment to represent the debtor in bankruptcy to disclose to the court all of the law firm's connections to the debtor, creditors, and any other party in interest in the bankruptcy proceeding.⁷ According to the indictment, Mr. Gellene failed to disclose to the bankruptcy court that his firm also represented the senior secured-creditor and one of the creditor's principals at the time of the bankruptcy proceeding. In February 1998, a federal jury in Wisconsin found Mr. Gellene guilty as charged in the indictment.⁸

Even prior to Mr. Gellene's indictment, during the grand-jury phase of the federal investigation, the bankruptcy bar was focused on the implications of the matter for practitioners filing similar disclosure declarations in other jurisdictions.⁹ The fed-

⁶ Indictment, *United States v. Gellene* (E.D. Wis. 1997) (No. 97 CR 221).

⁷ FED. R. BANKR. P. 2014(a).

⁸ Indictment at 3, *Gellene* (No. 97 CR 221) (citing FED. R. BANKR. P. 2014).

⁹ *Should Milbank Tweed Be Required To Disgorge \$1.8 Million Fee?*, 7 BANKRUPTCY COURT DECISIONS, Sept. 16, 1997, at A1.

eral prosecution in Milwaukee was followed by careful bankruptcy-court scrutiny of other disclosure statements filed by law firms in other jurisdictions. Law firms have become "hypersensitive" to disclosure of their connections to creditors and other parties-in-interest in the bankruptcy setting.¹⁰ Firms began to review their internal procedures for spotting potential conflicts-of-interest, and have become more candid in their disclosures to bankruptcy judges.¹¹ In one case, a law firm attached to its disclosure statement a computerized printout of all the firm's clients. In response to the federal scrutiny on bankruptcy disclosure, some law firms have begun consulting with government representatives for assistance on formulating ways to improve their internal identification of clients with connections to bankruptcy proceedings.¹²

C. HEALTH CARE FRAUD

Starting in the early 1990s, an increase in the federal investigative resources devoted to the investigation and prosecution of health-care fraud and abuse has led to widespread corporate attention in the health-care industry to addressing the problems of fraud and abuse. For example, from 1991 to 1993, the Federal Bureau of Investigation tripled the number of agents assigned to investigate health-care fraud and abuse.¹³ In May 1995, President Clinton launched "Operation Restore Trust," a special initiative of the Department of Health and Human Services against health-care fraud, waste, and abuse. Operation Restore Trust established a demonstration project focused on home-health care, nursing homes, and durable medical equip-

¹⁰ Mathew Goldstein, *Lawyers Go Over Limit: Bankruptcy Attorneys Learn Lessons in Disclosure*, CRAIN'S N.Y. BUS., June 1, 1998, at 3.

¹¹ *Id.*

¹² *Id.*

¹³ FEDERAL BUREAU OF INVESTIGATION, UNITED STATES DEP'T JUSTICE, HEALTH CARE FRAUD PROGRAM (pamphlet on file with *Journal of Criminal Law & Criminology*).

ment suppliers in five states.¹⁴ From 1995 to 1996, the number of federal prosecutions linked to health care increased by 60%.¹⁵

With the increased federal focus on health-care fraud and abuse, there has been a revolution in the attention spent by public and private health-care institutions on issues relating to fraud and abuse. In response to the demand of clients, most large law firms have expanded their health care practices to provide advice and counseling to institutions concerned about developments in the area. Health-care institutions have created internal codes of conduct and audit programs and hired compliance officers to monitor compliance with relevant statutes and regulations. Health-care institutions and professionals monitor federal investigative developments on a regular basis, and circulate those developments in newsletters and correspondence throughout the industry. The combined impact of the federal enforcement in an area that had been relatively neglected and of the private reaction to such enforcement has been a newly-sensitized health-care environment where fraud and abuse has been effectively deterred.

D. CORPORATE SENTENCING GUIDELINES

On November 1, 1991, the United States Sentencing Commission introduced a new set of guidelines applicable only to the sentencing of organizations.¹⁶ These "corporate" sentencing guidelines have revolutionized white-collar law-enforcement by effectively establishing a system where corporations and other organizations are driven to police themselves and their employees. One of the achieved objectives of the corporate sentencing guidelines has been that many corporate institutions have established internal mechanisms for preventing, detecting, and reporting criminal conduct.¹⁷ That objective was achieved in part by the design of the corporate sentencing guidelines, which

¹⁴ Department of Health & Human Services Press Release, "Operation Restore Trust Objectives and Accomplishments" (May 13, 1996).

¹⁵ Monica Langley, *A Nonprofit Hospital Finds Its Executives Were Making the Profit*, WALL ST. J., Nov. 20, 1996, at A1.

¹⁶ UNITED STATES SENTENCING COMMISSION, GUIDELINES MANUAL, Ch. 8 (1997) [hereinafter USSG].

¹⁷ *Id.*, at Ch.8, intro. comment.

oblige courts sentencing organizations to consider whether the organization brought the misconduct at issue to the attention of law-enforcement authorities, i.e., whether the organization voluntarily disclosed the misconduct.¹⁸

The guidelines also require courts sentencing organizations to consider whether at the time of the offense, the organization had "an effective program to prevent and detect violations of law," also known as a corporate compliance program.¹⁹ The guidelines detail what defines an effective corporate-compliance program.²⁰ Those minimum requirements include a corporate code of conduct, the assignment of high-level individuals to oversee compliance with the code of conduct, effective communication of the code of conduct to individuals in the organization, audit controls to monitor compliance, sanctions for those who violate the code of conduct, and the taking of reasonable steps to prevent further offenses after they become known.²¹

Federal law-enforcement authorities responded to the implementation of the corporate sentencing guidelines by establishing policies further encouraging organizations to disclose misconduct voluntarily and to establish corporate compliance programs. For example, both the Department of Justice (in the antitrust area) and the Department of Health and Human Services (in the area of health-care fraud and abuse) have policies which state that when the government exercises discretion regarding whether or not to prosecute an organization, the government will consider whether the organization made voluntary disclosure of the offenses and whether the organization had an effective corporate-compliance program.

The impact of the corporate sentencing guidelines and subsequently-established federal law-enforcement policies has been significant. Virtually every large corporate institution, fearing the potentially draconian sanctions resulting from a federal prosecution of the institution, has established a corporate code

¹⁸ *Id.*, at §8C2.5(g) ("Self-Reporting, Cooperation, and Acceptance of Responsibility").

¹⁹ *Id.*, at §8C2.5(f) ("Effective Program to Prevent and Detect Violations of Law").

²⁰ *Id.*, at §8A1.2 cmt. n.3(k).

²¹ *Id.*

of conduct and an audit program designed to root out corporate misconduct. In circumstances where an institution identifies misconduct within the organization, the institution invariably now considers making voluntary disclosure of that conduct to the government. The result has been that the federal government has dramatically increased its investigative capabilities beyond just federal law-enforcement authorities to include substantial portions of the private sector which now, in effect, act as the eyes and ears of the federal government.

Examples like the foregoing support the principle that the prosecution of white-collar offenders deters similarly-situated potential offenders from committing the same crimes. This appears to be a function of the rational, informed nature of potential white-collar offenders. The implication for law-enforcement authorities is that selective targeting of types of white-collar crime can efficiently reduce criminal conduct of this kind.

II. VIOLENT CRIME

For purposes of this commentary, "violent crime" refers not only to offenses against a person (such as murder, assault, and robbery), but also to narcotics and firearms offenses. Individuals who typically commit these types of offenses generally do not engage in the same cost-benefit analysis that white-collar offenders do, either because violent offenders do not act rationally, or because they are not adequately informed regarding the implications of their criminal conduct. This principle is highlighted by the following examples:

A. DRUG "MULES"

Perhaps the classic example of a violent offender acting in an irrational and/or uninformed manner is the low-level courier of narcotics such as cocaine. Specifically, depending on market conditions, a kilogram of cocaine sells for approximately \$20,000 at the retail level. Oftentimes, narcotics dealers hire individuals to deliver cocaine to buyers and/or to bring the money back from the purchaser. Such couriers, or "mules," frequently are paid a very small percentage of the cost of the kilogram, such as a few hundred dollars. If, however, a courier

is caught committing the crime, the courier faces a mandatory-minimum sentence under federal law of five years' imprisonment and a fine of \$250,000.²² Except in extraordinary circumstances, a rational actor would not take on the risk of such severe penalties for such a meager reward. At times, such offenders are operating under a misunderstanding that if they are not physically in possession of the cocaine, or if they do not receive the money at the same time they deliver the cocaine, they cannot be prosecuted.

B. BANK ROBBERY

The Federal Bureau of Investigation's statistics regarding robbery, burglary, and larceny of federally-insured financial institutions (crimes collectively referred to hereafter as "bank robberies") dramatically highlight the irrational nature of a violent criminal.²³ Specifically, in 1995, a total of 7239 bank robberies occurred nationwide.²⁴ The total value of the cash, securities, and other property taken in those bank robberies was \$61,280,877.55, or an average of approximately \$8,465 per bank robbery.²⁵ Of those 7239 bank robberies, law enforcement has "solved," that is, arrested the offender(s) in 4583 instances.²⁶ The solution rate, therefore, for bank robberies committed in 1995 is approximately 63%.

The statistics for 1996 are similar. In 1996, 8536 bank robberies occurred.²⁷ The property taken in those bank robberies totaled \$81,522,697.94, or an average of approximately \$9,550 per bank robbery.²⁸ Law-enforcement has solved 5122 of those bank robberies, or 60% of all bank robberies in 1996.²⁹ Com-

²² See 21 U.S.C. §841(a) (1994).

²³ The statistics referred to regarding bank robberies were obtained from the Chicago Division of the FBI. The reporting date for the statistics was May 7, 1998. Facsimile from FBI Chicago, to John N. Gallo, (June 17, 1998) (on file with *Journal of Criminal Law & Criminology*).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

bined for the two years, law-enforcement solved approximately 62% of the bank robberies committed; the average amount of loot gained from each of those robberies was \$9,053.

Bank robberies committed in 1995 and 1996 are punishable under the United States Sentencing Guidelines. Specifically, assuming a successful federal-prosecution under 18 U.S.C. §2113 (which prohibits "bank robbery and incidental crimes"), an offender with no criminal record who took less than \$10,000 faces a sentence of not less than forty-one to fifty-one months' imprisonment without possibility of parole.³⁰ If the offender has a prior conviction, brandished a weapon, caused bodily injury, or threatened death, the guideline range for the offense increases dramatically.

Despite these statistics, 8264 bank robberies occurred in 1997.³¹ Thus these offenders committed crimes where the likelihood is that they will steal less than \$10,000; where the chances of being arrested are about three out of five; and where the sentence they face if convicted in a federal court is approximately four years of non-parolable imprisonment. The irrational nature of the commission of the offenses in 1997 is readily apparent.

Finally, the FBI statistics regarding bank robberies are notable for revealing the importance of carefully monitoring the conduct of those previously convicted of similar offenses, particularly drug users. Of those identified as having committed bank robbery, about one out of four was previously convicted of a similar offense, about one out of three was on probation or parole, and (to the extent identifiable) about three out of four were narcotics users.³²

A personal experience with a repeat narcotics offender highlights the irrational nature of the violent offender. In 1990, the Internal Revenue Service learned that a man (hereinafter "Fat Daddy") in a suburb outside Chicago had purchased his home with cash and without having any known legitimate source of income. After further investigation, the federal gov-

³⁰ See USSG, *supra* note 16, at §2B3.1.

³¹ See *supra* note 23.

³² *Id.*

ernment obtained a court order calling for the civil forfeiture of Fat Daddy's home. At the time of the execution of the seizure order, federal agents confronted Fat Daddy, who admitted his connection to a wide-ranging narcotics distribution network. Fat Daddy agreed to cooperate with the federal agents in connection with an investigation into the narcotics network, then disappeared without maintaining the requested contact with the agents.

Sometime later, Fat Daddy telephoned a federal agent from the hospital and reported that he had just been shot. Fat Daddy suspected that he had been shot by narcotics conspirators suspicious that he was cooperating with the federal government. Fat Daddy admitted that he had been involved in narcotics distribution since the civil seizure, but promised to cooperate in the future with the federal government. After his release from the hospital, however, he again ceased communication with the IRS. Subsequently, a grand jury indicted him for structuring currency transactions to avoid reporting requirements, he was arrested, and he pled guilty under seal pursuant to a plea agreement that required him to cooperate with the federal government. Predictably, he again fell out of sight until he was arrested again. This time, the court ordered Fat Daddy detained until sentencing.

The court ultimately sentenced Fat Daddy to eleven months' imprisonment, followed by two years' supervised release. After his release from prison, a United States Probation Officer carefully supervised Fat Daddy, and required him to be tested periodically for narcotics use. Whenever he tested positive for narcotics use, the court ordered Fat Daddy to appear in court and threatened revocation of his supervised release and an additional prison term. In this fashion, the federal government closely supervised the conduct of an individual who undoubtedly will return to the practice of committing crime once his supervision ends.

In summary, because of the nature of most violent crime, law-enforcement necessarily is more reactive in responding to such conduct than it is for white-collar crime, where law-enforcement effectively can be proactive by targeting types of

offenses. The prosecution of individual offenders appears to have little general deterrent effect on other potential offenders. Law-enforcement, however, potentially can deter individual offenders from repeating similar crimes by aggressively supervising offenders, including periodically testing such offenders for drug use. If such supervision fails, the only effective means of deterring individuals from committing similar violent offenses is to incapacitate them, usually by imprisonment.

III. CORRUPT/VIOLENT ORGANIZATIONS

Federal law-enforcement faces a unique problem when confronted by criminal conduct of sophisticated violent organizations like organized crime or gangs. In this circumstance, the criminal conduct of the organizations typically is not deterred by the prosecution of other organizations (general deterrence) or by reacting to the criminal conduct of some of its individual members (individual deterrence). One of the reasons traditional forms of law enforcement are ineffective is that the leadership of these organizations typically insulates itself from the day-to-day operations of the organization, and hires low-level criminals like the above-mentioned narcotics courier³³ to conduct the criminal conduct of the enterprise, with the profits flowing back to the organization. In this context, the most effective law-enforcement technique is the identification of the leadership of the organization, the targeting of that leadership for investigation, and the use of appropriate means—such as wiretapping and the use of informants—to make a criminal case of some kind against the leadership. Once that has been accomplished, law-enforcement must remain vigilant in identifying successors to the leadership of the organizations, and repeat the process.

In this way, over time, such organizations lose their influence and effectiveness, and wither in terms of their capacity to terrorize communities. Notable examples of the success of federal law-enforcement in this regard include investigative efforts

³³ See *supra*, Part II(A).

relating to organized crime in New York and Chicago, and relating to gang crime in Chicago.

IV. CONCLUSION

In any society, law-enforcement will have an important role in society's efforts to reduce crime. As we have witnessed criminal activity decreasing, one of the questions raised has been what law-enforcement techniques were effective in causing the reduction in crime. The conclusion of this commentary is that the type of effective law-enforcement technique depends on the type of the crime. In the case of white-collar crime, where the offenders are rational, informed actors, the targeting of a select group in an identifiable subject area will lead to the deterring crime by the larger group in that same area. In the case of violent crime, where offenders are not as rational and/or informed about the implications of their conduct, law-enforcement is most effective when it reacts to offenders' conduct by seeking close societal supervision of offenders, and by seeking incarceration for those frequent and repeat offenders. In the case of corrupt, violent organizations, law-enforcement must identify the high-ranking members of the organization, target them for prosecution and incarceration, then repeat the process with the successors to the leadership.

