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National Institute of Justice
Issues and Practices

Using Civil Remedies for Criminal Behavior

Rationale, Case Studies, and Constitutional Issues

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U.S. Department of Justice
National Institute of Justice

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- *Conduct national demonstration projects* that employ innovative or promising approaches for improving criminal justice.
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- *Carry out research on criminal behavior.*
- *Develop new methods of crime prevention* and reduction of crime and delinquency.

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- Research that confirmed the link between drugs and crime.
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Using Civil Remedies for Criminal Behavior

Rationale, Case Studies, and Constitutional Issues

by
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and
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Issues and Practices is a publication series of the National Institute of Justice. Each report presents the program options and management issues in a topic area, based on a review of research and evaluation findings, operational experience, and expert opinion on the subject. The intent is to provide information to make informed choices in planning, implementing, and improving programs and practice in criminal justice.

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Foreword

Prosecutors and police have found it difficult to combat successfully a range of criminal activities that include drug dealing, car theft, hate violence, domestic violence, and possession of firearms by the mentally ill. A relatively small number of jurisdictions have found that civil remedies can be an effective means of attacking these and other illegal behaviors.

To be sure, most criminal prosecutors and police departments are unfamiliar with enforcing civil statutes and uncomfortable doing so. However, using civil remedies to address criminal behavior does not involve breaking new ground or tampering with an inviolate principle of separation of criminal and civil law. On the contrary, many civil judgments effectively sanction wrongdoers more severely than the criminal law, while many criminal sanctions involve classic civil features of compensation, community service, and victim restitution.

In fact, using civil remedies is another illustration of a police focus on problem solving as part of community policing strategies that have shown such promise in curtailing crime in many jurisdictions across the country. One aspect of community policing involves the application of a panoply of innovative and long-term solutions to a criminal problem, and the involvement of other agencies and the community in the solution. These elements of community policing are features of all of the case studies of civil remedies reported in this document.

Using civil statutes to get at hard-to-reach criminal behavior will not, of course, by itself solve most crime problems. However, the case studies make clear that by using civil remedies to attack carefully selected target behaviors, prosecutors and police administrators working collaboratively can begin to make a dent in a number of criminal activities that previously have appeared immune to the criminal law.

Jeremy Travis
Director
National Institute of Justice

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The report relies on a law review article commissioned expressly for this study that examines the constitutional issues involved in using civil remedies for criminal behavior: "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," by Mary Cheh in *Hastings Law Journal* 42(5):1325–1413, 1991. The report also draws on a second commissioned paper, "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law," by Kenneth Mann (*Yale Law Journal* 101(8):1795–1873, 1992). We also benefited from analyses prepared by Professors Cheh and Mann on the constitutional issues involved in using civil statutes to address criminal behavior, and from their critiques of the constitutionality of each case study in an earlier draft. In addition, Professor Cheh reviewed the entire report for constitutional soundness. A draft paper prepared by Sherman Cohn provided useful historical background on the civil/criminal dichotomy in American jurisprudence.

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Carol Petrie, then program manager for this project at the National Institute of Justice, conceived of the study and played a major role in the initial project planning. Cheryl Crawford, project monitor at the National Institute of Justice, guided us in preparing the report and provided helpful reviews of drafts. Donna Welch, a student at the De Paul College of Law, provided useful research assistance. Jan Chaiken of Abt Associates gave insightful comments on every aspect of the report. Stacia Langenbahn's copyediting improved the report's clarity on nearly every page. Mary-Ellen Perry and Winn Sinclair efficiently typed the numerous report drafts. Wendy Sanderson coordinated the report production.

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Executive Summary

A number of prosecutor offices and police departments have been making use of civil remedies to address criminal behavior. These jurisdictions have found that civil remedies can be easier to use than criminal sanctions for certain types of crime because they often do not require victims to testify, can provide immediate relief (for instance, through injunctions and restraining orders), and avoid the need for a labor-intensive criminal or civil trial. Civil remedies can also be more effective in preventing crime than criminal penalties because they more frequently involve the classic crime deterrent triad of swiftness, certainty, and severity.

Case Studies

Seven case studies present different criminal justice programs that use civil process to target intransigent criminal behavior. Neither a formula for attacking crime with civil statutes nor evaluations of exemplary projects, the case studies instead illustrate different approaches to using civil remedies to combat crime and diverse illegal behaviors for which civil process may be a more effective deterrent than the criminal law.

- *Using civil injunctive relief to prevent domestic violence.* Duluth has mounted a comprehensive community-wide effort to implement the Minnesota domestic violence statute that provides for civil orders of protection enjoining a batterer from further abusing his victim. A shelter advocate assists most victims to complete the petition and accompanies them to court. Judges in Duluth typically issue protection orders that bar or evict the offender from the residence, provide specific conditions for visitation and child custody, and mandate participation in a 30-week program for batterers. A community-based organization monitors violations, and violators are usually jailed at least overnight and prosecuted for the violation.

- *Combating hate crime.* The Massachusetts attorney general, together with the Boston Police Department, uses the Massachusetts Civil Rights Act of 1979 to secure injunctive relief for victims of hate crime. The restraining order typically bars offenders from having any contact with the victim. The few offenders who have violated the injunction have been arrested quickly, tried for criminal contempt, and sentenced to probation or, more typically, to jail.

- *Confiscating weapons from the mentally ill.* The Los Angeles Police Department, in conjunction with the Los Angeles district attorney, uses two civil statutes to confiscate weapons from the mentally ill even when no crime has been committed and usually without securing a search warrant. Through written agreements, the county health care system participates in the effort by agreeing to accept police referrals for evaluation and installing metal detectors in their facilities to catch patients and visitors trying to enter with firearms.

- *Breaking up "chop shop" operations.* The Arizona attorney general's office in Phoenix relies on police undercover work in combination with a State civil racketeering statute to shut down illegal enterprises that steal and resell cars. After initiating civil racketeering charges and parallel criminal action, the attorney general can obtain liens or pursue civil forfeiture remedies to preserve the enterprise's assets.

- *Evicting drug dealers from apartments.* The Manhattan district attorney applies the New York State Real Property Actions and Proceedings Law to compel landlords to evict tenants who have been involved in drug dealing from their premises. The statute empowers the district attorney to petition for an eviction if the landlord fails to act, and the law permits the court to impose a civil penalty of $5,000 on landlords who fail to comply.

- *Seizing whole buildings used in the commission of a felony.* The United States Attorney for the Southern District of New York uses a Federal civil forfeiture statute to evict drug dealers from privately owned dwellings by threatening or actually effecting the seizure of entire buildings. Using evidence of drug dealing provided by the police and affidavits from affected neighbors, the U.S. Attorney's Asset Forfeiture Unit secures comparatively quick eviction of drug dealers whom landlords are unwilling or unable to evict.

- *Abating drug-related nuisances.* The city of San Diego, California, uses a provision of the California Health and Safety Code to seek injunctive relief against property owners or tenants for the unlawful sale, manufacture, or use of illegal drugs on the property. In 90 percent of the cases, property owners, after having been notified about the problem, voluntarily put a stop to the activity. In the remaining cases, the city secures a preliminary injunction that requires landlords to halt the drug dealing and correct municipal health and safety code violations.

Making Effective Use of Civil Remedies

There are five key considerations involved in using civil remedies effectively to achieve criminal justice goals.

- *Find appropriate legislation.* Prosecutors and police administrators can (1) search through existing legislation for statutes and ordinances that can be used to address the problem at issue, (2) amend existing civil legislation so it becomes usable for this purpose, or (3) enact usable civil legislation.
- *Secure competent staff.* As with most programs that break from tradition and risk failure, using civil remedies requires an "entrepreneur" to get the program up and running. Highly talented staff are needed to occupy key positions in the effort to establish the program's credibility and avoid inviting constitutional challenges through inadvisable behavior. Staff training is critical to ensuring program success.
- *Develop close police-prosecutor collaboration.* Using civil remedies normally involves close and ongoing cooperation between police and prosecutor on each case. Most of the programs used specific alliance-building approaches to achieve and maintain this necessary collaboration.
- *Involve other agencies.* Prosecutors and police should see themselves as part of a team that includes other public and private agencies, including, as appropriate, local building, fire, and zoning departments, human service providers, and victim advocates.
- *Involve the community.* Individual citizens, community-based organizations, advocacy groups, and private sector associations can all be helpful—even essential—for initiating the program, forestalling potential opposition, and identifying, documenting, and preventing the recurrence of criminal activity.

Constitutional Issues in Using Civil Statutes

Programs that use civil remedies to attack criminal behavior are particularly susceptible to constitutional challenge, especially in the areas of forfeiture involving innocent respondents; providing proper notice; coerced self-incrimination; contempt proceedings; and double jeopardy. Every program in the report but one has been challenged at least once—in some cases successfully. However, all the programs have survived the challenges by either adjusting their procedures or amending their civil statute. Programs can protect themselves from successful challenge by taking several specific precautions, including hiring competent staff, minimizing their turnover, and training them thoroughly; pursuing only strong cases and collecting evidence as if each case had to be proven beyond a reasonable doubt; and welcoming legal representation on the part of respondents.

Chapter 1

A Word to Prosecutors and Police
Using Civil Remedies to Address Criminal Behavior Is Appropriate and Advantageous

There is ample precedent for using civil statutes to attack criminal behavior. The key is to abandon the confining view that the civil law may only be used to address private problems between citizens and the criminal law may only be used to respond to illegal acts committed against the State. In fact, as the vignettes below illustrate, civil remedies are already being used effectively to deal with a range of intractable criminal behaviors:

- *The Manhattan district attorney* applies the New York State Real Property Actions and Proceedings Law to compel landlords to evict tenants who have been involved in drug dealing from their premises. The statute empowers the district attorney to petition for an eviction if the landlord fails to act. Furthermore, the court may impose a civil penalty of up to $5,000 on landlords who fail to comply. Unlike an arrest, eviction—whether carried out by the landlord or the district attorney—effectively bars the drug dealer from the premises. During its first five years, the program put a stop to drug dealing in 1,986 apartments and stores.

- *The Massachusetts attorney general,* together with the Boston Police Department, uses the Massachusetts Civil Rights Act of 1979 to secure injunctive relief for victims of hate crime. One of the seven full-time sworn officers in the police department's Community Disorders Unit investigates every suspected hate crime in the city. The attorney general then seeks a restraining order, based on a preponderance of the evidence, that enjoins the offenders from having any contact with the victim. From 1982 to the fall of 1993, the attorney general obtained 130 injunctions against 302 defendants, nearly half of them representing civil rights violations committed in Boston. The few offenders who have violated the injunction have been arrested quickly, tried for criminal contempt, and sentenced to probation or, more typically, to jail.

- *The Los Angeles Police Department,* in conjunction with the Los Angeles district attorney, uses two civil statutes to confiscate weapons from the mentally ill even when no crime has been committed and without securing a search warrant. The police department has worked out a written arrangement with the mental health system for carrying out the program. The police seized and retained weapons from 150 mentally ill individuals in 1990, 152 individuals in 1991, and 150 individuals in 1992.

These vignettes, summarized from three of seven case studies presented in detail in chapters 2 and 3, suggest how civil remedies can help to address widespread and troublesome antisocial behaviors that criminal sanctions have been largely unable to curb. Four other programs are examined in this report:

- In Duluth, judges address domestic violence using civil injunctive relief coupled with mandatory counseling for the batterer.

- The Phoenix attorney general uses a State civil racketeering statute to shut down and seize the assets of "chop shops"—illegal enterprises involved in stealing and reselling cars or car parts.

- The San Diego city attorney relies on civil abatement legislation to obtain injunctive relief to curb drug sales in private homes and businesses that are creating a public nuisance.

- The U.S. Attorney for the Southern District of New York uses a Federal civil forfeiture statute to seize leaseholds and confiscate entire apartment buildings where significant drug dealing is taking place.

Advantages of Civil Remedies

Civil remedies offer two general advantages over criminal sanctions for certain types of crime:

(1) Civil remedies can be *easier to use* because they require less staff time to implement or do not take as long to have a deterrent effect.

(2) Civil remedies can be more *effective* in deterring some targeted offenders from committing future crimes.

Ease and Speed

The case studies presented in chapters 2 and 3 illustrate several of the reasons civil remedies can be *easier* and *quicker* to implement than a criminal prosecution:

- Victims and witnesses are often reluctant to testify in criminal cases because they fear retaliation or resent the inconvenience. When civil remedies are used against drug dealers in Manhattan and San Diego, affected neighbors usually do not have to testify in court. Hate crime victims and witnesses in Boston normally provide testimony only by affidavit when a preliminary civil injunction is issued.

- Relief can frequently be obtained very quickly through *ex parte* injunctions (issued without prior notice to the offender) and temporary restraining orders against perpetrators of hate crime in Boston, batterers in Duluth, and drug dealers in San Diego. In Phoenix, prosecutors use restraining orders to seize chop shop assets before operators have a chance to divert or dissipate their assets. The Manhattan district attorney can effect the eviction of a drug dealing tenant in only three to five months compared with the two to three years it takes the City Housing Authority or a private landlord to evict the tenant.

- Attorneys' offices save significant time when civil action enables them to avoid the labor- intensive work of a criminal or civil trial. The San Diego city attorney has gone to trial only once on a nuisance abatement case; most of the drug eviction cases the district attorney in Manhattan handles are settled before trial; only a brief appearance by the Los Angeles district attorney is required in the rare case in which a mentally ill person petitions to have a confiscated weapon restored. Police agencies, too, save time when they no longer have to return as often to the same address to deal with the same violent spouse, drug dealer, bias crime offender, or mentally ill disturber of the peace after civil action has largely or completely resolved the problem.

- Civil process can sometimes be achieved with reduced or less expensive staff. The Manhattan district attorney and Arizona attorney general make considerable use of paralegals in preparing cases to evict drug-dealing tenants and seize chop shops.

Effectiveness

The case studies illustrate that civil remedies can be *more effective in preventing crime* than criminal prosecution because they more frequently involve the classic crime deterrent triad of swiftness, certainty, and severity:

- Punishment of hate crime offenders in Boston, batterers in Duluth, and drug dealers in San Diego who violate a restraining order or an injunction is quick, automatic, and stern, because the grounds for arrest are broad and crystal clear, and because judges are quick to punish an offender who violates their own order.

- The civil forfeiture threatened or used by prosecutors in Phoenix against chop shops may have more of a deterrent effect with criminals than probation or even a prison sentence. Furthermore, the arrest and prosecution of individuals, even on a massive scale, often fails to end an illegal enterprise because the bosses—even from their prison cells—simply replace the incarcerated "workers" with other individuals. Forfeiture strikes at the heart of criminal activity regardless of the ultimate fate of individual offenders.

- In some cases, a criminal prosecution cannot be initiated against antisocial behavior. Without enabling civil legislation, police officers in Los Angeles could not seize weapons from the mentally ill without having probable cause to arrest them for a crime. It is often difficult to prosecute batterers who limit themselves to verbal threats against their partner, while a civil protection order can enjoin such behavior.

Of course, to police officers the civil process may sometimes seem slower, not faster, than the criminal route. Normally, police officers would make an arrest and consider their job

done, but with civil abatement or injunctive relief, they may have to continue to collect evidence or monitor the abated property, enjoined batterer, or bias crime offender. As a result, many of the significant advantages of the civil route may not be immediately apparent when the strategy is first applied. However, in time, the greater likelihood that civil remedies will provide a long-term solution to problems wins over most police officers to the approach.

Cost Recovery

A final advantage of civil remedies is the opportunity through forfeiture and remedial sanctions to *recover some of the costs of litigation.* Both the U.S. Attorney for the Southern District of New York and the Arizona attorney general have collected money through forfeitures, funds that the prosecutors share with local police. In San Diego, the city attorney sometimes recovers its investigative costs from the owners of properties that are creating a public nuisance.

Other Advantages

The rewards of using civil remedies can extend beyond the potential benefits of reducing crime:

- Prosecutors and police administrators can win good reviews if they succeed at the effort—"I became an overnight hero in the press and the office," one prosecutor reported after a successful case.
- Successful civil litigation can win support from the community and help to overcome the widespread mistrust between inner-city residents and the justice system. When word gets out that the police and prosecutor *can* do something about a problem—that the community can go to them and *get action*—residents are more likely to cooperate with law enforcement in the future and perhaps less likely to sue. One prosecutor reported the gratification he and several police officers experienced upon leaving an apartment building after evicting a drug-dealing family when other tenants opened their apartment doors to applaud and give the "thumbs-up" sign.
- People's quality of life is often destroyed or chronically impaired by the type of illegal behavior that civil remedies are most effective in helping to prevent—drug dealing, hate crime, domestic violence, mentally ill family members' access to firearms. Furthermore, most of these affected individuals do not have the resources to move to a less crime-ridden community or another residence. As a result, using civil remedies helps improve the living conditions of people who have the fewest options for improving their environment on their own.

If, despite these benefits, you have not considered using civil remedies, it may be because of (1) your training in law school or at the police academy, (2) concerns about potential constitutional issues involved in using civil remedies for criminal behavior, and (3) the separation of most prosecutor offices into criminal and civil divisions along with the perception that police officers are limited to enforcing the criminal law. As discussed below, each of these explanations for avoiding the use of civil remedies should not discourage you from giving serious consideration to applying civil remedies under certain circumstances.

Historical Background: The Civil/Criminal Dichotomy

Most justice system practitioners view civil law and criminal law as offering two distinct sets of remedies for very different behavior. For prosecutors, this dichotomy is driven home at the very beginning of their legal training by the division of the law school curriculum into civil and criminal categories and courses. Students learn that the State initiates the criminal process, with a successful prosecution resulting in a punishment, while the injured person initiates civil action, with the end result being some form of compensation. They learn a different terminology for these bodies of law—for example, "plaintiff" versus "prosecutor," "civil judgment" versus "sentence." By the time they graduate, new lawyers cannot help but become imbued with the notion that civil and criminal law are entirely separate entities.

Similarly, police academies train recruits exclusively in how to deal with criminal, not civil, matters. Recruits may even be informed that civil work is unethical because it involves siding with some citizens against other citizens in what is a private matter. Some recruits are told that they are not allowed to use their badge in a civil action—and that they may be sued if they do.

The dichotomy between civil and criminal remedies is further reinforced in the practice of law and policing. Lawyers typically begin their careers either in strictly criminal practice as a prosecutor or public defender, or in the exclusively civil practice of personal injury, corporations, real estate, or wills and estates. While deputy sheriffs handle some civil process, police officers enforce exclusively the criminal law.

The distinction is further strengthened when city attorney offices focus exclusively on civil matters, and district attorney offices handle only criminal matters.

In fact, however, the separation of civil and criminal law has been consistently honored in the breach for over 100 years. At least as far back as the False Claims Act of 1863, Congress has granted Federal administrative agencies power to impose punitive sanctions in a wide range of civil proceedings, ranging from antitrust statutes to securities laws. In cases brought under these statutes, the United States Attorney represents the Federal Government both in criminal prosecutions and civil actions. Today, many other civil judgments effectively punish the "respondent"—often, as with forfeiture judgments, more severely than the parallel criminal sanctions for the same conduct. On the other side of the coin, many criminal sanctions involve the quintessentially civil feature of compensation, such as community service and victim restitution.

Thus, you do not have to feel you are breaking new ground or tampering with an inviolate principle in seeking ways to use civil remedies to address criminal behavior. Rather, the key is to abandon the view that only the civil law is appropriate for compensating wronged individuals and the criminal law alone is applicable for sanctioning offenses against the State. Instead, think of antisocial behavior as a problem to be met, managed, and resolved by *whatever* tools will do the job—and not necessarily just criminal prosecution or civil remedies, but also code enforcement and community involvement.

This frame of mind is similar to the concept of community policing popular in law enforcement circles today. Rather than responding to every complaint as quickly as possible by simply making an arrest (or otherwise patching up the problem) and moving on to the next dispatcher call, advanced law enforcement agencies today consider (1) a variety of *innovative and long-term solutions to the problem* rather than a quick fix and (2) ways of *involving other agencies and the community* in the solution.

For example, police in Gainesville, Florida, discovered that it was far more likely that convenience stores would be robbed when there was only one clerk on duty. After police persuaded the city council to enact legislation requiring that there be two clerks in every convenience store after dark, the robbery rate dropped a reported 65 percent.[1] At the same time, the police met with convenience store owners to encourage them to remove window displays and elevate the check-out counters to allow passers-by a clear view of any suspicious activity that might be going on.

Both of these central elements of community policing—not trying to solve the crime problem by yourself and choosing a variety of more permanent solutions—are features of most of the case studies reported in this document. For example, the Los Angeles Police Department could not seize weapons from the mentally ill without the cooperation of the mental health department, whose hospitals must be willing to evaluate these individuals. Medical hospitals in Los Angeles have also joined the effort to disarm the mentally ill. San Diego involved the alcoholic beverage licensing agency in taking away the license of a bar that was engaged in drug dealing. The city attorney also organizes joint searches of homes with various code enforcement agencies and then includes renovations to the property as part of the civil injunction to combat drug-related nuisances.

In addition to the participation of other local government agencies, involvement of the community is often as central to the effective use of civil statutes as it is to the success of community policing. In Duluth, a local women's organization monitors adherence to civil protection orders to curb domestic violence and provides counseling and education programs for batterers. Ethnic and minority organizations in Boston bring hate crimes to the police department's attention and encourage victims and witnesses to work with the police. The Los Angeles Police Department consulted with local chapters of the National Alliance for the Mentally Ill and the American Civil Liberties Union about its plans to seize weapons from the mentally ill—and secured the support of both organizations. The San Diego city attorney's office worked closely with landlords, realtors, and apartment owner associations when it formulated its plan to apply a civil nuisance abatement statute to landlords and tenants engaged in drug dealing.

Constitutional Issues in Using Civil Remedies for Criminal Behavior

There have been constitutional challenges to civil statutes or their implementation in all but one of the eight programs described in chapters 2 and 3. However, if undertaken carefully, the application of civil remedies to criminal behavior is constitutionally defensible. For example, it is important to pay careful attention to the issue of double jeopardy whenever civil litigation against a respondent is contemplated in conjunction with a parallel criminal prosecution of the same individual for the same offense. Similarly, failure to afford a defendant in a criminal contempt hearing the full due process protections of a criminal trial could—and should—

lead to the decision being challenged and overturned. More generally, one constitutional law expert has written that:

> there are many potent constitutional guarantees, such as the due process clause, that apply to all civil matters. Civil procedural due process, while not as extensive as criminal law procedural protections, does impose significant safeguards against arbitrary, oppressive, or erroneous action.[2]

However, this scholar goes on to add that:

> Much of the criticism aimed at civil proceedings like forfeitures or statutory fines focused on government arbitrariness, excess, and disproportionality—all of which can be curbed without necessarily importing the procedural baggage of criminal trials into civil cases.[3]

Furthermore, because there are typically gray areas in constitutional law, it may be appropriate to use civil remedies in some circumstances even though you expect a constitutional challenge, as long as you believe appellate courts will ultimately uphold the pertinent civil statute and your use of it. For example, the Minnesota Court of Appeals ruled in *Baker v. Baker* (481 N.W.2d 871 [Minn. App. 1992]) that judges were violating the due process rights of the batterer when they awarded custody of the children to the abused partner in an *ex parte* preliminary hearing for an order of protection without a finding of immediate danger of physical harm to the child. In the same decision the court further held that an *ex parte* restraining order could not be issued without a showing of efforts made to notify the affected party or reasons for not making these efforts. However, on appeal, the State supreme court (481 N.W.2nd 282 [Minn. 1992]) unanimously overturned both rulings. There was a different ending when the California Supreme Court ruled in *Bryte* v. *City of La Mesa* (207 Cal. App. 3d 687 [1989]) that the Los Angeles district attorney had to initiate a hearing to determine whether the State could keep weapons the police had confiscated from the mentally ill rather than require the mentally ill person to petition for a hearing. As a result of the ruling, the State legislature amended the pertinent statute and the police and district attorney changed their procedures—without losing the ability to continue to seize weapons from mentally ill persons in the absence of an arrest.

Thus, on the one hand you should be extremely careful about affording all the required constitutional protections to respondents in a civil process. On the other hand, inevitable differences in interpretation of constitutional law make it reasonable under certain circumstances to apply a statute or follow a procedure that may subsequently be challenged as long as you have good reason to believe you are acting constitutionally. Of course, on close or uncertain questions, law enforcement officials should seek legal opinions from Government attorneys.

Each case study in chapters 2 and 3 has a section that describes legal challenges to the program such as the two court decisions mentioned above. In addition, two constitutional law experts reviewed an early draft of each case study to assess whether the statutory basis or procedures could be subject to challenge. The principal concerns these experts expressed are addressed in the case studies.

Chapter 5 specifically speaks to the issue of using civil statutes in a constitutionally defensible manner. The chapter suggests how you can make sure you provide all the protections to which respondents in a civil proceeding may be entitled in light of pertinent benchmark Supreme Court decisions. You may also wish to review two law review articles, commissioned as part of this study, that provide a thorough analysis of these constitutional issues: "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," by Mary Cheh (*Hastings Law Journal* 42(5):1325–1413, 1991), and "Punitive Civil Sanctions: The Middleground between Criminal and Civil Law," by Kenneth Mann (*Yale Law Journal* 101(8):1795–1873, 1992).

The Strict Division of Labor in Most Prosecutor Offices

In addition to dichotomized civil-versus-criminal thinking and legitimate constitutional concerns, a third reason civil remedies have not been used extensively for criminal behavior is that many prosecutor offices handle only criminal matters. As a result, attorneys in these offices lack experience to conduct civil litigation. This traditional ingrained notion that you are confined to using criminal sanctions for criminal behavior may prevent you from considering the benefits of adding civil remedies, code enforcement, and community involvement to your repertoire of responses to criminal behavior. As the case studies suggest, there are civil statutes in most jurisdictions that can be examined for possible application to a variety of antisocial behaviors.

Other prosecutor offices have separate civil and criminal divisions that never utilize each other's remedies except on occasion when a special task force is established to apply

both types of statutes. Consider reorganizing the prosecutor's office according to different types of crime in a way that would facilitate problem solving. For example, there could be divisions of drug enforcement, domestic violence, and consumer fraud enforcement, as well as a division for traditional statutory crimes, such as assault, theft, and homicide. Each division would consider employing whatever remedies will be most effective for a given problem area.

The case studies in this volume also illustrate that prosecutors can usually employ civil remedies for criminal behavior without changing the way their offices are organized. More important than organizational change is a perceptual change that accepts the possibility of using civil remedies as an effective and appropriate solution to behavior traditionally handled through criminal prosecution. As Barbara Jones, first assistant district attorney in the Manhattan, New York, prosecutor's office, says, "Prosecutors are so used to being prosecutors, using the [civil] Real Property Actions and Proceedings Law [to evict drug dealers from apartment buildings—see case study 5] was a way to learn that there are other methods of getting at criminals; there are civil remedies, and we have to be prepared to try them."

Police academies and in-service training programs need to educate police administrators and line officers about the appropriateness, effectiveness, and constitutionality of using civil statutes in certain circumstances. Prosecutors and police administrators in Los Angeles joined forces to train every police officer in the city in the value and legitimacy of using civil statutes to seize weapons from the mentally ill; similar training was provided to every Boston police officer regarding civil proceedings against hate crime offenders. In Duluth, the city attorney and city police train the entire police department every year in their responsibility under the law to arrest without a warrant batterers who violate orders of protection. Before each trial to evict a drug-dealing tenant, a paralegal from the Manhattan district attorney's office explains the rules of testimony in a civil proceeding to every first-time police witness. Once again, it is not a change in the structure or operations of the police department that is important; it is a modification in the way police officers think that needs to take place.

Prosecutors and police administrators interviewed for this report agree that even with the most thorough training, the best way to persuade colleagues to consider using civil remedies is to win a civil case against an elusive criminal offender—and then develop a track record of consistent wins over time.

Civil Remedies: No Panacea but a Big Help

Using civil statutes to get at hard-to-reach criminal behavior will not by itself solve most crime problems. Some types of crime are simply not susceptible to civil sanctions; other crimes can be prevented only with a combination of criminal prosecution, civil remedies, and still other responses such as enforcement of municipal health and safety codes, or administrative action by State and local regulatory agencies (for example, the alcohol beverage control commission). Using civil statutes also requires administrators and staff who can be flexible, innovative, and determined, and an "entrepreneur" who is motivated to take the initiative and the time to change the way things are traditionally done. Lack of money and staff may also limit the extent to which civil remedies can be pursued. Obviously, there must be usable civil legislation on the books that can be applied to criminal behavior. (However, the case studies illustrate that in the absence of such laws it is possible to enact civil statutes specifically to target criminal behavior.) There are constitutional limitations to what prosecutors and police can accomplish using civil remedies.

Finally, programs that use civil remedies never reach an equilibrium and then just go about their business; they are constantly evolving in an effort to become more effective, respond to changes in legislation and new case law, and accommodate fluctuations in funding and political priorities. As one program director observed, "These programs never achieve finality. They even seem to progress through certain stages, from entrepreneurship to 'winging it' to shake-down, then to formalization and institutionalization, and finally to fine-tuning and responding to never-ending changes in the external environment." However, regardless of what stage of implementation the program is in, the community can be assured with this type of effort that the prosecutors, police, and other agencies involved will always do their best to be responsive to the community's needs.

Despite these limitations, you will find that using civil remedies offers significant benefits. Chapters 2 and 3 describe how other prosecutors and police administrators in seven jurisdictions have been successful in making civil remedies work for them. Chapter 4 discusses steps you can take that will help make using civil statutes effective for you. The final chapter addresses constitutional issues involved in using civil remedies for criminal problems. You can secure additional information about using civil statutes from the individuals listed at the end of each case study and the law

review articles on constitutional issues referenced above. A glossary of selected legal terms used in the report may be found on the last page.

Endnotes

1. Herman Goldstein, *Problem-Oriented Policing* (New York: McGraw-Hill, 1990).
2. Mary M. Cheh, "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," *Hastings Law Journal* 42(5):1325–1413, 1991, p. 1369.
3. Ibid.

Chapter 2

Using Civil Remedies To Address Non-Drug Crime

Domestic Violence, Hate Crime, Possession of Dangerous Weapons, and Car Theft Rings

Seven approaches targeting intransigent criminal behavior using civil process were examined in the preparation of this report. The figure on the following page presents a number of key features of each approach.

Four of these programs are described in this chapter. Chapter 3, which follows, presents case studies of three other jurisdictions, all of which use civil remedies to target drug dealers.

To help you find quickly the same information of special interest about each program (for example, start-up issues, case law, police-prosecutor relations), each case study in chapters 2 and 3 is presented in a common format:

- Summary
- Illustrative Example
- Statutory Basis
- Procedure
- Program Organization, Staffing, and Resources
- Program Evolution
  - how the program started
  - collaboration
  - problems encountered
- Program Accomplishments
- Advantages of the Civil Approach
- Constitutional Issues.

The case studies do not represent a "cookbook" or formula for attacking crime with civil statutes. Rather, they illustrate different approaches to using civil remedies to combat crime. The uniqueness of each program suggests that you need to tailor your use of civil remedies in light of the opportunities and constraints of your particular legal system and community. However, the case studies illustrate that opportunities can be found in most jurisdictions to use civil remedies to attack some types of criminal behavior. More generally, the case studies illustrate the importance of using whatever tools are effective and constitutional—be they civil or criminal, code enforcement or community pressure—to solve antisocial behavior.

The case studies describe the programs as they existed in the summer of 1993. However, as the site descriptions make clear, the programs are continuing to evolve. Therefore, you should not assume that the case studies represent the best possible arrangement for using civil remedies to deal with criminal behavior or that the programs will be functioning exactly as described in this report.

Finally, the case studies are not evaluations of exemplary projects; rather, they represent the sites' own appraisals of their accomplishments. Information about each site was collected through interviews conducted on-site and by telephone in four jurisdictions and by telephone alone at three sites. Available program materials, including selected affidavits, pleadings, and injunctions were also reviewed. (You may obtain these materials, or other information about the programs, by contacting the individuals listed at the end of each case study.) A prosecutor or a police administrator from all but one of the sites met at an all-day meeting to share experiences and provide guidance in the development of this report.

Figure 2.1

Selected Features of Seven Programs

	Boston (chapter 2)	Duluth (chapter 2)	Los Angeles (chapter 2)	Manhattan (chapter 3)	New York (chapter 3)	Phoenix (chapter 2)	San Diego (chapter 3)
Target Crime	Bias crime	Domestic violence	Weapons possession	Drug dealing	Drug dealing	Chop shops	Drug dealing
Lead Agency or Agencies	Police department/attorney general	Community-based organization	Police department	District attorney	U.S. Attorney	Attorney general	City attorney police
Primary Civil Tool	Injunction	Restraining order	Search and seizure	Eviction	Forfeiture	Forfeiture	injunction
Statutory Basis[1]	Civil Rights Act	Domestic Abuse Act	Welfare and Institutions Code	Real Property Actions and Proceedings Law	Federal Civil Forfeiture Statute	Arizona RICO Statute	Health and Safety Code, Drug Abatement Act
Date Program Began	1979	1981	1985	1986	1987	1980	1988

[1] State statute unless otherwise indicated.

Case Study 1

Using Civil Injunctive Relief To Prevent Domestic Violence (Duluth, Minnesota)

Summary

A civil order for protection (also called a restraining order) is a legally binding court order that enjoins an individual who has committed domestic violence from further abusing the victim. While protection order legislation is found in every State, Duluth, Minnesota (population 90,000), has mounted an unusually comprehensive community-wide effort to implement its statute. Judges in Duluth typically issue protection orders that bar or evict an offender from the residence and provide specific conditions for visitation and child custody. A shelter advocate assists most victims to complete the petition and accompanies them to court. Respondents must participate in a 30-week program for batterers which seeks to change their behavior and reports absences to the court for follow-up. A community-based organization monitors reported and unreported violations. Violators are arrested even if the renewed violation did not take place in a police officer's presence, are usually jailed at least overnight, and are prosecuted for the violation.

Illustrative Example

A husband comes home to dinner and, finding fault once again with his wife's preparation of the meal, for the third time that month hurls the food, plates, and silverware at her head, screaming that if she doesn't prepare a decent dinner the next night, he will scar her forehead for life with the dinner fork. The wife calls the police, but her husband has stormed out to spend the night with his sister by the time the officers arrive. Since the woman was not physically injured, the police do not search for the husband but instead recommend she petition for an order for protection. Alerted by the police, a victim advocate sends the wife a letter providing information about orders for protection and procedures for filing criminal charges. The next week, the woman goes to family court with the advocate and successfully petitions for a temporary protection order that enjoins her husband from further abuse and excludes him from the home. At the full hearing a week later, the husband admits to "occasionally" threatening his wife but claims he never really hurts her—besides, his wife "provokes" it. The judge issues a "permanent" order typically valid for up to a year that requires the husband to participate in a counseling program for batterers. Three weeks later, following the arrest of the husband for trying to break into the home, the man is promptly found guilty of violating the order and receives a conditional jail sentence stayed upon future compliance with the order. The man does not disturb his wife again.

Statutory Basis

The Minnesota Domestic Abuse Act (Minn.Stat.Ann 518B.01 [Supp. 1992]) provides for victims to petition *pro se* (without legal representation) for a temporary (14-day) order for protection issued *ex parte* (without the presence of the offender) that restrains the abusing party from committing acts of domestic abuse. An overt physical act is not required to support granting of an order; a verbal threat, depending on the words and circumstances, can also suffice. At a subsequent hearing with the respondent which must be held within seven days of the temporary order's issuance, the temporary order may be made "permanent" for a year, except when the court determines that a longer fixed period is appropriate.

Relief Authorized

In addition to restraining the abusing party from committing acts of domestic abuse, the Minnesota Domestic Abuse Act authorizes the court to provide the following types of relief:

- exclude the abusing party from the dwelling that the parties share or from the residence of the petitioner,
- exclude the abusing party from the petitioner's place of employment,
- award temporary custody or establish temporary visitation with regard to minor children of the parties,
- award use and possession of property on a temporary basis, and
- order the abusing party to participate in treatment or counseling services.

Enforcement Provisions

The Minnesota Domestic Abuse Act requires a peace officer to:

> arrest without a warrant and take into custody a person whom the peace officer has probable cause to believe has violated an order.... The person shall be held in custody for at least 36 hours... unless the person is released earlier by a judge or judicial officer.

According to the statute, a person who violates an order commits a misdemeanor and, upon conviction, must be sentenced to at least three days' imprisonment and ordered to participate in counseling or other appropriate programs selected by the court. However, the statute also contains a provision to the effect that if the court stays imposition or execution of the jail sentence, and the defendant fails to comply with the court's treatment order, the court must impose and execute the stayed jail sentence. Neither the legislature nor the courts have resolved the apparent contradiction between the statute's mandatory jail time provision and its reference to a stay of the jail sentence.

Protection Order Procedures in Duluth

How cases are handled in Duluth reflects both statutory authorization and close coordination among all involved agencies.

Outreach

Victims may learn about civil protection orders in several ways. First, if the police are called to any domestic incident, they are required by State law to provide the victim with a card that explains what a civil order for protection is and how to petition for one. Second, if the police arrest the assailant, the booking jailor notifies the local women's shelter of the arrest, the charge, and the victim's name, address, and phone number. The shelter then sends a volunteer advocate to the victim's home to explain both orders for protection and the nature of the criminal and civil court process. Third, police officers provide copies of all police reports to the Domestic Abuse Intervention Program (DAIP), a local nonprofit organization that monitors the entire operation of the city's domestic violence effort. When the complaint alleges an assault, a program advocate calls the victim within two days. The program sends letters to victims if a threat of assault has occurred. Shelter advocates contact nearly 2,000 victims a year—an average of over five every day. Finally, victims learn about protection orders when social service agencies and churches refer them to the shelter for information and assistance.

Hearings

The Minnesota Domestic Abuse Act requires that "a petition for relief shall... be accompanied by an affidavit made under oath stating the specific facts and circumstances from which relief is sought." Shelter advocates help victims to complete the affidavit and accompany the victim to court.

Almost all protection orders in Duluth begin as issued without prior notice (or, *ex parte*) to the batterer. Judges determine whether domestic violence occurred based on a preponderance of the evidence. In most cases, the judge issues an *ex parte* order for the 14 days permitted by statute but always schedules a hearing within seven days, as required by law. Usually, the temporary order enjoins the offender from further abusing the petitioner and excludes the person from the home (unless the petitioner requests that the respondent be allowed to stay in the home—a request made in one out of every four or five cases).

Because approximately 9 out of 10 victims lack legal representation, the shelter advocate accompanies the victim to the initial hearing. Many respondents fail to appear, but most who appear admit to at least some of the violence alleged in the petition. In either case, the judge issues a "permanent" order typically valid for one year.

About 20 percent of respondents who appear at the initial hearing deny any violence or threats of violence. If the victim lacks legal representation, the judge grants a continuance so that she can obtain counsel for the civil trial that is scheduled. The judge also extends the duration of the *ex parte* protection order until the trial date. Normally, however, these contested cases are heard immediately in a civil trial, with about 95 percent resulting in a finding of domestic abuse and issuance of a permanent protection order. The trial typically lasts 30 to 45 minutes. Indigent defendants are not afforded an attorney, and there is no right to a jury trial. The judge's finding is based on a preponderance of the evidence.

Petitioners sometimes change their mind when they get to the hearing and ask to have the order "dropped." One judge believes that abused parties often change their mind because their partner has harassed or threatened them for having gone to court. The judge tells these petitioners that he can tailor the order so that they can continue to live with their partner. If an

order is so tailored, typically the judge still requires the batterer to attend counseling sessions and warns him that any renewed violence will result in immediate arrest. If the petitioner still does not want any order issued, the judge dismisses the case unless there are children at risk (in which case an order may be issued over the petitioner's objections).

Visitation

In most cases in which the couple has children, judges award temporary custody to the victim. Judges, victim advocates, and abused partners alike report that nowhere is the potential for renewed violence between a couple greater than when the respondent visits the children. According to one judge, "there are a lot of hassles around visitation—the offender doesn't stick to the schedule, he keeps the children longer than agreed on, or he uses it as an opportunity to harass the victim." The exchange of children also presents an opportunity for renewed violence. As a result, the Minnesota Domestic Abuse Act provides that "if the court finds that the safety of the victim or the children will be jeopardized by unsupervised or unrestricted visitation, the court shall condition or restrict visitation as to time, place, duration, or supervision, or deny visitation entirely, as needed to guard the safety of the victim and the children."

Judges in Duluth usually order explicit conditions for visitation, specifying neutral pick-up and drop-off locations, times and days of the week, and the involvement of neutral third parties. Duluth provides a visitation center where offenders can schedule visitation without having to telephone the victim, the victim can deliver the children indirectly to the offender and pick them up in the presence of center staff, and supervised visitation can take place to prevent child abuse.

Mandatory Counseling for the Offender

Judges in Duluth normally order respondents to participate in the Domestic Abuse Intervention Project (DAIP). The protection order requires the batterer to follow DAIP's recommendations. (The court sends 6 to 10 women to DAIP every year, the result of mutual orders for protection having been issued.) Typically, DAIP contracts with the offender to participate in its 26-week counseling and education program, followed by a 3-week program addressing the impact of violence on the children. The batterer may also be required to participate in individual therapy, to seek psychiatric help, or to participate in an outpatient drug dependency program. The Domestic Abuse Intervention Program is then appointed by the court as an interested third party in the case, permitting DAIP to request a review hearing or to ask the court to initiate a contempt of court action in the event of any attendance problems. Generally, DAIP will bring the offender back to court for a hearing if the person misses three sessions.

Sometimes there is another hearing after the offender begins counseling if the petitioner wants the court to allow the partner to move back into the home. According to one judge, "I will usually amend the order because I assume that the counseling has begun to take effect if both parties and the Domestic Abuse Intervention Project staff report there has not been and will not be any renewed violence."

Enforcement

Monitoring Procedures. Judges have arranged with the Domestic Abuse Intervention Project to monitor the behavior of respondents through the mandatory counseling program for offenders. If an offender fails to attend more than two counseling sessions (including the orientation or intake appointment) or reveals new abuses or violations, DAIP staff petition for a court hearing. Staff also review police investigation and arrest reports each day and inform the court if an incident involving a protection order violation has occurred. Furthermore, each victim is telephoned once a month to learn of any renewed violence. However, a victim advocate reports that "almost all reporting of violations is done at the information, support, or educational groups we offer to victims, so we put a lot of time into getting women to come to these sessions."

Arresting Violators. As noted, the Minnesota Domestic Abuse Act expressly requires warrantless misdemeanor arrest if the batterer violates an eviction provision or if he commits another assault. Police officers in Duluth almost always make an arrest if an offender is found in the home and a valid protection order that includes an eviction provision is in force. However, in monitoring police reports DAIP staff occasionally find that a rookie officer did not make an appropriate or mandated arrest. When this occurs, DAIP calls the officer's supervisor to determine why an arrest was not made and correct the problem—typically, because of the officer's lack of familiarity with the law.

Violators are usually jailed without bail until the next business day, when they are bonded out at arraignment. While a judge can bail someone out immediately, there is no automatic bail schedule in the sheriff's office. Furthermore, Minnesota allows jailers to hold an assailant arrested under the State probable cause arrest statute for 36 hours. Over-

night incarceration allows time for shelter advocates to contact the victim and help her obtain any needed assistance before the batterer is released.

Punishing Violators. Violation of a civil protection order is both contempt of court and a misdemeanor, the latter requiring imprisonment for three days, mandatory counseling, and a discretionary fine of up to $700. A second offense by the same person within two years is a gross misdemeanor with a maximum sentence of a year, a $3,000 fine, and a mandatory 10 days in jail and participation in counseling upon release.

The court typically has to address three types of violations. First, offenders whose only violation is *missing counseling sessions* are usually summoned to a review hearing at the court with Domestic Abuse Intervention Project staff. According to one judge, "This works better than contempt proceedings, which are very cumbersome." The judge tells the offender he could be jailed in a civil contempt proceeding in order to enforce compliance but that the present hearing is an informal court session designed to address the problem without recourse to a trial. Typically, the offender agrees to resume counseling.

The judge holds a trial for *civil* contempt only if the respondent refuses to go back into counseling or continues to skip sessions after an initial review hearing. Counsel is not afforded if the judge believes that jail is not a possible outcome of the trial. However, if the judge anticipates he might sentence the offender to jail until the person complies with the counseling requirement, he adjourns the hearing to allow the defendant to seek or be assigned counsel. Regardless of whether jail is a possibility, because the hearing is civil in nature the judge does not provide a jury trial and bases his decision on a preponderance of the evidence. Once jailed, the offender can purge himself of contempt by telephoning the counseling agency and promising to resume attending sessions. The judge has kept recalcitrant offenders in jail as long as 10 days and required them to begin the 30-week counseling program all over again.

Offenders may also violate the protection order by committing *further violent acts.* When this occurs, the prosecutor avoids charging *criminal* contempt because the criminal charge for a second assault, with its enhanced penalties, can result in a much stiffer sentence. Instead, the respondent is typically charged in criminal court with both assault (the new offense) and violation of the order for protection. The violation charge is often dropped as part of a plea bargain, because the sentence for a second assault can be more severe than the sanction for violating the order and because assault is a more severe violation to put on the person's record than an unspecified order for protection violation.

Finally, when the violation consists of the offender's presence in the victim's home and the protection order has an eviction provision, a criminal trial is held on a misdemeanor charge of violating a protection order. Although the statute appears to mandate a three-day jail sentence, because of the law's ambiguity these trials typically result in a year's probation and a conditional 30-day jail sentence that is stayed upon future compliance with the order.

Program Organization, Staffing, and Resources

The Domestic Abuse Intervention Project has six full-time staff and one half-time staff person. The program relies on volunteers, advocates, and jail visitors. The organization has no director—staff share responsibility for the program. Staff take turns screening résumés, after which every staff member interviews acceptable candidates. New hires are trained by observing how current staff operate and by attending batterer and victim counseling sessions in a nearby community.

The DAIP used to rely exclusively on grants and volunteers to sustain its activities. In 1992, however, it received $162,000 from the State Department of Corrections, foundation grants, and fees for its manuals and training seminars. In addition, the program now refers many batterers to community mental health programs for 12 weeks of the 26-week counseling and education program, where the batterer pays a fee through health insurance or out-of-pocket.

Two prosecutors handle all civil protection order violations—one has been doing so for over a decade. About 5 percent of their serious cases involve orders for protection violations. For many years, only one judge heard petitions for protection orders and two heard violations. However, since 1992, six judges hear petitions and five hear violations.

Program Evolution

How the Program Started

From 1976 to 1980, Minnesota women's advocacy groups mounted an extensive education campaign directed at both the public and policymakers about the nature and severity of the domestic violence problem. At the same time, these advocates hunted for a receptive city in which to test a

system-wide program to address domestic violence. With grant money from three private foundations, they persuaded the Duluth Police Department to initiate a three-month mandatory arrest policy for batterers as part of a research project. The program then expanded to other agencies in the city until by 1981 city police, prosecutors, judges, probation officers, corrections officials, human service providers, and victim advocates had been organized under the umbrella of the newly formed Domestic Abuse Intervention Project and adopted written policies and procedures coordinating their response to domestic violence. As part of the same movement, the Minnesota Legislature enacted the Domestic Abuse Act to facilitate handling these cases. What began as a "pilot test" in 1981 became a permanent program in 1982.

While the fundamentals of the program agreed to in 1981 have not changed, there has been constant improvement over time. For example, the DAIP changed the number of mandated sessions for abusers from 8 to 12 weeks in 1982 and then from 12 to 26 weeks in 1985. In 1989, the police department adopted a policy to discourage arrests in self-defense cases. The DAIP opened the visitation center in 1989 to offer a safe place to exchange children and to permit on-site visitations.

Collaboration With the Police, the Judiciary, and the Community

Collaboration by all involved agencies in Duluth was an essential program feature from the outset. For example, city prosecutors met with family court judges to agree on specific language to use in civil protection orders that would provide maximum protection for victims and make it easier for prosecutors to obtain convictions for violations. Prosecutors in the city attorney's office trained the police department's training officer and a representative of the battered women's shelter to ensure that cases would be thoroughly investigated and important evidence preserved.

This interagency training, originally voluntary, is now required by statute for police, prosecutors, and judges. Using videotaped scenarios of typical police calls for assistance in domestic situations, a police officer trainer, a prosecutor, a battered women's advocate, and, on occasion, a family court judge provide the mandated training of the entire police department every year (needed because new officers are hired to replace retirees and because the statute keeps changing). The training focuses on the requirements of the State law and departmental policy, including the use of warrantless arrests, differentiating between self-defense and mutual violence, enforcement of civil protection orders, victim notification, charging, report writing, and evidence gathering. The training includes a review of several cases that resulted in lawsuits against officers and their department for failing to protect victims of domestic abuse.

Police training also addresses issues that may have arisen since the previous training session. For example, a respondent who saw his wife in the stands at a football game in which their son was playing sat down with her to watch the game. When they got into an argument, the woman called the police to have her husband arrested for violating her protection order, which, although it permitted contact between the two of them, prohibited any further abuse. The police processed the case as a criminal misdemeanor violation, but with a possible technical violation of this nature it would be six months before a criminal jury trial was actually held. The judge therefore instructed the police during the training to refer such nonviolent cases to family court—as officers are expressly permitted by statute to do—where he could summon the respondent immediately to account for his behavior and, as needed, modify the protection order to make football games out of bounds or even order a bond placed with the court (once called a peace bond) which the respondent forfeits to the victim if he violates the order again.

Problems Encountered

One weakness in the Minnesota Domestic Abuse Act is the failure to provide for emergency relief after normal court hours. To find protection evenings and weekends, victims must stay with friends or relatives or go to a shelter until they can petition for an *ex parte* order at the beginning of the next business day. (Legislation in California and Colorado permits police officers on the scene to telephone an on-call judge after normal working hours for authorization to issue a protection order on the spot.)

A weakness of the statute was its failure to address the legal status of a victim who lets the offender back in the home after obtaining a protection order with an eviction provision. Some police officers in Duluth called to the scene of a domestic assault in these situations were arresting the victim, and prosecutors were charging the victim with violating the protection order by letting the abuser back in. Initially, advocacy groups encouraged the city attorney to discontinue this practice, but the long-run solution was to have the statute changed to include two provisions specifying that:

> the admittance into petitioner's dwelling of an abusing party excluded from the dwelling under an order for protection is not a violation by the peti-

> tioner of the order of protection . . . .[and] the respondent is forbidden to enter or stay at the petitioner's residence, even if invited to do so by the petitioner or any other person; in no event is the order for protection voided.

At one time, some judges were frequently issuing mutual restraining orders enjoining both partners from engaging in violence. This practice diminished considerably when the Minnesota Court of Appeals in *FitzGerald* v. *FitzGerald,* 406 N.W. 2d 52 (Minn. App. 1987) ruled that the issuance of a mutual restraining order in a domestic abuse action, following a hearing at which only the wife requested an order and at which there was no evidence that the wife abused the husband, was reversible error. Judges still sometimes issue mutual orders if the respondent, too, petitions for an order, or when both parties agree to mutual orders. In these mutual order cases, the judge requires both parties to participate in the DAIP. The man participates in a men's violence education group. The woman, however, is screened at intake into the program to determine, based on the police report and her responses to the interview questions, whether she in fact had been acting in self-defense or even did not engage in violence at all, and whether she has a propensity for violence. If the woman has a personal problem with violence, she is assigned to a women's anger education group. However, if she does not have a problem with violence, she is assigned instead to a group for battered women.

Some observers feel that more consistency among the increased number of judges who hear protection order petitions is needed. For example, while every judge requires counseling for respondents in over 95 percent of cases, some judges still do not always consider it a violation if a respondent who was invited back into the home assaults the victim again.

Program Accomplishments

The number of protection orders issued in the past 10 years has remained relatively constant at about 300 per year. For example, 276 orders were issued in 1990 and 308 in 1991. However, the number of violations has been declining because, according to one judge, they are being prosecuted more strenuously and ambiguities in the law (for example, how to handle abusive situations when the victim invited the respondent back into the home) have been clarified in statutory amendments. In addition, according to a DAIP study, two years after using the judicial system for obtaining an order of protection, 81 percent of victims surveyed reported that the system was helpful or very helpful in ending abuse.[1]

Since the interagency approach was first implemented in 1982, over 2,000 assailants have entered DAIP rehabilitation programs. In 1991, 351 batterers were ordered into the program. One of the project's founders estimates that 1 out of every 19 men in Duluth has been through the DAIP program. The DAIP also found that five years after going through the program and judicial system, 60 percent of DAIP participants have no record of further violence against the same or another woman. While this success rate might seem low, it may be a reasonable achievement in light of the evidence that family violence is not easily reversed and may escalate with continued access.[2]

The same project co-founder admits that while individual men who are caught and sent through the program may decrease or discontinue their violent behavior toward their partner, there is no evidence that the program has a general deterrent effect. According to the co-founder, men in Duluth who are about to assault their partner do not step back to say to themselves, "Gee, I shouldn't beat her up, because I'll get arrested." Indeed, there are young men in the DAIP program whose fathers went through it.

A judge who believes that civil protection orders have been effective in Duluth cites as evidence victims' own reports that they have not been further abused since an order was issued. The judge also points to the fact that many women come in for a new order when the old one is about to run out—suggesting it must be doing some good—while other women who allowed their first order to lapse and were reassaulted after it expired return to petition for a new one.

Advantages of the Civil Approach

According to a victim advocate in Duluth, "Orders for protection are much more effective than bringing criminal charges in cases where (1) the woman needs immediate protection, or (2) she is still making a decision about continuing the relationship, or (3) she is afraid of a major confrontation with her abuser involving physical retaliation, harassment at work, or harassment of her family or friends." A judge agrees: "Women can effectuate a court-ordered separation faster, and they can proceed without an attorney."

The Minnesota Domestic Abuse Act provides these advantages by authorizing immediate *ex parte* relief, including eviction of the batterer from the residence, thereby protecting the complainant before the results of a criminal prosecu-

tion can take effect. A permanent protection order can provide long-term relief by continuing the exclusion of the offending party from the home. The Minnesota statute also makes noncriminal behavior, such as harassment or merely trying to make contact with the victim, grounds for warrantless arrest of a respondent.

In considering civil relief, victims need not be deterred by concern that their partner will be jailed or will precipitate explosive altercations in court during the various stages of a criminal case. Protection is also more likely to result from the civil route, because judges can provide relief to the victim based on only a preponderance of the evidence. Furthermore, a trial on a civil contempt charge for failure to attend the DAIP counseling program can be scheduled quickly, avoid the expense and delays of impaneling a jury, and result in immediate jailing upon a finding of guilt.

The criminal justice system is unable to provide the victim with similar relief unless it is included as a condition of pretrial release, bail, or probation. Even if such relief is provided, law enforcement officers typically need a bench warrant to arrest individuals who violate their conditions of pretrial release or probation, whereas warrantless arrests are permissible and jail is mandated for violation of a civil protection order. Moreover, criminal prosecution, which usually takes six-to-eight months, usually cannot arrange an effective, permanent *ex parte* eviction of the offender.

Constitutional Issues

The most controversial provision of orders for protection—*ex parte* relief—is supported by case law. The leading United States Supreme Court cases, which appear controlling in protection order cases today, include:

- *Matthews* v. *Eldridge,* 424 U.S. 319 (1976). In determining whether *ex parte* termination of disability benefits violated due process, the Court enunciated a "balancing test," holding that *ex parte* relief could constitutionally be granted in those cases in which the private interests being abridged were outweighed by the governmental interests being protected. Also essential to consider are the fairness and reliability of the existing procedures for providing due process review of the *ex parte* decision, and the probable value, if any, of additional procedural safeguards.
- *Fuentes* v. *Shevin,* 407 U.S. 67 (1972). The Court held that a court may forgo notice in certain prejudgment replevin cases (in which a person entitled to the repossession of goods seeks to recover them) if the pending action is necessary to protect an important governmental or public interest, or if the situation has a special need for prompt action.
- *Mitchell* v. *W.T. Grant Co.,* 416 U.S. 600 (1974). The Court ruled that providing relief prior to notice and deferring a hearing on deprivation of property may be permissible if (1) the petition includes statements of specific facts that justify the requested relief, (2) notice and opportunity for a full hearing are given as soon as possible, preferably within a few days after the order is issued, and (3) the temporary injunction is issued by a judge.

The Minnesota Domestic Abuse Act incorporates conditions for granting an *ex parte* order that are intended to meet the U.S. Supreme Court's guidelines for constitutionally depriving a defendant of property in a summary proceeding without prior notice. The Minnesota statute requires immediate and present danger of domestic abuse to issue an *ex parte* order—that is, the situation must be an emergency for which any delay imperils the petitioner's safety. The act also requires that a full hearing be set for not later than seven days from the issuance of the temporary order. Finally, the statute makes clear that nothing in the act "shall affect the title to real estate."

Recently, however, the Minnesota Court of Appeals in *Baker* v. *Baker* (481 N.W. 2nd 871 [Minn. App. 1992]) ruled that under Minnesota statute an *ex parte* temporary restraining order could not be issued without a showing of efforts made to notify the affected party or reasons for not making these efforts. As a result, courts were required to look at whether or not notice of the initial *ex parte* protection order application should have been given to the respondent. However, on appeal, the Minnesota Supreme Court in *Baker* v. *Baker* (494 N.W.2d 282 [Minn. 1992]) overturned the court of appeals, holding that a petition for *ex parte* relief for domestic violence need only be accompanied by a petitioner's affidavit under oath asserting fear of further violence.

In the same decision, the Minnesota Court of Appeals has also ruled that, again under Minnesota statute, an *ex parte* order granting child custody or denying visitation must contain a finding of immediate danger of physical harm to the child who is the subject of the order. As a result, petitions would have had to allege facts allowing the court to make this finding. Once again, the State Supreme Court reversed the appeals' court decision.

Although not an issue in Duluth, constitutional law experts suggest that States may founder in their efforts to enforce protection orders if they confuse civil and criminal contempt. If violation of a protection order is punished by a fixed and determinate jail sentence, as opposed to jail as a condition to enforce compliance, criminal procedural protections apply.

In addition, although no prosecutor in Duluth has ever done this, if a State seeks criminal contempt penalties, double jeopardy will likely bar a second prosecution for the substantive crime that constituted violation of the order. For example, if a State pursues criminal contempt against a batterer who, contrary to the order, assaulted his wife, a separate criminal prosecution for assault will be barred. States need to be aware of this possibility so as not to sacrifice criminal prosecution for a serious criminal offense by enforcing a protection order through a criminal contempt proceeding.

Finally, some constitutional scholars believe that civil orders that mandate participation in counseling sessions may present constitutional difficulties. Unlike orders that require respondents to compensate a victim or to stop further illegal conduct, forced counseling may deprive a respondent of constitutionally protected rights of physical liberty and free expression. Counseling is usually a condition of release—a choice—for persons who already face incarceration or other penalties. Such an individual has an opportunity to choose confinement or counseling. With the Duluth program, counseling is ordered first and nonperformance can lead to jail. Since no challenge has been made to this part of the Duluth program, it may be an example of a reasonable approach that can be followed until a constitutional challenge is successful. Alternatively, the problem, if one exists, can be avoided by simply getting the respondent to enter a consent agreement to submit to counseling.

* * *

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Case Study 2

Combating Hate Crime (Boston, Massachusetts)

Summary

Hate crimes are activities deliberately intended to intimidate or threaten individuals because of a characteristically unavoidable group affiliation, such as their race, ethnicity, national origin, gender, religion, sexual orientation. age, or disability. The Massachusetts attorney general's office together with the Boston Police Department attempt to regulate these crimes by making use of State civil legislation to seek injunctive relief for victims of these offenses. Typically, the court issues a civil injunction, based on a preponderance of the evidence, that enjoins the perpetrators from further intimidating the victim and other members of the victim's group. Violation of the order may result in swift arrest of the offender and a prompt criminal trial for contempt of court.

Illustrative Example

An African-American family living in a predominantly white section of Boston had been subject to intimidation from neighborhood youth for a period of years. The boys had terrorized the parents and children by breaking windows in the family's home, overturning their cars, and yelling threats against them while drinking in a park across the street from the home. Police officers, called repeatedly to the scene, did not consider that arresting the juveniles and processing the case through the juvenile justice system would do any good. Because they had not committed battery on any family members, the boys would receive only a slap on the wrist in juvenile court and resume their threatening behavior. However, after the Police Department's Community Disorders Unit investigated the problem, the attorney general was able to secure a civil injunction enjoining 13 youths from further intimidating the family, whether by contacting a member of the family, congregating on the street where the victims lived, or threatening any African-American person in the park. A short time after the order was issued, one of the defendants returned to the park across from the victims' house to resume his intimidation of the family by exposing

himself to the wife and yelling, "HEY, BERTHA!" The youth was arrested, prosecuted in Superior Court for the crime of violating the civil injunction, and sentenced to 60 days in the House of Correction. As a result, not only did the threats end, many white neighbors were delighted to reclaim the park from the disorderly drinkers. Local police were pleased that they no longer received repeat calls from frustrated neighbors to do something about the juveniles' criminal behavior.

Statutory Basis

The Massachusetts Civil Rights Act of 1979, modeled on the Federal Civil Rights Act (42 U.S.C. Section 1983), affords victims of hate crime civil injunctive relief. According to the act:

> Whenever any person or persons, whether or not acting under color of law, interfere by threats, intimidation or coercion, or attempt to interfere by threats, intimidation or coercion, with the exercise or enjoyment by any other person or persons of rights secured by the Constitution or laws of the United States, or of rights secured by the constitution or laws of the commonwealth, the attorney general may bring a civil action for injunctive or other appropriate equitable relief in order to protect the peaceable exercise or enjoyment of the right or rights secured. Said civil action shall be brought in the name of the commonwealth. (General Laws Chapter 12, Section 11H)

By protecting rights secured by the constitutions and laws of both the State and the Federal government, the legislation allows the attorney general to seek injunctive relief for a wide range of illegal behavior, from infringement of employees' exercise of organized labor activities protected under Federal statutes to interference with activities protected by the State public accommodations statute. The act's coverage is expanded by article 1 of the State Constitution's Declaration of Rights of the Inhabitants of the Commonwealth, which asserts:

> All people are born free and equal and have certain natural, essential and inalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing and protecting property; in fine, that of seeking and obtaining their safety and happiness. Equity under the law shall not be denied or abridged because of sex, race, color, creed, or national origin.

Violation of a temporary restraining order or a preliminary or permanent injunction issued pursuant to the Civil Rights Act is a criminal offense punishable by a fine of not more than $5,000, imprisonment for not more than two-and-one-half years, or both. If bodily injury results from a violation, a fine of up to $10,000 and imprisonment for up to 10 years may be imposed. The legislation authorizes peace officers to arrest offenders who violate an injunction on the basis of probable cause (chapter 12, section 11J).

It should be noted that the Civil Rights Act does not impose any prohibitions on speech or the content of speech. It regulates only conduct, specifically conduct that violates a victim's legally protected rights.

Procedure

Boston Police Department General Orders require that all suspected hate crime incidents be classified as priority one cases, that a police supervisor respond to the scene and oversee the case, and that the district commander and Community Disorders Unit (CDU) be notified. After further investigation, a detective from the CDU confirms the probable bias motivation in the incident, and the unit takes over investigation of the case. The CDU takes the case to the attorney general's Civil Rights Division, which petitions superior court for injunctive relief.[3]

Superior court serves notice on the defendant to attend a preliminary injunction hearing, which usually takes less than 90 minutes. Defendants are not provided with legal representation because the case is a civil matter, but they sometimes appear with private counsel. Evidence from police officers, witnesses, and victims is presented in the form of affidavits, although victims sometimes also testify in person.

Typically, the preliminary injunction protects not only the victim but any other potential victims of the same category as the original victim—for example, in the illustrative example above, any African American in the park. The injunction also protects witnesses who prepare affidavits. While only two judges have denied a preliminary injunction, some have narrowed the restrictions requested by the attorney general on the offender's ability to move freely in the victim's neighborhood. However, these changes are the exception. For example, when a defendant who had been taping pictures of Hitler on the door of a Jewish woman's

apartment objected to being barred from visiting friends living in the same building as the victim, the judge issued the injunction with the geographic restriction intact.

Following the issuance of the "preliminary" injunction (which typically has no time limit), the attorney general and offender usually negotiate a consent agreement in which the offender agrees to refrain from certain behavior. In effect, the consent agreement becomes a permanent injunction.

In about one case in five, the offender contests the preliminary injunction or refuses to negotiate a consent agreement. A date is then set for a full trial at which the preliminary injunction is made permanent if the State wins the case. However, while the case is awaiting trial—sometimes for as long as two years—the preliminary injunction remains in force. The trial allows for cross-examination, but there is no right to a jury trial, and the judge decides the case based on a preponderance of the evidence.

Injunctions have been issued against juveniles as young as 13, but for very young offenders the attorney general usually negotiates a mediation plan. Civil Rights Division staff, a local community mental health center, community advocacy groups like the Anti-Defamation League, or professional mediation groups serve as mediators. Parents often come to the hearings when juveniles are involved, and the attorney general routinely requests the court to appoint a parent guardian *ad litem* for the children. The injunction is served on the parents of every child under 18, as well as on the juvenile.

The offense that constitutes a violation of the injunction may be prosecuted as an ordinary crime or as criminal contempt, both of which carry the right to a jury trial and a requirement that the government prove guilt beyond a reasonable doubt. Nonetheless, the attorney general always conducts a trial for criminal contempt in superior court because under chapter 12, section 11J, of the General Laws, the maximum penalty is higher than for the criminal offense itself.

The attorney general consults with the district attorney's office that acts as the criminal prosecutor to make sure the civil proceeding does not jeopardize any parallel criminal case. For example, the attorney general usually forwards victim and witness affidavits to the district attorney's office to ensure they are consistent with the local prosecutor's criminal trial strategy. The attorney general seeks a protective order against discovery in the civil injunctive case pending completion of the criminal case to prevent the defendant from using his or her right to discovery to obtain witness affidavits being used in the civil case and thereby gain an advantage in the criminal case that would normally not be available.

Program Organization, Staffing, and Resources

The Community Disorders Unit has seven full-time sworn officers (all detectives), four interpreters, and one secretary. The lieutenant who commands the CDU screens job applicants for "street smarts," and he looks for candidates with good people-to-people and verbal skills. Candidates must also be able to write well to document convincingly the evidence of bias motivation that will convince the attorney general to take on the case and the judge to issue an injunction.

During their first year with the unit, new officers attend a two-and-one-half-day seminar on civil rights at a local university and an eight-hour course on the Civil Rights Act taught at the State police training academy (required of all the city's new recruits). They must read, sign, and return the CDU commander's written guidelines for investigating hate crime cases. New officers engage in no street work for the first week; they read and discuss cases with the commanding officer. Then they spend a month on the street in the company of different experienced CDU investigators. This buddy system also provides a test of whether the new officer can work with the other members of the unit—for example, with a gay officer. All CDU officers are trained to prepare a case as if they were going to present it at trial—not as if they were simply establishing probable cause.

With 10 full-time attorneys, the attorney general's Civil Rights Division is the largest such unit in the country. Because Civil Rights Division assistant attorneys general share responsibility for hate crime cases, in any given week they may spend 0 to 100 percent on Civil Rights Act cases. New assistant attorneys general are trained in office meetings, one-on-one training by the division chief, and close supervision by more experienced assistants. The division chief also provides new assistants with training manuals that provide standard pleadings files, step-by-step instructions for what to expect in court, and pertinent law review articles and case law. Several times a year, the CDU officers meet with the Civil Rights Division assistant attorneys general to air any problems, make sure each side knows what it can expect from the other, and review any new case law.

Program Evolution

How the Program Started

The Community Disorders Unit was formed in 1978 in response to increasing racial problems in Boston that were being publicized by local media, community leaders, and activist groups. In particular, civil rights groups were seeking to prevent the city from receiving Federal block grants until it protected minority workers who were being harassed as they commuted through an all-white neighborhood on their way to work on federally funded contracts at the Boston Naval Shipyard. At the same time, attorneys from major Boston law firms were suing the city to protect minority residents from a persistent pattern of criminal assaults in public housing projects which either victims were not reporting or the police department was not addressing effectively.

Although it operated out of the commissioner's office, the CDU was largely ignored by the rest of the police department until a series of highly publicized racial crimes later in 1978 impelled the commissioner to warn every district commander personally that continued failure to make hate crime a high priority would be dealt with severely.

The Community Disorders Unit, in conjunction with the attorney general's Civil Rights Division, became much more effective in targeting hate crime after the enactment of the 1979 Massachusetts Civil Rights Act, which provided civil tools to deal with the problem. The legislation was introduced in response to the stoning of buses during Boston's school integration crisis in the early 1970's, which led to a 1974 Federal court order to desegregate the city's schools. The final catalyst to its passage was the shooting of an African-American football player during halftime by a white spectator rooting for the opposing team.

Collaboration Between Police and the Community

Public pressure and media exposure led to enactment of the Civil Rights Act and formation of the Community Disorders Unit. In addition, the unit's effective use of the act has depended heavily on the willingness of victims and witnesses to report hate crimes and stay the course during the period of civil litigation.

The CDU and Civil Rights Division have taken a variety of steps to facilitate community involvement. Staff conduct regular outreach to advocacy and community groups, explaining how they can act as liaisons with law enforcement on behalf of victims by encouraging victims to report incidents, explaining civil procedure to them, and trying to maintain their cooperation during the civil process. In the past some victimized minority groups had language barriers that prevented them from communicating with police and prosecutors. As a result, the chief of the Civil Rights Division and the commanding officer of the Community Disorders Unit give presentations to refugee organizations and foreign-speaking community groups. The Community Disorders Unit has placed notices written in Cambodian, Vietnamese, and Laotian in both the foreign-language press and neighborhood centers explaining why and how to contact the unit. The unit has officers or interpreters who speak Spanish, French, Chinese, Vietnamese, and Laotian. The CDU maintains a list of officers with the Boston Police Department who are bilingual and available to act as interpreters.

Even without any communication barriers, some minorities are afraid of the criminal justice system because of unpleasant experiences with police. Many immigrant groups, such as Haitians and Cambodians, are terrified of the police because in their country of origin law enforcement was a repressive force. The nonimmigrant community may also fear the police because of past mistreatment in this country. Partly for this reason, the program initially had no credibility with the gay and lesbian community. This changed when the CDU commanding officer met one-on-one with gay leaders (who spread a positive message about the unit to other gays) and marched with the gay and lesbian contingent in the Boston St. Patrick's Day Parade.

Many gays and lesbians are still afraid to report bias crime because they may have to reveal their sexual orientation. However, there is less risk of public exposure in civil court than in criminal court—there are usually no reporters in civil court, and the preliminary injunction can be issued with only affidavits, because there is no constitutional right to confront one's accuser at a civil hearing. In addition, having signed an affidavit, victims are then afforded 24-hour protection by the Community Disorders Unit to make them feel secure in cooperating with public authorities and reporting any violations. (An injunction was once issued without even a complaining witness. A largely white neighborhood had been the object of anti-Asian graffiti, but no member of the minority community would sign an affidavit. The Community Disorders Unit was eventually able to identify the perpetrators. Brought to the station house for questioning, the youngsters proved willing to sign affidavits against each other. A judge issued a temporary restraining order on the basis of this evidence.)

The CDU commanding officer reports that the most effective way of winning over minority groups is a successful prosecution.

Problems Encountered

Statutory language. The Massachusetts Civil Rights Act does not specify which particular groups of individuals are protected. The statute refers only to the infringement of the rights of "any. . . person or persons." Some observers contend that this vagueness is an advantage. By not restricting the act to specific currently victimized groups, other future victims can be protected by application of the existing statute. Not prescribing specially protected groups has the added advantage of removing the argument that the law favors some groups over others.

However, by failing to find clear guidelines in the act, some prosecutors may hesitate to apply the statute's generalizations about victims to some groups of victimized individuals. This problem arose in the mid-1980s when the attorney general's office had to consider whether to apply the statute to gays and lesbians. Ultimately, the attorney general decided that the statute protects homosexuals because the act prohibits interference with activities protected by the State public accommodations statute or with the exercise of rights secured by the Constitution of the Commonwealth—and article 1 of the Declaration of Rights of the Massachusetts Constitution recognizes an inalienable right of enjoying life, liberty, safety, and happiness. Passage in 1992 of a Gay Rights Bill strengthened the State's right to include gays and lesbians in the purview of the Civil Rights Act and has made the attorney general and judges less reluctant to use the act for this purpose. In addition, the State's Hate Crime Reporting Act of 1990 includes sexual orientation as a victim group.[4]

Enforcement. Police officers' lack of familiarity with the Civil Rights Act is reported to be the most serious obstacle to enforcement. Many officers do not think of civil action as a possible response to criminal behavior.

The Community Disorders Unit trained every officer in the Boston Police Department regarding the legal definition of hate crime under the law, how to evaluate whether bias motivation might be involved in an incident, other information the attorney general needs to litigate the case, and police authority to arrest for violation of an injunction. The CDU subsequently conducted rollcall training to educate every Boston police officer to fill in the box on the incident report indicating "community disorder" when a crime might be bias motivated. Boston police have been told that if they fail to check off the appropriate box on the incident report and there is a second and serious bias-related call to the same location, they will be—and have been—disciplined with an oral or written reprimand and targeted for additional training.

In serious hate crime cases, the CDU calls the commanding officer of the local precinct in which the violence occurred for permission to involve the precinct officer who originally investigated the case in the unit's followup investigation—typically a learning and rewarding experience for the officer. By promptly taking over these cases, the CDU also helps local captains to consider the unit as an asset, because its detectives can shield them from blame if the problem gets worse.

Despite the training and incentives, some police officers may still be reluctant to confront hate crime because they do not take such offenses seriously, they find it frustrating to determine whether a crime is motivated by bias, or they share some of the negative attitudes of the perpetrators toward minority groups. Even when precinct police officers realize an incident is bias motivated, they may be under pressure from the community to refrain from publicly labeling the neighborhood as racist by "blowing up a case of mere vandalism" into a civil rights violation. They may feel that loyalty to the precinct station and the community requires that they ignore the problem. Application and enforcement of the act depends on the willingness of public officials to admit there may be racism in their town. Enforcement in Boston was encouraged for many years by a mayor who vocally opposed hate crime and admitted that his own neighborhood had a race relations problem.

The Boston Police Department may be better motivated than some other law enforcement agencies to identify and investigate hate crime because a special unit commanded by a senior detective who reports directly to the commissioner was designated to investigate these offenses. Importantly, Boston has staffed the CDU with seven full-time investigators; without several detectives dedicated to these cases, the work load is usually too heavy to get to incidents that do not involve personal injury (for example, smashed windows) but that, if not adequately addressed, can progress to an explosive situation.

Program Accomplishments

History of Successful Litigation

From 1982 to September 30, 1993, the attorney general obtained 130 injunctions against 302 defendants, an average of nearly 10 injunctions and over 20 defendants a year. Forty-

five percent of injunctions issued since 1988 represent civil rights violations committed in Boston.

The court has denied a preliminary injunction only three times. For example, one judge felt the attorney general should wait until an offender who was already in jail had been released. In another case, the judge ruled that, given the defendants' claim of innocence, there had to be a trial—affidavits were not a sufficient basis for issuing an injunction.

There have been very few instances in which an offender has violated an injunction, apparently because offenders realize they will be jailed if they violate an order. The State won the cases in three of the four criminal contempt trials that occurred in Boston. In the fourth case, the jury found the defendant not guilty.

Anecdotal Evidence

The reported number of hate crimes in Boston has varied from a high of 607 in 1978 to a low of 157 in 1985. There were 181 incidents reported in 1991 and 249 in 1992. However, these numbers are not good indicators of the extent of hate crime or of the effectiveness of attempts to prevent it. The number of reported incidents can be affected by such factors as the addition of new victim groups (for example, women in 1992), the willingness of victims to report incidents, a recent influx of new immigrants, the thoroughness of the CDU and Civil Rights Division's outreach efforts, and increased willingness and knowledge on the part of beat officers to label and report crimes as bias motivated. The number of reported incidents also does not necessarily correspond with the number of injunctions sought by the attorney general, because in many cases the incident is not considered serious enough to warrant civil relief, the victim or witnesses are not willing to cooperate, or the perpetrator lives out of State and will probably not be returning to Massachusetts.

Nonetheless, law enforcement officers, prosecutors, and judges agree that the Civil Rights Act has curtailed intimidation and violence. In the few cases in which offenders have violated an injunction, an immediate trial for criminal contempt has prevented further intimidation—as in the vignette presented at the beginning of this case study. In a more recent example, when six skinheads who were members of the White Youth League assaulted two gay men, criminal prosecution by the local district attorney, which resulted in only probation, failed to reduce skinhead criminal activity. However, because of the group's expressed hatred of all non-Aryans, the attorney general secured injunction that enjoined the six youths from having any physical contact or engaging in any threatening, intimidating, or coercive behavior, not just with the victims, and not only with any gay person, but with any other members of *any* other protected group. As a result, the intimidation stopped—because the penalty for an assault would have been up to 10 years in prison. The CDU commanding officer holds the opinion that most perpetrators of hate crime are cowards, and once they have been publicly exposed in an injunction they are afraid to repeat the behavior.

Advantages of the Civil Approach

Police and prosecutors often find it difficult to deal effectively with hate crime in the criminal justice system. Evidence may be insufficient to convict the perpetrator according to a standard of beyond a reasonable doubt, often because victims and witnesses refuse to testify in hate crime cases when they fear that repeated court appearances will expose them to retaliation. Many assailants count on this refusal to testify. District attorney's offices and criminal court judges, deluged with cases, often cannot devote to hate crime cases the special attention that superior courts can give them. Even when a hate crime case is successfully prosecuted, the typical punishment—particularly for juveniles and young adult offenders—is only probation, so continued intimidation—as in the skinheads case described above—remains a possibility. By contrast, there are several benefits to proceeding civilly against hate crime.

Lowers Standard of Proof

When a group of individuals is involved in hate crime, there are frequently some members who cannot be prosecuted criminally for lack of evidence beyond a reasonable doubt. Civil injunctive relief, based on a preponderance of the evidence, makes it possible to enjoin hate crime when there is insufficient evidence to sustain a criminal conviction. The reduced evidentiary standard also makes it possible to secure injunctive relief without oral testimony during the preliminary injunction phase. In addition, because the State may bring the charge—rather than a citizen bringing a private cause of action—petitions for injunctive relief need not show irreparable harm or a balance of harms; all that need be demonstrated is a public interest in discontinuing the illegal behavior and the likelihood of a statutory violation.

Widens the Net

Proceeding civilly enables the State to target juveniles effectively—an important consideration since the median age of hate crime offenders in Massachusetts is 19. Because pro-

ceeding civilly enables juveniles to avoid a criminal record, police, assistant attorneys general, and judges are more willing to provide relief to the victim. Furthermore, a civil injunction gives youngsters who are only borderline troublemakers an excuse to use with their friends for not committing another offense. The injunction also gives parents leverage to keep their children away from gang friends—a number of parents have personally thanked Community Disorders Unit detectives for providing them with this weapon.

Provides Quick Relief

The civil route has the advantage of providing quick relief through the swift scheduling of a hearing for a temporary restraining order or, more typically, a preliminary injunction. Being able to proceed quickly not only provides victims with the earliest possible protection, it encourages them to proceed with the parallel criminal case because they feel protected against retaliation. Recourse to an immediate injunction can quickly cool a neighborhood situation before it explodes into a large-scale and violent community disorder. In comparison, a criminal prosecution must slowly wind its way through the courts.

Involves Effective Enforcement

Most criminal matters arising under the Civil Rights Act are disposed of in district court—the State's lower-level trial court. The jam-packed and rushed atmosphere of district court may give defendants the impression that their offense is simply one of hundreds of similar crimes and therefore relatively unimportant. By contrast, the somber formality of a session in superior court, the State's upper-level court, is more likely to give the defendant (and the victim) the impression that the offense is being taken very seriously—especially if the defendant receives a personal lecture about the consequences of violating the judge's own order.

Civil injunctive relief also has special deterrent power because imposition of punishment in a trial for criminal contempt is quick compared with a trial for most other criminal cases. In addition, whereas violation of a stay-away order in a criminal case would only result in a hearing on whether to revoke probation, in a civil case a violation leads to a criminal prosecution.

Judges are often more strict about punishing a violation of their own personal order than they are about enforcing a legislative statute. Jail time has usually been imposed for injunction violations, whereas probation is the usual sanction when hate crime is charged criminally. Furthermore, while most delinquents believe they have little to fear from the juvenile court system, they learn that punishment in civil court can be serious—and they cannot manipulate the proceedings in superior court the way they feel they can "con" the participants in a juvenile hearing.

Finally, not only does the Civil Rights Act authorize peace officers to arrest violators of court injunctions without a warrant—even for misdemeanor offenses that the police have not observed—on the basis of probable cause, injunctive relief provides police officers with a "bright line" rule for making an arrest. Whereas police may feel uncertain about making an arrest for intimidating or threatening behavior, they are more confident about arresting someone who violates the conditions of an injunction.

Constitutional Issues

There have been two challenges to the Massachusetts Civil Rights Act, both of them on behalf of juveniles. In 1985, "John Doe" appealed a superior court finding that he was in criminal contempt as a result of having violated a preliminary injunction issued pursuant to the Civil Rights Act. The juvenile moved in the superior court to dismiss the complaint, contending that the Commonwealth could only have proceeded against him as a delinquent child and that the superior court had no authority to consider the complaint for criminal contempt. The juvenile relied on G.L. c.119, §74, which provides that "no criminal proceeding shall be begun against any person who prior to his seventeenth birthday commits an offense against the law of the commonwealth" unless proceedings against him as a juvenile have begun and been dismissed. In *Doe* v. *Commonwealth,* 396 Mass. 421 (1985), the supreme judicial court denied the appeal, ruling that "the restrictions of G.L. c.119 concerning the disposition of charges against juveniles do not apply to a charge of criminal contempt of court based on the violation of a court order."

The second appeal involved three teenagers alleged to have intimidated African-American children near their elementary school. In addition to enjoining the teenagers from again violating the act, the resulting court order prohibited them from further attempts at intimidation by forbidding them from being at the school during specified hours or by knowingly approaching within 100 yards of the children. One of the defendants appealed the order, arguing that the injunction provisions of the act were not applicable to minors and that the defendant was entitled to a jury trial. Following transfer from the appeals court on its own initiative, the

Massachusetts Supreme Judicial Court in *Commonwealth* v. *Guilfoyle,* 402 Mass. 130 N.E. 2d 984 (1987), ruled that the act clearly applies to "any person." Noting that the act, remedial in nature, was enacted to combat the serious problem of racial harassment by private parties, the court held that to narrow its application to adults would undermine the intent of the legislature. Furthermore, the essence of the statute is not criminal but civil, and a juvenile is not immune to civil actions.

The court held further that the superior court properly denied the defendant's motion for a jury trial. While article 15 of the Commonwealth's Declaration of Rights provides a right to trial by jury in actions known to the common law, the court ruled that this article is inapplicable to the Civil Rights Act of 1979, because at common law there was no cause of action for violations of civil rights. The act creates a new cause of action, not a new version of a traditional criminal proceeding.

Finally, the defendant argued that, because of the criminal nature of the sanctions that would be imposed if he violated the injunction, an exception to the general rule of using a preponderance of evidence as the standard of proof in civil cases should be made in this case and the stricter beyond-a-reasonable-doubt standard should be applied. The court disagreed, ruling that the injunction imposed did not require incarceration or a fine, and that only if the defendant violated the injunction did he become subject to the possibility of criminal sanctions.

Defense attorneys continue to raise three objections to injunctive relief under the Civil Rights Act—and continue to be overruled. First, defense attorneys object on occasion to the geographic restrictions placed on their clients. These restrictions concern some judges as well. One way the court addresses defense counsel's objections is to restrict all travel within a designated area with certain exceptions—for example, for purposes of going to school or work. As noted, judges on their own initiative sometimes reduce the geographic restrictions requested by the attorney general. Indeed, it is likely that there will be continued challenges to particular orders based on scope. The standard that governs is one of reasonableness, and orders may not unjustifiably impinge on fundamental liberties like freedom of movement and freedom of association. Necessarily, these issues must be decided on a case-by-case basis. Prosecutors and police should take care to provide sufficient factual basis and justification for the scope of all orders sought.

Second, a few attorneys have argued that enjoining multiple defendants from congregating together within a designated area violates the Constitution's First Amendment right to freedom of association. However, one judge justifies the restriction on the grounds that the right to freedom of association is not protected if it is used expressly to intimidate other people, because such congregating by offenders has a chilling effect on the constitutionally guaranteed rights of the victims.

Third, defense attorneys have claimed that injunctive relief is inappropriate for a single offense when there is no pattern of criminal activity. The pattern argument is based on Federal court rulings that an injunction may not be issued unless the attorney general shows that the same person or persons are likely to be hurt again. At least one judge rejects this argument on the grounds that if a hate crime incident happened once, that by itself is evidence of a propensity on the part of the offender to repeat it with the same victim. Moreover, in most cases brought by the attorney general the defendant has already intimidated the victim on several occasions. In any case, the plain language of Massachusetts statute states that the attorney general may sue for injunctive relief for even a single civil rights violation. In addition, unlike the Federal statute, the Massachusetts act does not require proof of the likelihood that the offense will be repeated.

Two recent United States Supreme Court cases have addressed hate crime legislation. In *R.A.V.* v. *City of St. Paul* (112 S. Ct. 2538 [1982]), the Court unanimously struck down the city's hate crime ordinance. The case was brought by a teenager who was caught setting a wooden cross aflame on an African-American family's lawn. Rather than invoke statutes prohibiting trespassing, damaging property, or disturbing the peace, the city cited the Bias Motivated Crime Ordinance, which forbade speech or behavior likely to arouse "anger or alarm" on the basis of "race, color, creed, religion, or gender."

The Massachusetts Civil Rights Division chief does not believe that *R.A.V.* v. *St. Paul* has any implications with respect to the constitutionality of the Massachusetts Civil Rights Act. This was also the conclusion of a task force established by the attorney general to examine what the decision might mean for Massachusetts. According to the task force Special Report Regarding the Constitutionality of Massachusetts Civil and Criminal Rights Laws issued in March 1993, the Supreme Court in *R.A.V.* v. *St. Paul* struck down a local ordinance as unconstitutional on its face under the First Amendment because, in the majority opinion, it prohibited the expression of certain ideas on the basis of their offensive content and not the illegal method in which these ideas were conveyed. The majority found that the St. Paul

ordinance directly proscribed words that communicated messages of racial, gender, or religious intolerance, indicating that the city was "seeking to handicap the expression of particular ideas," rather than the conduct itself. (In a concurring opinion, a minority on the Court found the ordinance unconstitutional on the grounds that it singled out certain forms of speech for prohibition and not others.)

By contrast, the Massachusetts Civil Rights Act does not prohibit speech or the content of speech but rather *conduct*—that is, interference, or attempts to interfere, with other persons' exercise of their constitutional rights. Furthermore, the act is legislation of general applicability providing for criminal and civil penalties in cases of civil rights violations regarding *any* secured right, rather than being confined to the rights of particular groups or classes of individuals. To obtain a civil injunction or other civil remedy under Section 11H, the State must demonstrate that a victim's Federal or State protected rights were abridged through threats, intimidation, or coercion. Indeed, in *R.A.V.* v. *St. Paul* the Court indicated that if the St. Paul ordinance had prohibited expression that "communicate[s] ideas in a threatening (as opposed to a merely obnoxious) manner," the statute would have been constitutional.

In the second case, *Wisconsin* v. *Mitchell,* 113 S.Ct. 2194, __ U.S. __ [1993], the Supreme Court upheld a Wisconsin hate crime statute that allowed enhanced prison sentences and fines for crimes already on the books if the defendant intentionally selects the victim on the basis of race, religion, sexual orientation, or national origin. Under the Wisconsin law, an African-American man who instigated an assault on a white 14-year-old in Kenosha received a four-year sentence for aggravated battery, two years more than the maximum he could have received for the same assault without a proven racist motive. The Wisconsin Supreme Court overturned the law on the grounds that the enhanced penalties violate the First Amendment by effectively punishing "offensive thought," but the Supreme Court reversed. The Court concluded that the law punished the underlying conduct, not expression, and it reiterated that motive is frequently an important factor in determining a sentence for criminal conduct. According to the Court, like antidiscrimination laws, the Wisconsin law "singles out for enhancement bias inspired conduct because the conduct is thought to inflict greater individual and societal harm."

* * *

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Case Study 3

Confiscating Weapons From the Mentally Ill (Los Angeles, California)

Summary

The Los Angeles Police Department and the Los Angeles County district attorney make use of two civil statutes to confiscate deadly weapons from the mentally ill even when no crime has been committed and typically without securing a search warrant. One statute authorizes peace officers, upon probable cause to believe a person is a danger to himself or others, to detain suspected mentally ill persons for evaluation at a county mental health facility; the second statute requires police to seize any deadly weapons owned by or under the control of individuals who have been detained for evaluation. If the person is examined and released by the evaluating facility, the weapons are not returned unless the individual informs the court that he or she intends to seek return of the weapons, the person shows up for a court hearing on the matter, and the court decides the person is not a danger to him- or herself or to others. If, as more typically happens, the evaluating facility decides to admit a detained individual for further evaluation, the person may not possess any weapons—whether or not the police actually confiscated any firearms prior to the evaluation—for five years unless the

individual successfully petitions the court for permission to possess them. A special law enforcement Mental Evaluation Unit and the Psychiatric Section of the district attorney's office handle confiscation of these weapons.

Illustrative Example

A dangerous, mentally ill ex-marine who had vowed to kill Los Angeles police officers moved to an apartment across the street from a precinct house where he had a clear line of fire into the police station. Shortly thereafter, he paraded into the police parking lot with an unloaded assault rifle.[5] The police seized the weapon and called the department's special Mental Evaluation Unit, which took him to a mental health facility for evaluation. When the person was about to be released three days later, the hospital notified the unit in advance so that the officers could set up a surveillance operation to make sure he did not carry out his threats. Immediately upon discharge, the man went directly to a gun store and bought 400 rounds of M16 ammunition and 40 magazines, bought a revolver from a friend, and next purchased a 22-caliber rifle and 200 rounds from another gun store. He ended up in a department store getting into a screaming argument with a salesperson who would not sell him yet another firearm. He stormed outside, secured a large machete, and began hacking a telephone pole. At this point, the surveillance team arrested him. The man refused a consent search of his premises and vehicles. The criminal codes contained no provision that would allow the officers to conduct the search, but by detaining the person under the civil law for a second mental evaluation at a local mental health facility, the officers were able to secure a warrant to search his apartment and vehicles and seize the weapons. When he was released again from the hospital, he gave up his flat near the precinct house and moved back in with his mother.

Statutory Basis

Section 5150 of the California Welfare and Institutions Code authorizes peace officers to detain suspected mentally ill persons for evaluation:

> When any person is a danger to others, or to himself or herself, or gravely disabled, as a result of mental disorder, a peace officer . . . may, upon probable cause, take... the person into custody and place him or her in a facility designated by the county and approved by the State Department of Mental Health as a facility for 72-hour treatment and evaluation.

Section 8102 of the code mandates the seizure of deadly weapons from these individuals under certain circumstances. According to paragraph (a) of this section:

> Whenever a person who has been detained or apprehended for examination of his or her mental condition or who is a person described in section 8100 (i.e., is a mental patient) or 8103 (i.e., has been adjudicated to be a danger to others as a result of mental disorder), is found to own, have in his or her possession *or under his or her control,* any firearm whatsoever, or any other deadly weapon, the firearm or other deadly weapon *shall* be confiscated by any law enforcement agency or peace officer, who shall retain custody of the firearm or other deadly weapon. (Emphasis added.)

Procedure

Confiscation by the Police

To date, the Los Angeles Police Department has made greater use of sections 5150 and 8102 than has any other law enforcement agency in California. When field officers have probable cause to detain an individual who they believe is mentally ill,[6] they typically call the department's Mental Evaluation Unit (MEU) whose 10 sworn officers work full-time handling cases involving the mentally ill. An MEU officer checks the State's database on firearm sales to see whether the detainee has purchased a firearm. Approximately 5 percent of all persons checked in this manner have purchased a gun. If the person has bought a firearm, the field officers are instructed to seek a consent search of the person's home. (If the person has a firearm in plain view, or one is found pursuant to a pat-down search, officers may seize the weapon without a warrant.) After calming down, the person usually consents to the search. Sometimes the police officers obtain permission to search from family members who have legal access to the house—in fact, the field officers are often told by family members that the detainee has access to a gun because the relatives are afraid of what the person may do with the weapon. If necessary, the officers may tell the family that they could be sued civilly or arrested if they do not turn in the weapon, because section 8101 of the Welfare and Institutions Code makes it a felony to knowingly allow possession or control of a deadly weapon by a mentally ill person held in a facility for evaluation.

On the rare occasions when a detained individual refuses consent and no family members are available, willing, or

legally able to give permission, the officers obtain a search warrant from the district attorney's Psychiatric Section and, together with an assistant prosecutor, go before a judge to have it signed. No judge has refused to issue a search warrant under these circumstances.

When field officers take a weapon from someone they suspect is mentally ill, they transport the person to the Mental Evaluation Unit. If an MEU officer judges the person to be a danger to him- or herself or to others, the unit keeps the weapon and asks the person to sign a receipt that describes the weapon being seized, explains the statutory authorization for the seizure, and describes the procedure for seeking the return of the weapon. The field officer then transports the person to a facility for evaluation.

Opportunity To Seek Return of Weapons

Upon release from the hospital, the person must be given a written explanation by hospital staff of the procedure for seeking recovery of the weapon. Two different sets of circumstances may now occur.

When the detainee is not admitted to the hospital for evaluation. If, after examination, the hospital releases the suspected mentally ill person without imposing a hold for inpatient evaluation, according to the Welfare and Institutions Code the hospital is mandated to notify the Mental Evaluation Unit when the person is being released. Usually, however, the detained person has to remind the hospital to document his or her release to the MEU. In the vast majority of cases, the person never bothers to contact the hospital. As a result, the MEU, lacking any documentation of the person's release, simply retains possession of the weapons with the legal right to destroy them after six months.

In the atypical instance that the alleged mentally ill person reminds the hospital to send the MEU notification of release, the Mental Evaluation Unit has 10 days in which to petition the superior court for a hearing to show cause why return of the firearm would be likely to endanger the person or other people; otherwise, the MEU must make the weapon available for return. At the time it petitions for a hearing, the MEU must send a certified letter advising the person of the petition, the person's right to request and attend a weapons return hearing, and a 30-day limit in which the person must contact the court clerk to set a time for a hearing.

If the individual does not contact the clerk—as is typically the case—the district attorney's Psychiatric Section petitions for a default order and permission to destroy the weapon. About 15 individuals have requested and attended a hearing. Most of these hearings have resulted in return of the weapons by the court because the prosecutor-designated psychiatrist reported that the person was not a danger. In the few cases in which the psychiatrist has reported that the person *was* dangerous—typically, suicidal—the court has ordered another evaluation and scheduled a formal hearing with live testimony presented by the person, the prosecutor, and sometimes a Mental Evaluation Unit detective, along with the submission of medical records from facilities that have treated the person and an affidavit signed by the psychiatrist who performed the emergency evaluation. In most of these second hearings, the court has authorized return of the weapons because the person was deemed to be no longer suicidal.

When the detainee is admitted for evaluation. In the vast majority of cases, the facility admits the person for further evaluation, because the MEU has become skilled in identifying persons who are indeed mentally ill and dangerous. Once the person has been admitted, the police have no further role in the case. Instead, a provision of the Welfare and Institutions Code, effective as of January 1991, automatically comes into effect that prohibits the patient's access to any weapons. According to section 8103(f)(1), no person taken into custody on a 5150 and admitted for evaluation because the person is a danger to him- or herself, or to others, shall "own, possess, control, receive, or purchase any firearm for... five years after the person is released from the facility." Such a person may be permitted access to a weapon only if a psychiatrist at the evaluating facility or a court determines that the firearm is likely to be used in a safe and lawful manner.

Whereas under section 8102 the police department must petition to retain confiscated weapons when the suspected mentally ill person is not held for evaluation by a facility, under section 8103 *patients* held for evaluation must petition for a return-of-weapons hearing. Few individuals whose weapons have been seized and retained for five years under section 8103 have petitioned for a hearing to have the weapons returned. Those who have petitioned have usually been successful because they are no longer considered to be suicidal. In a few cases, family members have petitioned the court to have weapons collections that were seized by the police returned because the firearms were in the home solely for display and did not belong to the mentally ill person. Typically, the court permits return of the weapons provided the owners sell them, although the judge usually continues the case pending verification of the sale.

Program Organization, Staffing, and Resources

The Mental Evaluation Unit consists of 10 sworn officers and an officer-in-charge. Although 17 officers have left the unit since 1984, 15 left because they were promoted; 1 was transferred; and 1 became a stockbroker. In hiring new staff, the captain of the Detective Headquarters Division allows the MEU officer-in-charge to pick anyone who volunteers from within the detective division. The officer-in-charge prefers individuals who have good writing skills and some experience with the drug abuse or mental health field. The supervising officer excludes candidates whose personnel file includes complaints from the community. Officers are not hired if they have a history of pre-employment or on-the-job mental health problems. Detectives are preferred because of the investigative work sometimes required.

Officers new to the MEU attend programs in suicide intervention, hostage negotiations, and threat assessment. Much of what they need to learn they master on the job over a period of time. In addition, they must learn to reorient their thinking to assess each situation not from the criminal justice point of view, or even from the perspective of the mental health system, but in terms of bringing to bear whatever resources will prevent the mentally ill person from gaining further access to weapons.

The district attorney's Psychiatric Section has five deputies, but only the assistant deputy district attorney-in-charge spends time on weapons cases—10 percent of his time on average over the course of the year.

Program Evolution

How the Program Started

In 1984, the Los Angeles Police Department came under heavy criticism as a result of two tragedies, one in which a police officer was killed by a mentally ill person, and one in which a mentally ill person shot 2 children to death and injured 13 others. As a result, the chief of police invited the top-level officials of 10 criminal justice and social service agencies involved with handling the mentally ill to form a permanent Psychiatric Emergency Coordinating Committee. After six months of hard-nosed discussion, the committee hammered out a comprehensive memorandum of agreement in which the administrator of each participating agency agreed in writing to a list of specific actions with the overall objective of diverting mentally ill persons involved in minor criminal behavior from the criminal justice system into the health care system.

The police department fulfilled its responsibility to the interagency agreement in part by revitalizing its existing—but understaffed and underutilized—Mental Evaluation Detail, turning the one-person detail into a 10-person unit whose officers were trained extensively in the assessment and handling of the mentally ill. The MEU is now responsible for:

- Providing immediate telephone consultation in the handling of mental illness cases to any officer in the Los Angeles Police Department, a consultation that field officers are required to initiate before (a) taking an apparently mentally ill person into custody only because of the person's mental condition, (b) transporting any person to any mental health facility, or (c) booking any apparently mentally ill person for a criminal offense.
- Evaluating the condition of suspected mentally ill individuals brought to the unit's office in downtown Los Angeles, including all such persons found with a weapon.
- Going on-site, when necessary, to assist police with, or take charge of, crisis situations involving the mentally ill.

At the same time that the MEU was expanded and given increased responsibilities, the officer-in-charge searched through the State Welfare and Institutions Code looking for provisions he could use for seizing weapons from the small proportion of the mentally ill population who are dangerous. He thought of the idea of using a search warrant to confiscate weapons pursuant to section 8102 as a way of reducing the opportunity for violence by the mentally ill, but without having to arrest them and involve them in the criminal justice system. He and the assistant deputy in charge of the district attorney's Psychiatric Section drafted a warrant in consultation with the Los Angeles County Mental Health Department and the presiding judge of the Los Angeles County Superior Court. In their opinion, the content of the warrant met all legal obligations. In addition, the city attorney's office issued an informal opinion that a properly drafted search warrant may issue for searches for deadly weapons and confiscation of same pursuant to section 8102. As noted, it turned out that police officers do not need to use the warrant very often, but no judge has refused to issue any warrant police have sought.

The heads of the district attorney's Psychiatric Section and the Mental Evaluation Unit spent two years training all 7,900 Los Angeles Police Department officers and the entire sheriff's department in the statutory requirements of the

Welfare and Institutions Code regarding the mentally ill and in their responsibilities under the interagency agreements worked out to handle this population.

Collaboration With the Social Service System

At the same time in 1984 that the various agencies were hammering out an interagency agreement, two changes in the State's Welfare and Institutions Code were enacted. One amendment forbade mental health personnel from using lack of bed space as a reason for refusing to assess whether a person brought in by a peace officer needed to be evaluated and treated. A second amendment stipulated that the officer shall not be kept waiting longer than necessary to complete the necessary paperwork and "a safe and orderly transfer" of physical custody of the person.

Two years later, selected hospitals in Los Angeles County agreed to a set of procedures that facilitate enforcement of a State law against possessing a dangerous weapon in a hospital. As spelled out in two "High-Risk" policies, the facilities agreed to perform the following:

- Install metal detectors or scanner devices at appropriate locations in the facility.
- Effect the surrender through their own security force, and by force if necessary, of any weapons identified by any means on patients who appear for treatment.
- Turn over the weapons to the local police department, with a written report, within 72 hours.
- Report to the local police department whenever they receive notification that a psychiatric patient has a deadly weapon at an off-site location.

These policies, established at the instigation of the Mental Evaluation Unit, apply to each hospital that operates an acute and emergency inpatient service, or a psychiatric emergency and inpatient service. Each hospital is required to incorporate these procedures into its operating policy and procedure manual and communicate them to all appropriate staff, with periodic reinforcement through in service training after an initial orientation session provided by the Mental Evaluation Unit. To date, hospitals have involved the police with over 50 individuals entering with a weapon.

Program Accomplishments

The Mental Evaluation Unit confiscated weapons from 150 people in 1990, 152 people in 1991, and 150 people in 1992. It is difficult to prove that use of the Welfare and Institutions Code to seize and retain weapons from the mentally ill has resulted in reduced violence among this population. While the police and prosecutor have been able to use the civil legislation to confiscate weapons and keep them away from several hundred dangerous mentally ill persons, many of these individuals may have simply replaced the seized weapons by purchasing them on the black market. However, the officer-in-charge of the Mental Evaluation Unit points out that most mentally ill individuals who use weapons do not engage in long-term planning; rather, they typically have poor impulse control and simply grab any available weapon in response to an immediate infuriating or disheartening situation, such as being evicted from their residence or abandoned by their lover. To the extent that a deadly weapon has been removed from their control, and the crisis passes without their securing a replacement, violent crime in the city has been reduced.

Advantages of the Civil Approach

In the past, there was no provision for officers in California to confiscate firearms from a mentally ill person who had not committed a crime but qualified as a danger to him- or herself or others. This stymied police officers when they had probable cause to believe that mentally ill persons had firearms in their home. In addition, such persons had to have demonstrated a desire to use the weapon. Section 8102 of the Welfare and Institutions Code authorizes confiscation and custody of firearms taken from a mentally ill person for his or her own safety or the safety of others if the person has been detained for examination as a suspected mentally ill person. Sections 8102 and 8103 provide for retention of the confiscated weapons until the person obtains an order from superior court permitting their return.

Constitutional Issues

Originally, the Welfare and Institutions Code required release of weapons seized from mentally ill persons after discharge unless the *police department* initiated a court hearing to determine whether the firearms should be returned. However, section 8102, enacted in 1984, placed the burden for requesting a hearing entirely on the person who had been detained. According to the statute, police could retain a confiscated firearm until the owner obtained a court order directing the police to return the weapon.

In 1989 a mentally ill woman from whom the police had seized a large collection of deadly weapons challenged the

constitutionality of the legislation. The woman argued that section 8102 was unconstitutional on due process grounds because the statute compelled the owner of the property to initiate the post-deprivation hearing for return of property. In *Bryte* v. *City of La Mesa,* 207 Cal. App. 3d 687 (1989), the court of appeals agreed. However, in later modifying its opinion, the *Bryte* court expressly allowed that weapons might still be lawfully seized in the first instance:

> Our conclusion that §8102 is unconstitutional, resting as it does on the failure of the section to provide ready administrative review of property confiscation, does not imply any disfavor of a seizure provision which did incorporate such protection.

Although a portion of an act in California may be unconstitutional, as in most States the entire act is not necessarily therefore void in its entirety. As a result, in 1989 the legislature revised the portion of section 8102 found unconstitutional in *Bryte.* As noted, the new legislation in section 8102 requires the police department to petition the court to retain the weapons. However, the new legislation extended the authority of the police by adding "danger to self" to "danger to others" as grounds for petitioning to retain the weapons.

Ironically, the recent amendments to section 8103 place the burden on most patients once again to file a petition to have a confiscated weapon returned or to be allowed to obtain a weapon by other means. The recent amendments to section 8103 require an individual who is admitted for evaluation to initiate a hearing. Since most suspected mentally ill persons brought to mental health facilities by the police are held for evaluation, *Bryte* has effectively been abrogated for all but the few cases in which the person is discharged after examination without being held for evaluation. The same type of challenge that succeeded against section 8102 may be successfully brought against section 8103. If such a challenge were sustained, it might create a burden on the prosecutor and MEU in terms of paperwork involved in initiating hearings and attending them.

Constitutional law experts and the Psychiatric Section assistant deputy agree that there may be other grounds for successful challenges to the legislation or its implementation. There could be a Fourth Amendment issue involved in seizing weapons not on an individual's person before the person has been found to be mentally ill and when the person has not agreed to be searched. However, Mental Evaluation Unit officers do make an on-site probable cause assessment of the individual's danger to self and others based on extensive training in making such evaluations. In addition, on the few occasions when the person refuses to have his or her home searched, someone else with legal access to the residence usually gives permission for the search, or a warrant, where needed, is readily obtained.

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Case Study 4

Breaking Up "Chop Shop" Operations in Phoenix

Summary

The Arizona attorney general's office in Phoenix relies on police undercover work in combination with a State civil racketeering statute to shut down "chop shops"—illegal enterprises that steal and resell cars, often after "chopping" them into resalable parts. The Phoenix Police Department typically approaches the attorney general's office with a proposal to target an ostensibly legitimate business that police investigators believe is a chop shop. If the evidence of illegal activity is strong, and a review of the enterprise's financial records suggests the presence of seizable assets, the attorney general initiates civil racketeering charges and

parallel criminal action. During the proceedings, the State can obtain liens or pursue civil forfeiture remedies to preserve the enterprise's assets. The program has obtained millions of dollars in judgments, disbursing some of the money as restitution to victims whose vehicles were stolen.

Illustrative Example

After one and one-half years of intensive surveillance and undercover work, the Phoenix Police Department's Organized Crime Bureau was convinced that a large wrecking yard operated by a group of people connected to an organized crime syndicate in Chicago was in fact a high-volume chop shop. These individuals had purchased the yard in the early 1980's in Mesa, Arizona, a community near Phoenix. The operators of the wrecking yard fenced in a large remote area and used it to store stolen cars and disassemble them into usable parts. When the chop shop operators received an "order" from the black market for certain parts, they dispatched trained car cutters and thieves to steal and then cut up a suitable car for resale. In the late 1980's, the Phoenix Police Department executed a search warrant for the wrecking yard and seized more than 2,000 stolen car parts, which the State sold for $187,000. The attorney general's office filed a civil racketeering complaint and obtained a judgment of $2.2 million.

Statutory Basis

The legal basis for targeting chop shops is the Arizona Racketeering Act, A.R.S. §§13-2301 *et seq.*, a civil statute loosely patterned on the Federal RICO statute (18 U.S.C. §§1961-68). The Arizona Revised Statutes (A.R.S.) civil forfeiture provisions that the attorney general uses are procedural only; the authorization for their application is contained in A.R.S. §13-2314. In chop shop cases, the Arizona Racketeering Act, A.R.S. §§13-2301 *et seq.*, provides the jurisdictional basis for the attorney general's complaints. Then, depending upon the precise allegations, which vary from case to case, the State alleges violations of other provisions of the State code. For example, A.R.S. §§13-2301(D)(4), 13-1802, and 13-1003, serve as the basis for allegations of theft and conspiracy to commit theft; A.R.S. 13-2312 (B) as the basis for illegally conducting an enterprise; A.R.S. §13-2312(A) as the basis for illegally controlling an enterprise; and A.R.S. §§13-2314(G) and §§13-4301 *et seq.* as the basis for *in rem* forfeiture claims (legal action instituted against property).

Procedure

Chop shop cases are typically developed by the Phoenix Police Department's Organized Crime Bureau. Months of police work usually precede the initiation of civil and criminal cases against the defendants. Police informants and undercover agents provide evidence used to establish probable cause for a search warrant. Once the search warrant is executed, circumstantial evidence is easily acquired. For example, in one case agents found 48 doors that had been taken off their hinges using a torch rather than by removing the bolts; all the cars' lock mechanisms had been removed with a pulling device. Based on the testimony of an automobile fraud expert, the court accepts these indicia of a chop shop as prima facie evidence of an illegal enterprise.

In one long-term undercover operation, the police went "into business" as a chop shop, creating a mock setup and "hiring" thieves, torchers, mechanics, and salespeople. The police make themselves available to the target operators to exchange parts and services, or engage in other illegal transactions.

Working with the police, the prosecutor examines assets and bank records, and checks to determine whether the target enterprise's financial status indicates that the amount of the potential forfeiture makes it worth pursuing civil remedies. The examination also uncovers evidence to be used in a civil or criminal proceeding.

To some extent, the decision to pursue a civil remedy is a strategic and financial judgment call based on whether the attorney general can remove significant assets from the chop shop industry and, at the same time, afford to do the case. However, the attorney general office's Financial Remedies Unit has developed several criteria for authorizing the filing of a forfeiture cause of action under the State RICO statute and determining whether to proceed civilly in an *in rem* forfeiture proceeding (an action instituted against property), civilly in an *in personam* forfeiture proceeding (action seeking judgment against a person), criminally in an *in personam* proceeding, or with some combination of these options. The criteria for choosing among these three courses of action follow.

Factors indicating use of in rem *civil forfeiture proceedings:*

- The recovery anticipated would not be cost effective in a more expensive *in personam* civil forfeiture procedure.

- Speed is desirable, as where the defendants property is subject to depreciation or waste.
- There is a substantial chance of flight by claimants, making an *in absentia in personam* proceeding unlikely or impossible.
- Saving the expenses of third parties is particularly important, as where the interest held by exempt persons is relatively large.
- The facts indicate that a jury may be reluctant to convict a potential claimant, as in "victimless" offenses.
- Little or no discovery is needed by the State.

Factors indicating use of in personam *civil forfeiture proceedings:*

- The necessity for *in personam* remedies, such as temporary restraining orders and preliminary injunctions, to preserve the forfeitable property.
- The need for further discovery after the initial filing of the case.
- Likelihood that further forfeitable assets will be discovered during the course of the action, making liens on an *in personam* basis advisable at the outset.
- The assertion of vicarious liability.
- Numerous defendants or witnesses making lengthy proceedings necessary in any event.
- Inability to obtain territorial jurisdiction of the property, requiring *in personam* jurisdiction of its owner.

Factors indicating use of criminal in personam forfeiture proceedings:

- Absence of nondefendant claimants that would necessitate separate litigation of their interests.
- High likelihood that the case will be completely concluded by a plea agreement in which the forfeiture aspects can be settled simultaneously without negative effect on the goals of either the forfeiture or the criminal case.
- Absence of need for *in personam* remedies against nondefendants.
- Compatibility of forfeiture with other aspects of the case, for example, the forfeiture will not make the case overly complex or cumbersome, or will enhance jury understanding of the State's position by emphasizing the profitability of the offense involved.
- Importance of procedural efficiency in light of the size and complexity of the case and potential recovery—for example, the case may be too factually complicated, too remote in location, or too small, to make a separate civil case worthwhile.

Consistent with these criteria, actions against chop shops usually involve both criminal prosecution of one or two operators and *in rem* civil forfeiture proceedings. The attorney general's office favors the combined criminal and civil procedures described here over a lone criminal RICO proceeding against a large number of defendants because large criminal RICO cases tend to be expensive and lengthy. Judges, too, are reported to dislike huge criminal RICO prosecutions because the cases often get bogged down in procedural matters, especially when a complex set of assets is at issue.

A standard civil RICO complaint filed by the Arizona attorney general's Financial Remedies Unit will allege that the named defendant committed acts of theft and conspired to commit theft. Specifically, the State alleges that the defendant "knowingly controlled the motor vehicle of another with intent to deprive him or her of such property" and "knowingly controlled the motor vehicles of another knowing or having reason to know that the property was stolen." Defendants are also usually accused of "trafficking in stolen property" for financial gain, "illegally conducting an enterprise," and "illegally controlling an enterprise."

The State then seeks the *in rem* forfeiture of all properties connected to the illegal transactions along with a temporary restraining order (TRO) and preliminary injunction to (1) keep the defendants from destroying or altering any company records and (2) prevent any alienation of assets by the defendants which might be used to satisfy a judgment. To these ends, the police close the shop and sequester as many vehicles and parts as possible. In addition, the attorney general routinely seeks to recover the cost incurred in investigating and prosecuting the case.

Defendants are served with a copy of the complaint, and almost all defendants have legal counsel in the civil proceeding.

Program Organization, Staffing, and Resources

Each investigation by the police department's Organized Crime Bureau involves a minimum of 2–4 police officers. To execute a search warrant, as many as 50–60 officers participate depending on the location and size of the premises to be searched. After the attorney general has initiated litigation, 1 or 2 officers remain with the case in order to give depositions, appear in court, and provide continuity from the beginning of the case through final judgment. The attorney general's Drug/Financial Remedies Unit typically has one or two lawyers and at least one paralegal working on chop shop cases, although this varies with the number and size of cases.

In a memorandum prepared at the beginning of 1991, the Phoenix Police Department summarized the costs of its chop shop investigations. According to the memo, three cases that concluded with the arrest of 60 suspects were funded by the Arizona attorney general's Racketeering Revolving Fund at a cost of $83,577, while the Phoenix Police Department expended approximately 17,300 person-hours to operate undercover shops and investigate the enterprises.

- The first case ran from December 1985 to December 1986 and required $27,449 of attorney general funds and 5,600 person-hours of police time. The operation recovered 17 stolen vehicles valued at $96,000.
- The second case took from February 1988 to February 1989. This case involved 3,200 hours of police officer time. Attorney general office funds were not involved. The FBI funded most aspects of the case and handled all the report writing and record keeping. Five stolen vehicles were recovered at a value of $60,000.
- The third case, which began in May 1989 and ended in January 1991, involved $56,128 in attorney general funds and 8,500 person-hours of police investigation time. Twenty-six suspects were identified, and 44 vehicles worth $450,000 recovered.

What happens to the seized vehicles varies from case to case. Generally, the State auctions them (typically to car dealers), usually realizing about 50 percent of the value of the cars. In one case, some recovered vehicles were returned to insurance companies that had already reimbursed the original owners for their stolen cars, four cars in good condition were refitted for use by the police department, and eight vehicles were auctioned, with the money given to the police department. Some of the recovered funds from auctioned parts and cars are deposited in a revolving fund to help pay for new cases, but most of the money is returned to victims as restitution, with about 100 victims compensated to date.

Program Evolution

A professional chop shop is a large, sophisticated business that relies on a network of car thieves, automobile mechanics, salespeople, "torchers," transporters, and often drug dealers (in search of extra cash) who locate, steal, transform, and ship stolen cars to customers. Typically, a chop shop customer orders a vehicle by size and other specifications. The chop shop owner then contacts a thief to locate and steal the desired model. The stolen car is brought to the shop, where a "torcher" removes the vehicle identification number and other identifying marks. A mechanic might install special equipment or make other changes requested by the customer. Instead of picking up the car, the customer often arranges to have a transporter deliver it to a desired location. At this point, the modified vehicle once again enters the stream of commerce, ending the original owner's hope of recovery. As illustrated in the opening vignette, sometimes stolen vehicles are broken down and sold for parts to a "dealer."

How the Program Started

Although automobile theft is a problem in every State, the problem is particularly acute in Arizona because of the State's proximity to the Mexican border. A favorite "chop shop special" is a heavy-duty, four-wheel-drive utility vehicle, because these cars are useful for transporting illegal goods (often drugs) over the mountains and back roads of Mexico. In addition, a significant number of cars sold on the open market in Mexico are said to be stolen vehicles from the United States. Sometimes the new owner, who made the purchase in good faith from a dealer, may not know the vehicle was stolen. In other cases, the dramatic price discount provides an unmistakable signal that the car is "hot."

An increase in chop shop operations in Arizona in the late 1970's and early 1980's caused the police department to ask the attorney general for help in addressing the problem. Together, the two agencies decided to try using the State civil RICO and forfeiture statutes to remove quickly the financial incentives from chop shop operators.

Collaboration Between the Attorney General and the Police

Each chop shop case requires a high degree of coordination between the attorney general's office and the Phoenix Police

Department's Organized Crime Bureau. The police take responsibility for investigating possible chop shop operations and gathering evidence of criminal activity and racketeering. The attorney general sometimes provides advice at this stage. For example, during an undercover operation, the attorney general may check for whether there is an entrapment issue and, if so, how it should be handled. In setting up their own chop shop operation, the police may ask what their liability is if a criminal wants to use their operation and the police department ends up selling a car to an innocent purchaser who will lose the car once the vehicle is recovered at the end of the case. Normally the attorney general becomes actively involved in the case only after it is clear that there is sufficient evidence of illegal activity to warrant civil and criminal proceedings against the operators of the enterprise.

During the investigation of a chop shop enterprise, the prosecutor handling the case in the attorney general's office confers regularly with the police regarding the quantity and quality of available evidence, the estimated size of the criminal enterprise, and the results of research into the background and financial dealings of the targets. The two police officers who work with the prosecutor throughout the case frequently testify at trial on behalf of the State because they are thoroughly familiar with the investigation—for example, with the results of the executed search warrant, the details of the finances of the criminal enterprise, and the background of the principals.

Problems Encountered

The only significant problem that has occurred, according to the police department, was learning how to make maximum use of liens and temporary restraining orders so that assets would not disappear by the time the State was ready to execute on a judgment. In the first big case the police worked on with the attorney general, described in the vignette at the beginning of this case study, by the time the State received a $2.2 million judgment most of the business assets had been sold or spent. The prosecutor and police initially failed to anticipate that the target of their investigation would quickly transfer or spend down its assets before they could be seized. After a lien provision was added to the Racketeering Act, the attorney general began to use liens and temporary restraining orders to maximum advantage.

Program Accomplishments

Car theft remains a very serious problem in Phoenix. In the first six months of 1989, auto theft increased by 11 percent nationally but rose 50 percent in Phoenix. The Phoenix Police Department receives as many as 2,000 stolen car reports per month. Nevertheless, by concentrating on large-scale operations, the prosecutor and police campaign against chop shops may prevent a bad problem from becoming worse. Since 1980, the attorney general and police department have successfully completed eight cases, ranging from multi-yard setups to mom-and-pop backyard operations. In addition, an undercover investigation that lasted for more than three years led to the filing of civil racketeering complaints against five separate enterprises in 1990. More indictments are expected on another case that is still under investigation.

The cases have generated large civil judgments for the State (and criminal sentences for the chop shop operators). Total judgments as of September 1993 reached $5,103,461, with over $500,000 actually collected excluding cars, tools, or forfeitures. The group of three cases noted above netted 66 stolen vehicles worth over $600,000. Moreover, the prosecutor reports that the civil judgments have had a crushing impact on these financially motivated illegal enterprises by disrupting the whole business enterprise, not just the one or two individuals who are targeted in the criminal prosecution.

The attorney general also uses civil process to target other organized criminal operations, including gambling, narcotics, prostitution, theft, and major fraud. The prosecutor relies on A.R.S. §13-2301(D)(4) and §13-1003 as the basis for counts of racketeering and conspiracy. The attorney general may also allege that the defendants have illegally conducted, controlled, or conspired to control an enterprise, in which case the complaint has the same causes of action as the chop shop complaint. As with the chop shop complaint, the jurisdiction for the complaint rests in the Arizona Racketeering Act.

Investigations of these illegal enterprises are handled in the same manner as investigations of chop shops, except that the police rely heavily on wire taps when investigating gamblers. The normal civil remedy is forfeiture of property essential to the type of crime and cash and accounts.

Advantages of the Civil Approach

An exclusively criminal approach to dismantling chop shops has two principal shortcomings. First, criminal cases can take months to go to trial, during which time defendants can sometimes alienate or dissipate assets, making it impossible to execute any judgment the State may obtain. Second, even if a particular chop shop operator is convicted and imprisoned, the business enterprise may be unaffected and simply continue with a new person at the helm. Incarceration does

not disrupt the continued existence of the illegal enterprise, because the flow of money continues to make the criminal activity profitable for other participants in the business (or new people recruited from the outside) to take the place of the "employees" who have been incarcerated.

The use of civil RICO and civil forfeiture enables the attorney general to move against both the wrongdoers and their assets relatively quickly. The civil route is also easier because the burden of proof is a "preponderance of the evidence," not "beyond a reasonable doubt" as in criminal cases. In addition, prosecuting civilly discourages defendants from banding together and coordinating their defense. When a large number of defendants are charged with criminal RICO violations, they tend to organize quickly and present a united front to the State. In the civil context, where only one operator's assets may be forfeited, there is no incentive for other operators to get involved. The civil forfeiture sanction overcomes still another obstacle to putting rackets out of business—jury or judicial reluctance to convict or incarcerate defendants in individual criminal cases. For example, major bookies may feel they can count on light criminal sentences due to the victimless nature of their offenses, but they will not escape the jury's desire to see their profits go to taxpayers.

Finally, the program provides restitution for some victims, which the criminal process does not necessarily provide. (In a criminal case, by the time it is determined that restitution must be made, there are generally no assets available.) Both the police and the attorney general can also usually recover some of their costs. The money recovered by the police is used to pursue new investigations. As summarized by the chief of the Financial Remedies Unit:

> Forfeiture is ideally suited to the need to reduce or reverse the economic incentives of racketeering because it strikes directly at the profit motive, confiscates property used and therefore prevents its reuse, and is relatively quick. It is also doubly cost-effective in that it is inexpensive and returns property to the State at the end of the case.

Constitutional Issues

There have been no successful court challenges to the chop shop program in Arizona. The Arizona Court of Appeals has considered the question of whether dual civil and criminal proceedings may raise double jeopardy issues and determined that they do not. In *Matter of 1632 N. Santa Rita, Tuscon* (166 Arizona 197, 801 P.2d 432 [1990]), the Arizona Court of Appeals held that forfeiture by criminal conviction does not violate the double jeopardy clause. A.R.S. section 13-2314(F) (3) specifically states that a forfeiture proceeding is remedial and not punitive; the statute says that forfeiture "helps the state defray the expenses of the investigation and prosecution."

There is also a growing body of Ninth Circuit case law about civil forfeiture which likewise has not raised any barriers to the operation of the chop shop program. For example, in *U.S.* v. *$5,644,540.00* (799 F.2d 1357), the court ruled that when the government has demonstrated that it has probable cause to believe seized property was involved in a drug transaction, the burden then shifts to claimant to show by a preponderance of the evidence that property was not involved in such a transaction. If probable cause is not rebutted, forfeiture is warranted. To meet its probable cause burden, the government must only show that it had reasonable grounds to believe that property was related to an illegal drug transaction.

In another Ninth Circuit case, *U.S.* v. *McCaslin* (959 F.2d 786), the court held that the double jeopardy clause stands for the proposition that a defendant who already has been punished in a criminal prosecution may not be subjected to additional civil sanctions to deter him from crime or for retributory purposes. However, additional civil sanctions that are remedial may be imposed. Furthermore, according to the ruling, the double jeopardy clause does not apply in forfeiture cases where a criminal prosecution for the crime also occurs because forfeiture proceedings are directed against the property, not against the person. It remains unclear whether these distinctions are sufficient to escape the double jeopardy clause and the Supreme Court's opinion in *United States* v. *Halper* (490 U.S. 435 [1989]). Until the Supreme Court clarifies the issue, however, lower court rulings will govern. Finally, it may be that some forfeitures will be set aside based on the Supreme Court's recent ruling in *Austin* v. *United States,* No. 92-6073 (June 28, 1993), that forfeiture is subject to the Eighth Amendment limitation on "excessive fines." Here again, however, further rulings will be needed to clarify the meaning of "excessive."

* * *

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Endnotes

1. Mary E. Asmus, Tineke Ritmeester, and Ellen L. Pence, "Prosecuting Domestic Abuse Cases in Duluth: Developing Effective Prosecution Strategies From Understanding the Dynamics of Abusive Relationships," *Hamline Law Review* 15 (1): 115–166, 1991.

2. Several studies that have examined the effect of different police responses to domestic violence document the difficulties of reversing family violence. A pilot study in Minneapolis suggested that arresting batterers reduced the likelihood of repeat battering more than counseling the suspects or sending them away from the home for eight hours. However, while subsequent studies in two jurisdictions showed similar results, studies in three other communities found that arresting the suspect led to increased violence later on. Lawrence W. Sherman, "The Influence of Criminology on Criminal Law: Evaluating Arrest for Misdemeanor Domestic Violence," *The Journal of Criminal Law and Criminology* 83 (1): 1–45, 1992.

3. The Community Disorders Unit is also involved in the parallel criminal prosecution typically brought by the district attorney in the county in which the offense took place pursuant to the criminal section of the Civil Rights Act (General Laws Chapter 264, Section 37), which makes it a misdemeanor to "willfully injure, intimidate, or interfere with, or attempt to do so, any person in the free exercise of any right or privilege secured by the constitution or laws of the state or federal government."

4. California's Banes Civil Rights Act (section 51.7 of the State civil code) offers one solution to affording the widest possible protection against hate crime by providing that "all persons . . . have the right to be free from any violence, or intimidation by threat of violence, . . .because of their race, color, religion, ancestry, national origin, political affiliation, sex, sexual orientation, age, disability, or position in a labor dispute. *The identification in this subdivision of particular bases of discrimination is illustrative rather than restrictive*" (emphasis added).

5. In California, an individual who wishes to purchase a firearm must wait 15 days while the State Department of Justice conducts a background check of the person's criminal history and history of mental illness. However, the check is not foolproof. For example, a mentally ill person who has never been treated by a public facility will not be identified in the State's computer search of hospitalized individuals.

6. Field officers assess whether there is probable cause to believe a person is at risk to him- or herself or to others based on hearsay, observation, and questioning. Officers observe for unusual behavior and listen for disoriented thinking, such as the person's inability to say who or where he or she is. Subjects are also questioned about their psychiatric history and medications.

Chapter 3

Using Civil Remedies To Address Drug Dealing in Public and Private Housing

This chapter describes three programs, all of which use civil remedies to address drug dealing conducted in public or private housing. However, while targeting the same criminal behavior, each takes a different approach to the problem. The Manhattan district attorney uses a 125-year-old—but updated—statute originally directed at houses of prostitution to persuade landlords to evict drug dealers—or do the evicting for them. The U.S. Attorney for the Southern District of New York goes one step further—seizing property used for drug dealing. The city attorney in San Diego uses a public nuisance statute in conjunction with complaints alleging municipal code violations to obtain restraining orders and injunctions to abate drug dealing in privately owned homes and apartments in residential neighborhoods.

Case Study 5

The Manhattan District Attorney's Narcotics Eviction Program

Summary

Acting under the authority of a New York State statute,[1] the Manhattan district attorney's Special Projects Bureau has established a Narcotics Eviction Program that requests landlords to commence eviction proceedings against tenants who are using their apartments or places of business to conduct an illegal trade, such as selling, manufacturing, packaging, or storing illegal drugs. The program secures speedy evictions in cooperation with the city police department, civil court, private landlords, the New York City Housing Authority (for public housing), and the community. If the landlord refuses to act, the prosecutor, using evidence furnished by the police, initiates eviction proceedings as though it were the owner or landlord of the premises. A specially designated part of the civil court hears the case. If the court finds that the apartment or store was being used for an illegal business with the tenant's participation, knowledge, or acquiescence, the tenant may be evicted. The noncooperating landlord may be ordered to pay a civil penalty of up to $5,000 and reimburse the district attorney for reasonable attorney fees. The average eviction takes about three to five months from case acceptance to actual eviction.

Illustrative Example

For one-and-one-half years, tenants had filed numerous complaints with the New York City Housing Authority (which manages, largely with Federal funds, subsidized rental units for low-income families) regarding illegal drug sales being conducted from an apartment in their building on Madison Street in Manhattan's Lower East Side. The police had even arrested the tenant for allegedly selling heroin outside the apartment and seized an electronic currency counting machine, two triple beam scales, and nearly $23,000 in cash found inside the apartment. Twenty-one glassine envelopes alleged by police to have been thrown out of the window of the apartment contained 8.8 grains of 85 percent pure heroin. Yet the apartment continued to be used as a base for drug dealing. Using the evidence cited above, the Manhattan district attorney's Narcotics Eviction Program petitioned the court for an eviction. The leaseholder, a welfare recipient, argued that she should not be evicted because the police did not find any controlled substances in her apartment. However, the judge ruled in favor of the district attorney because the applicable civil statute does not require the prosecutor to prove that the specific illegal acts were

committed, only that the alleged conduct warrants the inference that the premises are being used for the illegal purposes. The tenant was evicted, and the Housing Authority re-rented the apartment to another tenant.

Statutory Basis

The legal basis for the district attorney's Narcotics Eviction Program to evict tenants engaged in drug dealing is section 715 in the New York State Real Property Actions and Proceedings Law enacted in 1868 to abate "bawdy house" activity. Section 715 was amended in 1947 to include "any illegal trade, business or manufacture." The section provides in pertinent part:

> An owner or tenant . . . of any premises within two hundred feet from other demised real property used or occupied in whole or in part as a bawdy house...or for any illegal trade, business or manufacture..., or any duly authorized enforcement agency of the state or of a subdivision thereof, under a duty to enforce the provisions of the penal law or of any state or local law, ordinance, code, rule or regulation relating to buildings, may serve personally upon the owner or landlord of the premises so used or occupied, or upon his agent, a written notice requiring the owner or landlord to make an application for the removal of the person so using or occupying the same. If the owner or landlord or his agent does not make such application within five days thereafter; or, having made it, does not in good faith diligently prosecute it, the person, corporation or enforcement agency giving the notice may bring a proceeding under this article for such removal as though the petitioner were the owner or landlord of the premises . . . . Proof of the ill repute of the demised premises . . . or of those resorting thereto shall constitute presumptive evidence of the unlawful use of the demised premises required to be stated in the petition for removal. Both the person in possession of the property and the owner or landlord shall be made respondents in the proceeding.

Procedure

Screening Cases

Cases come to the attention of the Narcotics Eviction Program primarily as a result of an ongoing review of search warrants executed by the police in Manhattan for suspected narcotics offenses. Program staff examine the warrants to determine whether drugs or drug paraphernalia were seized from any residential or commercial rental units. For the matter to be considered further, the police records must reveal evidence consistent with the operation of a drug business. Typically, the amount of heroin, cocaine, or other controlled substance seized must be at least an eighth of an ounce—a felony-level weight in New York. The statute does not authorize government action for illicit personal drug use.

Even without the recovery of drugs, the program may consider bringing civil action if there is other evidence that drugs are being sold from the premises, such as large amounts of cash, tools for packaging drugs (such as large quantities of crack vials or piles of glassine envelopes), triple beam scales, cutting agents and mixes, or records of drug transactions.

An attorney or paralegal then examines additional evidence that might lead to dropping the matter, such as who the tenant is, his or her age and financial status, whether any person arrested is indeed the leaseholder, whether the tenant is a confidential police informant, and whether any related criminal action against the person is pending. For example, the program will not take civil action if it finds out that the tenant is an innocent elderly woman whose grandson went to live with her, was arrested for drug dealing, and is on the way to prison.

In addition to evidence from executed search warrants, the program receives referrals from the police department's community police officers whenever a field officer's complaint report suggests the presence of a drug-trafficking operation. Individual residents, groups, landlords, and attorneys representing landlords also contact the program directly with information about drug activity in their buildings.

Notification

After an attempted courtesy telephone call, the Narcotics Eviction Program informs the landlord by letter of the suspected drug dealing and requests the initiation of eviction proceedings. A copy of the Real Property Actions and Proceedings Law and a description of the program are enclosed in the letter. A copy of the executed search warrant, inventory of property recovered in the search, and the laboratory report's analysis of any drugs seized are sent to the landlord's attorney.

A paralegal telephones approximately two weeks later to verify that the landlord and the landlord's attorney received the materials and to inquire about the eviction proceedings. If the landlord fails to take action, the prosecutor sends a

second letter, warning that if confirmation of an eviction proceeding is not received by a specified date, the district attorney's office will "commence eviction proceedings as the petitioner" with the tenant and landlord as respondents. The landlord is warned that if the court finds that relief is warranted, it may direct the landlord "to pay a civil penalty not exceeding $5,000 and to reimburse the petitioner for reasonable attorneys' fees and the costs of the proceedings."

In the vast majority of cases, the landlord agrees to bring the eviction action as the petitioner in civil court. However, the Narcotics Eviction Program prosecutes cases not only in the place of recalcitrant landlords but also, on occasion, on behalf of landlords who are afraid of retaliation from a drug dealer or who cannot afford to retain private counsel. When intimidation is the reason the prosecutor takes on the case, however, the judge may require the landlord to pay for the litigation. Tenants are notified of the proceedings by the petitioner—that is, the landlord or Narcotics Eviction Program.

The Narcotics Eviction Program litigates all cases in Manhattan involving the New York City Housing Authority's subsidized rental units in the borough. The housing authority's position is that a consent decree it entered into with tenant groups in 1971 effectively prevents it from complying with a prosecutor's request to effect eviction proceedings in a timely manner on its own because of the lengthy administrative hearing process it must afford every tenant it attempts to evict on the grounds of nondesirable behavior. However, although named pro forma as a respondent in every case involving public housing, the housing authority works cooperatively with the program to remove the drug-trafficking tenant. As a result, no penalties or reimbursement fees are ever sought from the authority.

By contrast, the program always tries to motivate private landlords—who constitute the bulk of its cases—to do their own litigation, using their own private counsel and the assistance, as needed, of a program assistant district attorney and paralegal.

Trial

At the initial court appearance, the judge has the participants agree on the issues that are in dispute, and adjourns the case for trial. While the tenant is afforded an opportunity to obtain private counsel or seek representation from a legal services agency in New York City that provides indigent defendants with free counsel, most tenants do not seek legal counsel. To date, almost every landlord has appeared with private retained counsel.

At trial, the landlord (or the program prosecutor substituting for the landlord) must prove by "a fair preponderance of the evidence" that an illegal trade, activity, or business is being conducted at the apartment or store. The landlord must also prove that the tenant knew, or should have known, that the illegal activity was taking place and failed to take reasonable steps to prevent it.

The program arranges for testimony by a police officer involved in the case. It is the program's policy always to present evidence from a police officer who went into the apartment and who can testify under oath as to his or her observations and the evidence recovered. However, the prosecutor almost never provides the names of undercover police officers or asks them to testify so as not to compromise their safety or their value in future criminal investigations by "blowing their cover." This policy can sometimes make it difficult to have evidence admitted that an undercover buy actually occurred when such evidence may be crucial to establishing the presence of a criminal business at the apartment. Neighbors are rarely called upon to testify in support of eviction proceedings.

If the tenant does not appear, the trial becomes an uncontested hearing, ending, if the evidence is found sufficient, with the signing of an eviction order to be executed by the city marshal after 72 hours' notice by the landlord's attorney.

Program Organization, Staffing, and Resources

Six assistant district attorneys in the Special Projects Bureau, excluding the bureau chief and deputy, each devote about one-quarter time to the Narcotics Eviction Program. The bureau chief and deputy spend about half time. Two paralegals work full-time, and three other paralegals spend about half time on the program. There is also a full-time program secretary. The program's automated case tracking system permits staff to monitor the status of all cases from referral to final disposition, and to generate various statistical reports and case listings.

To be considered for a position in the program, attorneys must have been in the prosecutor's office for at least two years. They must have an interest in civil law and a desire to work with the community, including attending community meetings. The Special Projects Bureau chief instructs new staff in their responsibilities.

The program's operating budget is about $300,000 a year, with most of the money provided by the City of New York as

part of the district attorney's office budget. Additional funding comes periodically from State and Federal Government grants.

To expedite evictions, New York State established a special part of the Manhattan civil court to handle cases brought under the Narcotics Eviction Program. One judge hears all the eviction cases. Generally, motion practice is limited under these special proceedings, and cases get scheduled for trial within two to four weeks. There is now a Narcotics Eviction Program modeled after the Manhattan program in each of the other four city district attorneys' offices, and special courts for these cases have been established in those boroughs as well.

Program Evolution

Originally, it was the community that launched the use of civil remedies to evict drug dealers, first by bringing the initial case to court and subsequently by placing pressure on the district attorney's office to take action of its own to address the problem.

How the Program Started

> In 1986, the owner of a three-story brownstone on Manhattan Avenue died intestate and without heirs, and the city's public administrator was made responsible for the building. Eventually, drug dealers took over the building and the entire neighborhood degenerated. Neighbors complained to the police, who made several raids and numerous arrests, but the dealers would just return to the apartment as soon as they were bonded out—or else other dealers would take their place. The public administrator, too, was given notice of the illegal drug activities but failed to take any action. As a result, 26 homeowners and tenants who lived within 200 feet of the premises hired a housing attorney, subpoenaed police officers to testify, and obtained a judgment under section 715 of the Real Property Actions and Proceedings Law, evicting all the occupants and boarding up the building. The court placed a lien on the building and awarded costs and attorney fees to the petitioners to be paid from the proceeds of any future sale of the premises.

Hundreds of drug dealers in Manhattan conduct their business from private and public buildings. In the past, when law-abiding tenants complained about drug-dealing neighbors, most landlords—including the housing authority—were usually unable or unwilling to evict the drug dealers: eviction procedures are time consuming, expensive, and typically futile. At the same time, landlords who tried to initiate eviction proceedings demanded that law-abiding tenants testify against their drug-dealing neighbors because landlords had no legal access to police arrest reports to present in court as evidence of illegal activity in their properties.

Because the case described above was such an exception—quick, cheap, and effective—it attracted a great deal of attention to the Real Property Actions and Proceedings statute it was based on. As a result, the Manhattan district attorney's office, already under criticism (as were the police department and other city agencies) from the community for failing to deal with drug traffickers operating out of rented premises, conceived of the idea of using section 715 systematically to evict drug dealers. The district attorney's office realized that many of the drug dealers were conducting their trade with impunity because—unlike the unique case described above which piqued their interest—local residents and neighbors were generally too afraid of retaliation to testify publicly about the illegal activities. In addition, section 715 would provide a lawful means, prosecutors realized, for the district attorney to share certain police reports with landlords for the purposes of facilitating evictions.

Finally, the district attorney's office realized that using section 715 would overcome another barrier to evicting drug-dealing tenants. As noted above, following a class action suit brought by tenants, the Housing Authority had in 1971 signed a consent agreement that effectively emasculated its eviction powers by requiring a series of time-consuming hearings and appeals before it could evict any tenants. Prosecutors anticipated—and courts subsequently ruled—that the district attorney did not need to afford an administrative hearing for a housing authority tenant because the requirements of due process would be met by such procedural guarantees as bringing cases only after notice, permitting the tenant to appear with an attorney, presenting the evidence in open court, and providing for cross-examination (*N.Y. County District Attorney's Office* v. *Oquendo,* 147 Misc.2d 125 [N.Y.C. Civ. Ct., N.Y. Co. 1990]).

Collaboration With Police and the Community

The Narcotics Eviction Program that was established to apply section 715 began with a single assistant prosecutor and one paralegal. The operation expanded when it began coordinating its activities with police and the community.

Cases were originally culled only from a review of search warrants executed in the borough. When the district attorney's

office persuaded the Manhattan police precincts to notify the program of their drug cases, prosecutors could also consider possible civil action even when no search warrant had been executed. The program reciprocates the police precincts' sharing of cases by informing police commanders of the results of every case it handles. Prosecutors are careful not to jeopardize the criminal action that the State almost always brings against the drug-dealing occupants whom the Narcotics Eviction Program is targeting for eviction along with the tenant of record who has sublet the apartment or allowed non-tenants to move in. As a result, the program may defer the commencement of the civil case—which would proceed to trial much more quickly than the criminal case—until completion of the criminal proceeding to prevent the defendant from gaining access to testimony in the civil case, which the prosecutor would be required to make available to the defense in a subsequent criminal proceeding. In the vast majority of eviction cases, however, eviction actions are not deferred pending disposition of any corresponding criminal actions. The civil case may be delayed or dropped if the tenant of record turns out to be a confidential informant in the criminal case or is cooperating with law enforcement to convict the drug dealers.

Prosecutors discovered that police officers unfamiliar with the program could be confused about testifying in a civil case by the different rules of evidence and the need to cooperate with the landlord's attorney and the landlord. As a result, the program established the policy that a paralegal must meet with every officer before every hearing to explain the nature of the civil proceeding, attend the session with the officer, and confer with the landlord's counsel.

Relations with the police continued to improve over time as personal contacts increased between the chief of the Special Projects Bureau and local police administrators. For example, if a list of search warrants is needed immediately, it takes only a phone call to have the police fax the list the same day. At times it can be difficult to arrange for police officers who have the needed evidence to appear at the trial because they are usually on special task forces that limit their availability to testify during normal court hours. Now, however, the Special Projects Bureau chief can telephone the precinct commander to arrange for hard-to-reach officers to testify. The chief can also ask for officers from the community policing units to visit apartments or stores after successful evictions to report on whether any drug activity has resumed.

According to the Special Projects Bureau chief, there would be no program without the involvement of the community. For example, the net for possible cases was expanded when the Special Projects Bureau chief arranged for the district attorney's Community Affairs Unit, whose staff meet frequently with the borough's 12 community boards, to notify the program of alleged drug dealing to investigate. In addition, only if neighbors and law-abiding tenants complain to the police will police—and then the program—be able to obtain the evidence needed to take action. As a result, program prosecutors and paralegals regularly attend law enforcement, community, and landlord and tenant association meetings to explain the Narcotics Eviction Program, encourage tenants to report illegal drug behavior, and emphasize that neighbors who report drug dealing will be protected from retaliation from the drug dealers by not having to testify in court and remaining anonymous.

Finally, along with some follow-up monitoring by the police, feedback from the community is essential to learn whether an eviction has been effective. Only if other tenants start complaining again in the event the problem recurs will the program know that it has to take action once more.

Problems Encountered

The Manhattan district attorney's office occasionally experiences negative publicity and court challenges when it becomes involved in evicting a tenant whom the public and the tenant's attorney regard as an innocent victim who did not acquiesce—much less participate—in the drug dealing:

> An apartment in a housing project was the subject of numerous complaints of drug dealing for over two years. The tenant of record, a 74-year-old man, had allowed a prostitute friend to live with him, but later her pimp also moved in, apparently over the man's objections. The pimp began selling drugs from inside the apartment, adversely affecting the quality of life of the other tenants. When the elderly man told the couple to leave, the pimp beat him up so badly that he had to be hospitalized. When the man went home, he was too afraid to register any more complaints. The district attorney then brought a civil action to evict all three of the parties. The pimp and the prostitute left the apartment after an eviction action was commenced against the leaseholder. The program arranged for the leaseholder to be relocated secretly to a senior citizen's home, because if he remained at the same apartment the pimp and prostitute would force their way back in.

Some observers believe that the district attorney's office, under pressure not to appear "sympathetic" to drug dealers, is less scrupulous than it should be about targeting tenants who may be innocent of wrongdoing. However, the Special

Projects Bureau chief reports that the office is careful to proceed only when the participation, knowledge, or acquiescence of every tenant is clear, to avoid evicting blameless people and subjecting them to litigation. For example, a tenant in whose apartment a large quantity of drugs was found inside the oven may claim, "I never saw it," to which the judge responds, "You mean you never cook?" Similarly, many targeted tenants routinely claim they were "out of the country," "asleep," or otherwise incapable of knowing that someone—for example, their teenage son—was engaged in drug dealing in their apartment; yet in almost every instance tenants cannot produce airline ticket stubs or other documentation to discredit the evidence against them. In fact, the program's success is largely attributed to this emphasis on meeting stringent evidentiary requirements before commencing any eviction action. Eviction proceedings begin in court in only about one-half of all cases screened.

Program Accomplishments

History of Successful Evictions

Between June 1988 and August 1993, the Narcotics Eviction Program was successful in putting a stop to drug dealing in 1,986 apartments or stores. Of these properties, tenants vacated the premises before trial in 1,190 instances, while the court issued evictions in 796 cases. The large majority of all actions involved residential units. On 105 occasions, the program allowed the tenant to remain on condition of good behavior, typically because the prosecutor was convinced that the tenant was not involved in the illegal act and the offender had been removed and would not return.

The program has referred several cases to the U.S. Attorney's office, which has legal authority under Federal civil statutes to seize an entire building if the landlord fails to take action. (See the following case study for a description of the U.S. Attorney's forfeiture program in New York City.) Usually, these referrals involve large apartment buildings in which drug dealing is occurring in several units. In a few instances, the district attorney has referred cases that involved landlords who refused to begin eviction proceedings, perhaps because they considered the $5,000 fine trivial or because they were receiving payoffs from the drug dealers.

The court has dismissed only 20 cases—1 percent of the program's evictions. Most of these cases have been dismissed due to technicalities in which the landlord failed to follow proper procedure. Other cases have been dismissed because of insufficient evidence that an illegal trade was being conducted or because the landlord (or prosecutor) did not prove that the tenant was aware of the criminal activity. For example, in one case the prosecutor supported a landlord's action to evict a 68-year-old leaseholder and her two daughters, claiming that while the mother was not selling drugs herself, she knew that her daughters were and refused to stop them. However, the judge ruled for the respondent, holding that the evidence did not demonstrate that the tenant must have known of and thereby acquiesced in the illegal drug activity in view of her advanced age, poor health, and apparent lack of sophistication, the early morning hours when the drug sales were transacted, and the absence of narcotics in open view except near the dealers selling them. The tenant was allowed to remain on condition that the offending members of the household not return to the apartment (*Lloyd Realty Corp.* v. *Albino,* 146 Misc.2d 841 [N.Y.C. Civ. Ct., N.Y. Co. 1990]).

Evicted Drug Dealers Face Disruption

Program staff and observers report that the program's long-term effectiveness is perhaps best measured by the small number of new complaints from other neighbors and tenants once a drug dealer has been evicted, even though the prosecutor's office encourages them to report any new illegal drug trafficking that occurs in the re-rented premises.

The drug dealers may set up shop in another apartment building or neighborhood and make life miserable for a new set of neighbors. However, according to police and the Special Projects Bureau chief, drug dealers who have to relocate their business typically have their relationship with their clients and suppliers severed. Dealers who try to reestablish their business in a new location may have to compete—sometimes violently—with well-established drug dealers protecting their own turf in the new neighborhood. Drug addicts in the new neighborhood may also be unfamiliar with the particular "brand name" of drug the incoming dealer is used to selling. Regardless of the fate of evicted dealers, public housing units from which they have been evicted become available to some of the city's more than 200,000 families on the five-year waiting list to enter subsidized housing.

Advantages of the Civil Approach

The limitations of a criminal prosecution in deterring drug dealing in apartment buildings or storefronts have been suggested above: criminal matters take months to go to trial, during which time the defendants typically remain on the

premises; and even when the defendants are convicted, brief jail sentences or simply probation (because of jail overcrowding) enables offenders to return quickly to their former base of operations. Dealers who are sentenced to long prison terms are simply replaced by other dealers in the units because the leaseholder of record has not changed. As noted, the housing authority cannot evict tenants without a hearing and appeal process that can take years—with no guarantee of success. Landlords who wish to evict such drug dealers are stymied by lack of access to evidence from police reports and by neighbors who are afraid to testify against other tenants in public (dealers often terrorize neighboring tenants so as to stay in business unmolested). Even with compelling evidence, most landlords are said to regard the process for effecting an eviction through normal channels as a tremendous hassle that is best avoided.

In addition to overcoming these barriers, the civil approach has the advantages of both a tempting carrot and a powerful stick. The carrot: eviction enables landlords to raise the rent with a new tenant—rent control and rent stabilization procedures in New York City make it very difficult to increase rents with existing tenants. The stick: not only can the civil court fine landlords $5,000 for noncompliance, landlords realize that the case can be referred to the U.S. Attorney for a forfeiture proceeding if they do not make a good faith effort to evict the drug dealer.

Finally, with the civil approach, the standard of proof of "a fair preponderance of the evidence" makes it possible to evict tenants on the basis of a single police witness (and representative of the landlord or owner). In addition, the landlord does not have to establish that the tenant him- or herself is involved in the illegal activity, just that an illegal business is being conducted on the premises which the leaseholder is—or ought to be—aware of.

Constitutional Issues

There have been no successful challenges either to the Real Property Actions and Proceedings Law or to the Narcotics Eviction Program's application of the statute. One respondent challenged a decision on the grounds that the court should suppress the evidence used to find that he had engaged in drug dealing because the evidence was the fruit of an illegal search and seizure. The appeals court ruled that in Narcotics Eviction Program cases the tenant is not entitled to a suppression hearing because the proceeding is civil. However, where the evidence of narcotics activity has been suppressed at a related criminal proceeding, the civil court in a subsequent eviction case must employ a balancing test in ruling on the admissibility of such evidence. The court must weigh the potential deterrent effect of suppressing the evidence on future police misconduct against the societal costs that would result from the exclusion. In the criminal trial, a technical flaw in the warrant had dictated a suppression of the evidence. Nevertheless, the evidence was still found to be admissible in the eviction case because the deterrent effect was outweighed by the social cost of losing evidence material to establishing the deleterious impact of drug dealing on the residents of the respondent's public housing building (*New York County District Attorney's Office* v. *Mendez,* N.Y.L.J., Aug. 28, 1991, at 22, col. 1 [App. Term, 1st Dept.]).

Other unsuccessful challenges have claimed that eviction was unjustifiable because the parties to be evicted were too old or too young, would become homeless, or had lived in the apartment for many years. However, many of the individuals targeted by the program are absentee tenants who live somewhere else and simply use—or allow others to use—the apartment for drug trafficking.

Impartial observers have identified practices that could provide the basis for successful challenge to the program. First, they warn that some cases may raise credible constitutional issues on appeal if judgments are won against arguably "innocent" co-tenants—especially the elderly—who have either been terrorized into permitting the drug-dealing occupant to remain on the premises or who are the dependent—typically underage—family members of the drug dealer and are themselves not involved in the criminal activity. Second, observers caution that consistent with the language in the authorizing statute, the program should target only transactions in the nature of continuing, planned, or complete sales—that is, a trade. It is also essential in any program of this nature that the tenant be given notice and an opportunity to be heard prior to any order of eviction, and that the government bear the burden of proof.

Finally, while a concern might be raised that prosecuting a tenant both criminally and civilly might violate the Constitution's prohibition against double jeopardy, legal scholars believe that the eviction would not be double punishment, since removing someone from an apartment constitutes an administrative remedy that serves reasonable regulatory goals of both abating a public nuisance and remedying a violation of the tenancy. Only the criminal case results in actual punishment for the drug dealer.

* * *

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Case Study 6

United States Attorney for the Southern District of New York's Use of Property Forfeiture Proceedings To Evict Drug Dealers

Summary

The United States Attorney for the Southern District of New York uses a Federal civil forfeiture statute to evict drug dealers from privately owned dwellings by threatening or actually effecting the seizure of entire buildings. The statute, which was amended to define leaseholds as personal property, enables the U.S. Attorney to seize a leasehold when the Government can demonstrate that there is probable cause to believe that the property is being used in the commission of a felony. With the cooperation of the New York City Police Department, which provides evidence of drug dealing, and the assistance of affected neighbors, who supply affidavits, the U.S. Attorney's Asset Forfeiture Unit secures comparatively quick evictions of drug dealers whom landlords are unwilling or unable to evict. The U.S. Attorney, rather than the district attorney, handles these cases because New York State does not have a civil forfeiture statute.

Illustrative Example

A family living in a high-rise apartment building was operating a heroin ring that was so successful that customers and dealers dominated the building's elevators, preventing elderly and infirm residents from getting to or leaving their apartments. Police and prosecutors had received numerous complaints that the apartment was a haven for drug dealers but had been unable to solve the problem. The U.S. Attorney, after finding ample evidence of drug dealing by reviewing citizens' affidavits and records of police surveillance and undercover activity, assessed the landlord's knowledge of the drug dealing. Because the landlord did not live in the city and was unaware of the illegal activity, to effect the drug dealers' eviction the U.S. Attorney moved to seize the leasehold by establishing probable cause to believe that it was being used in connection with a felony. The Government obtained permission from a judge to seize the leasehold without prior notice to the landlord based on the exigent circumstances of the case. After the Government threatened to confiscate and sell the property, the landlord agreed to enter into a consent agreement with the U.S. Attorney, promising to evict the drug-dealing tenants, correct municipal code violations, and refurbish the affected unit as a condition of recovering the building. The remaining tenants and other residents in the neighborhood report that the drug dealing, with its attendant disruptions and violence, has stopped.

Statutory Basis

The U.S. Attorney uses 21 U.S.C. Section 881,[2] which provides in pertinent part, that:

> [a]ll real property, including any right, title and interest in the whole of any lot or tract of land and any appurtenances and improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of [a felony violation of Chapter 21 of the U.S. Code]

is subject to seizure and forfeiture to the United States, and no property right shall exist in such property.

Civil forfeiture is an *in rem* action brought against an asset—in this case the leasehold—because of its connection to criminal activity. For a drug asset to be subject to civil forfeiture, the Government must demonstrate that there is probable cause to believe it is linked to criminal activity.

Procedure

The U.S. Attorney's Asset Forfeiture Unit (part of its Criminal Division) handles all civil forfeiture litigation against landlords whose premises are being used to deal drugs. The unit's decision to file a complaint for civil forfeiture gener-

ally represents the culmination of several months of research and investigation by the U.S. Attorney, the New York Police Department, and the Drug Enforcement Agency (DEA). Typically, law enforcement officers who observe or receive repeated complaints from residents about suspected drug activity initiate a case by going to the U.S. Attorney. (Often there is a companion criminal case already pending against the offending tenants.) Once the police have successfully made an undercover buy, the U.S. Attorney obtains a search warrant. A subsequent search enables Federal and local law enforcement personnel to confirm the illegal activity.

Meanwhile, the forfeiture unit collects extensive documentation to accompany the complaint, including a copy of the lease, fruits of the search, a record of tenant complaints, and police affidavits describing the drug activity observed. In deciding whether to litigate the case, the unit looks at whether the drug activity meets the statutory requirements for a forfeiture action, the strength of the evidence, and the human side of the situation (for example, whether the drug dealers are the grandchildren of an innocent grandparent who is the legal leaseholder).

If the forfeiture unit decides to pursue the case, the U.S. Attorney presents a complaint to a Federal magistrate for approval alleging probable cause to support civil forfeiture under section 881. Often, the affiant (the police investigator or DEA case agent working the location or supervising the informants) attends the hearing. The U.S. Attorney then files a summons and the complaint, and a copy of each is posted at the premises in question. The landlord is also notified by mail of the proceedings. In the very rare circumstance—such as the case described in the vignette above—in which the Asset Forfeiture Unit proceeds without notice, a U.S. assistant attorney first obtains permission from a judge on the grounds of the exigent circumstances exception.

Normally, the drug-dealing tenants default on the complaint and, unless there is a parallel criminal proceeding, are not heard from again. The landlord, cognizant of the risk of losing his or her property, at this stage usually negotiates a settlement of the case. According to forfeiture unit attorneys, landlords often know that their property is being used for drug dealing but feel ill-equipped to deal with the problem, even if they could afford to hire security personnel. However, some building managers have facilitated or actively engaged in the illegal transactions. When this is the case, the superintendents become defendants in a parallel Federal criminal proceeding.

In the typical settlement, the U.S. Attorney enters into a five-year consent agreement with the landlord to evict the tenants, correct municipal code violations, make improvements in lighting and security, and refurbish the unit(s) as a condition of recovering the leasehold. The U.S. Marshal keeps the rent money in an escrow account for the landlord until the leasehold is returned to the landlord, but the property owner must pay for the expenses of the seizure—in one case, for example, payment of an armed guard at the property for three months. The forfeiture unit has also targeted commercial property, seizing six leases in two buildings in which grocery stores were selling crack.

In the few instances in which the landlord is uncooperative or has abandoned the property, the forfeiture unit pursues the litigation and enters into occupancy agreements with the building tenants. The U.S. Marshal, in effect, becomes the landlord and, through a contracted property manager, performs all of the typical landlord functions, including the collection of rent and the effectuation of repairs. The Marshal then seeks a suitable buyer for the property as soon as possible, either through the traditional sale from the courthouse steps or, more frequently, the use of brokers, sales agents, auctioneers, and other contract sales professionals. Immediately following the sale of forfeited property, the proceeds of the sale are deposited into the Federal Asset Forfeiture Fund (see below). Sometimes the seized property has little value and is in such bad shape that it cannot be repaired or made safe, in which case the Government occasionally loses money on the forfeiture.

Program Organization, Staffing, and Resources

The U.S. Attorney's Asset Forfeiture Unit handles a wide range of forfeiture actions, of which property involving drug dealing is just one. The unit, which has grown from a single attorney to 8 full-time lawyers and 10 paralegals, devotes an average of about 20 percent of its time to forfeiture actions against landlords of buildings being used for drug dealing. Lawyers in the unit go through six months of training in the General Crimes Unit, which handles "buy and bust" cases, theft of mail matters, and similar routine cases. This training gives the lawyers a chance to learn about the criminal side of the office, since lawyers in the forfeiture unit handle both civil and criminal forfeiture matters. The same attorney handles both the civil and criminal forfeitures for the same case to facilitate coordination of the forfeiture actions. In addition, the civil attorney becomes a part of the criminal team if there is a criminal prosecution, conferring with the criminal prosecutor during all criminal court proceedings connected to the case.

In selecting attorneys for the unit, the unit chief prefers individuals with civil litigation skills. She also chooses lawyers who are extremely mature and have a great deal of common sense—for example, to know not to seize an elderly grandmother's apartment because a grandchild is dealing drugs.

Staff salaries and overhead are paid for by the U.S. Department of Justice from appropriate funds. However, contract personnel, data processing, training, and other forfeiture-related out-of-pocket expenses other than salaries of U.S. Government employees are paid from the U.S. Department of Justice Asset Forfeiture Fund created by the Comprehensive Crime Control Act of 1984 and codified at 28 U.S.C. 524(c). Begun in 1985, the fund was established as a repository for forfeited cash and the proceeds of sales of forfeited property from all cases involving the Department of Justice. The size of the Asset Forfeiture Fund varies from year to year but has been over $500 million each year since 1989. Deposits to the fund in 1992 totaled $531 million.

Although the fund is housed in the Treasury Department, establishment of a separate account for these moneys allows proceeds of successful forfeiture cases to be reinvested directly into law enforcement efforts rather than deposited in the Treasury General Fund. In fiscal year 1993, the 94 U.S. Attorneys nationally received about $12.6 million from the fund as follows: $500,000 for case-related expenses (for example, travel, transcription services), $10,692,000 for contract employees, and $1.4 million for forfeiture training and printing.

The Department of Justice also shares Federal forfeiture proceeds, including cash and tangible property (for example, vehicles, vessels), with participating law enforcement agencies. The amount of money shared with each agency is determined on a case-by-case basis reflecting the overall level of participation of each agency, including not only the amount of manpower committed to the investigation but such considerations as whether the local law enforcement agency originated the information that led to the seizure or initially identified the asset for seizure. In a simple case in which a local police department (for example, the New York City Police Department) works with the U.S. Attorney and both agencies contribute an equal amount of time and effort to the case, the net proceeds of the forfeiture would be divided evenly between the local police department and the Department of Justice Asset Forfeiture Fund. In fiscal year 1992, $242.6 million in forfeited cash and tangible property was shared with State and local law enforcement agencies nationally, with a total sharing of over $1 billion since the fund was established. (Information is not available for how much of the fund's moneys were shared with individual local U.S. Attorney offices and local law enforcement agencies.) Of course, it should be noted that monetary success may carry negative legal implications. For example, the Supreme Court in *United States* v. *James Daniel Good Real Property* (114 S.Ct. 492, __U.S.__ [1993]) was particularly concerned to protect the due process rights of the defendant in a forfeiture proceeding "where the Government has a direct pecuniary interest in the outcome of the proceeding."

Program Evolution

How the Program Started

Illegal drug dealing is a major problem in New York City that ties up a tremendous—and increasing—amount of criminal justice system resources. The 1,830 sworn officers in the Police Department's Narcotics Division alone make 100,000 drug-related arrests a year. Many of these narcotics sales take place in apartment buildings.

The U.S. Attorney began to target drug dealers through building forfeiture actions in 1987 when the office was approached by city police administrators who were frustrated by the failure of repeat arrests and criminal prosecutions to stem the tide of drug dealing in certain apartment buildings. The U.S. Attorney established a task force to investigate whether civil forfeiture could be used to help solve the problem.

As all the involved parties gained experience, general rules of procedure evolved. For example, at the beginning, cases were brought against isolated apartments within a building occupied by otherwise law-abiding tenants. However, because every agency involved in the forfeiture procedure has limited resources, the U.S. Attorney decided to focus exclusively on buildings in which there are several tenants involved with drug dealing and the trafficking is disturbing other residents. For instance, one operation was directed at a 64-unit apartment building in which 21 tenants were evicted. One hundred law enforcement officers participated in the virtual military takeover of another building in which drug dealers were using 19 of 40 apartments to sell narcotics.

Collaboration With Police and Community

The Asset Forfeiture Unit coordinates and cooperates closely with several law enforcement agencies in each forfeiture proceeding. For example, since the Drug Enforcement Administration (DEA), city police department, or the U.S. Marshals Service may execute the warrant, the forfeiture unit coordinates their efforts to avoid duplication. When the

Marshals service is ready to seize and seal a property, the forfeiture unit arranges preseizure planning meetings with all involved agencies to decide who will go into the building and when.

Community concern and support has helped the U.S. Attorney identify and develop cases. Frequently the police investigate and verify drug dealing only in response to neighborhood complaints. Citizen affidavits are often included with the materials accompanying the forfeiture complaint, and they assist the Asset Forfeiture Unit in meeting its "probable cause" burden.

Although the U.S. Attorney's office does not meet regularly with community groups, its community liaisons have provided the Asset Forfeiture Unit's name to these groups and encouraged them to call with any information they obtain about drug dealing in a particular building. In addition, as news of successful evictions and forfeitures of buildings has spread, unit attorneys believe that residents of other buildings infested with drug dealers have been increasingly emboldened to complain and cooperate with police investigations.

Problems Encountered

The U.S. Attorney's program requires coordination with Federal DEA agents and local police. Initially there were some problems in ensuring that all involved agencies were "up to speed" on any particular case. There were instances in which various participating agencies were not fully informed about the status of a forfeiture proceeding or confused about how the case would develop. For example, initially the forfeiture unit found that when the time came to effect the seizure of a property, the Marshals' office sometimes did not have enough deputy marshals on hand to do the job. The forfeiture unit solved the problem by bringing the Marshals' office into each case at the beginning of the proceedings to ensure full cooperation from the agency and provide plenty of advance notice of what the manpower needs of the case might require. This type of frequent communication, good case management, preseizure meetings, and experience has resulted in a successful working relationship among the various branches of law enforcement.

Program Accomplishments

As of the end of 1993, the Asset Forfeiture Unit had 101 active civil forfeiture cases involving properties being used for drug dealing. From its inception to the end of 1993, the unit had completed the seizure of 117 pieces of property, including 8 commercial establishments. Seven of the 117 seized properties were returned after settlement discussions, and 6 were forfeited judicially after trial. The remaining 104 properties were either forfeited after the owners defaulted or are still in settlement discussions. Of the residential properties seized, about 70 percent represent single-family homes and 30 percent multiunit buildings.

The longest a normal civil forfeiture case takes from filing the complaint to actual forfeiture is one to two years. However, when landlords default—as they do most of the time—the case is concluded in only 30 to 60 days.

Very rarely is a case dismissed. If forfeiture unit attorneys do not have overwhelming evidence, they settle the case. If an innocent owner is involved, the case is dropped. In one of the few cases the unit has lost, the owner of a bar convinced the court that he used the ammonia he kept in his bathroom not to cover up signs of drug use but rather to douse drug dealers to get them off his property.

A common criticism of the civil forfeiture strategy is that the approach does not necessarily prevent a drug dealer from resuming operations at another location. The forfeiture unit responds that offenders are prevented from resuming business at least temporarily if they are sent to prison as a result of the parallel criminal prosecution. In addition, the U.S. Attorney believes that the disruption that dealers experience following seizure and eviction raises their cost of doing business and cuts them off (if only temporarily) from their suppliers and customers.

The forfeiture strategy benefits the besieged neighbors of the dealer, who are usually desperate to see the drug dealing end but feel powerless to solve the problem on their own. Neighbors report that a drug operation tends to attract violence and other criminal activity, which stop when the dealer is evicted. Tenants who have been plagued for years by the annoying and often frightening behavior of their drug-dealing neighbors are reported to be delighted to see these people evicted. The unit also assists honest landlords who are often anxious to reclaim their property and rent to law-abiding tenants but are frequently afraid of the dealers and unsure about how to proceed.

Advantages of the Civil Approach

A significant advantage of the U.S. Attorney's civil approach is the comparative ease and speed with which the Government can act to abate drug dealing in private residential apartments: what used to take one-to-three years in a criminal prosecution now usually takes about six weeks. The lower burden of proof—probable cause as opposed to beyond a

reasonable doubt—in large part explains this phenomenon, because while U.S.C. 881 requires an illegal act, a criminal conviction of a person is not necessary to achieve a civil forfeiture.

Another advantage of civil forfeiture is that it provides for forfeiture regardless of the current status of the property's owner. Even if the owner is dead, has fled, or cannot otherwise be reached, the property remains forfeitable, since the property itself, and not any individual, is the "defendant" in the suit.

The U.S. Attorney's goal is to reduce the sale of narcotics by taking the profit out of drug dealing. As noted, by making it difficult for drug dealers to remain in contact with steady customers, eviction raises drug dealers' cost of doing business. This disruption makes the illegal enterprise less profitable and therefore possibly less attractive. For example, multiple arrests and prosecutions over many months at two stores that were being used as drug emporiums had failed to stop the narcotics trafficking; as a result, the district attorney and city special prosecutor for narcotics asked for help from the U.S. Attorney's office, which in a few months was able to close both stores through civil litigation, forcing the dealers either to go out of business or to try to muscle in on some other dealer's territory.

Constitutional Issues

Until 1989, the U.S. Attorney's forfeiture unit asked a Federal magistrate to sign a writ of seizure, which then enabled the U.S. Marshals Service and local police to arrange to seize and seal a targeted dwelling. The U.S. Attorney took the position under 21 U.S.C. section 881 that a preseizure hearing was not required before a unit is subject to forfeiture. It was the U.S. Attorney's position that since section 881 was specifically amended to cover leaseholds to facilitate drug-related seizures, and since the procedural safeguards required by due process depend in part on the nature of the Government interest at stake, *ex parte* seizure of leaseholds was permissible without an adversarial preseizure hearing. According to the U.S. Attorney, the Government's strong interest in curtailing drug offenses would be frustrated by a preseizure notice and hearing: such notice would effectively enable drug dealers to relocate or conceal their drug operations. Given the severe nature of the city's drug problem and the Government's compelling interest in the health and safety of neighboring tenants, the U.S. Attorney believed that a preseizure hearing was not required. However, in 1989 a property owner successfully appealed a seizure on the grounds that he was entitled to an opportunity to oppose the seizure before it took place.

The case, *U.S.* v. *4492 Livonia Road,* 889 F.2d 1258 (2nd cir. 1989), involved a claim by a homeowner whose home and 120-acre parcel of land were seized *in rem,* pursuant to section 881(a)(7), without advance notice to the homeowner and without an opportunity for an adversarial preseizure hearing. The house and land were subsequently forfeited. The court concluded that due process is violated when a seizure takes place without notice or opportunity for a hearing, but that an unconstitutional seizure does not bar subsequent forfeiture. The court reasoned that "due process has been held to require notice and an opportunity to be heard prior to the deprivation of a property interest . . . in the absence of an 'extraordinary situation' that justifies postponing notice and opportunity for hearing."

More recently, in *United States* v. *James Daniel Good Real Property* (114 S.Ct. 492, __U.S.__ [1993]) the Supreme Court specifically ruled that *ex parte* seizures of real property are unconstitutional unless the Government proves "exigent circumstances." Moreover, the Court said that to establish exigent circumstance, the Government must show that less restrictive measures—that is, a *lis pendens* (court control over property pending settlement of the case), restraining order, or bond—would not suffice to protect the Government's interests in preventing the sale, destruction, or continued unlawful use of the real property.

To date, there have been no problems with sufficiency of the evidence to meet the probable cause standard that real property is being used in the commission of a felony. While magistrates are particularly concerned that there be sufficient evidence of an ongoing criminal enterprise, because seizing a person's property is such a drastic measure, one Federal magistrate who has heard these cases observed that the evidence is always "overwhelming."

One other concern about forfeiture cases is the potential harm to "innocent" tenants, such as parents and young children, whose knowledge of the suspected drug activity is unclear or whose ability to make the offenders move out is uncertain. Thus far, no challenges have been raised on this ground either, perhaps because the U.S. Attorney has generally declined to litigate such cases. For example, the forfeiture unit did not pursue a case in which a mother, whose three sons were allegedly dealing drugs from her apartment, had a legal services lawyer telephone to say the woman was not personally involved in any criminal activity. The U.S. Attorney has also asked the U.S. Marshals Service to report any innocent people it finds in any apartment the Marshals seize but allow these tenants to remain where they are. When the forfeiture unit learns of innocent tenants, it seeks to reach a settlement that accommodates their needs for housing. Typically, these tenants—for example, the grandparents of adult

children who have been targeted for dealing drugs—are allowed to continue living in the apartment, but they may be instructed to pay their rent to the Marshals' office. However, the forfeiture unit rarely has to deal with innocent tenants, because most of the individuals occupying targeted apartments are drug dealers who use the property for "business" purposes only and live elsewhere.

A few years ago several newspapers criticized the U.S. Attorney for the midwinter eviction of drug-dealing tenants who might have had no alternative shelter arrangements. As a result, every seizure warrant now requires that social services—primarily housing assistance—be offered to evicted tenants. To implement this plan, the U.S. Attorney met with the Assistant Commissioner of the Department of Public Welfare to arrange for the agency to coordinate with the police department to have a social worker present at every seizure. It is unclear how effective these social services are and how many evicted tenants take advantage of them, especially in light of the reported reluctance of most shelters to house accused drug dealers.

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Case Study 7

San Diego's Team Approach to Abating Drug-Related Nuisances

Summary

The city of San Diego, California, uses a provision of the California Health and Safety Code to seek injunctive relief against a property owner or tenants for the unlawful sale, manufacture, or use of illegal drugs on the property. The city attorney must demonstrate that drug activities have continually taken place on the property over a period of time. In 90 percent of the cases, property owners, after having been notified about the problem by telephone, by letter, or during a brief hearing in the city attorney's office, put a stop to the drug dealing. In the remaining cases, the city secures a preliminary injunction, after which the landlords typically agree to halt the drug dealing and correct any violations that were identified by building code inspectors as part of the abatement process.

Illustrative Example

The Titus house, located in a single-family residential neighborhood, was a typical drug house in San Diego. The extended Titus family had distributed drugs from the site for nearly a decade. The entire neighborhood was disrupted by the drug business: teenagers loitered and closed deals in the front yard of the house; raucous parties took place every weekend; cars double-parked on the street while drivers raced to the front door to purchase their weekly supply.

During 1987, the San Diego Police Department conducted several undercover purchases in the neighborhood. This resulted in 29 drug-related arrests at the Titus house and another 200 arrests within a two-block radius of the house. However, few of the convictions carried sentences that would put the family out of business. Adult members of the Titus family were diverted to drug-treatment programs, or grandsons "took the rap," since juvenile records are sealed once a youth reaches adulthood. Despite hundreds of hours invested by the police department using traditional law enforcement techniques, the Titus family continued its successful drug business.

The city attorney finally obtained a temporary restraining order against the landlord and tenants, directing them to cease and desist all drug-related activity at the house. Signs were posted advising the neighborhood drug dealers about the order. Tenants were instructed not to remove any personal property or fixtures from the premises. Shortly thereafter the court issued a preliminary injunction that required the owner to correct numerous housing and zoning code violations (including broken windows, inoperable plumbing, unsafe staircases, and lack of heat) or vacate the tenants and board and secure the building until it was repaired or razed.

The property owner signed a stipulated final judgment to settle the litigation. He agreed to evict the tenants, make the necessary repairs or demolish the building within 90 days, and pay $3,600 in costs to cover the expenses of the inves-

tigation. Neighbors reported that for the first time in nearly 10 years their street was once again a quiet neighborhood.

The peace lasted for many months. But then someone else bought the property, went bankrupt, and allowed the drug dealing to resume. When the bank foreclosed on the property, the city attorney negotiated with the bank to board the property. As a result, while the police are still occasionally called to the former Titus house, the problem for the neighbors has become a minor nuisance instead of a constant source of danger and annoyance.

Statutory Basis

The San Diego city attorney's program of drug abatement makes use of section 11570 of the California Health and Safety Code, known officially as the Uniform Controlled Substances Act and colloquially as the Drug Abatement Act, which provides in pertinent part that:

> every building or place used for the purpose of unlawfully selling, serving, storing, keeping, manufacturing, or giving away any controlled substance, precursor, or analog specified in this division, and every building or place wherein or upon which those acts take place, is a nuisance which shall be enjoined, abated and prevented, and for which damages may be recovered, whether it is a public or private nuisance.

The act authorizes district attorneys, city attorneys, and private citizens to file a civil complaint and seek equitable relief to abate and permanently enjoin the responsible persons from conducting or maintaining the drug-related nuisance. The statute empowers the civil court to issue a temporary restraining order and a preliminary injunction to abate the nuisance. A 1991 amendment to the act (section 11573.5(f)) provides explicit statutory authority for courts to impose a wide range of conditions for injunctive relief, including:

- Seizure of all fixtures, musical instruments, and other movable property that is used to maintain the nuisance.
- Closure of the building for any use for as long as one year.
- Assessment of a maximum civil penalty of $25,000 against any of the defendants.
- Payment of damages equal to the fair market rental value of the property for one year instead of closing the building.

The act also makes provision for the city attorney to require other remedies, including capital improvements to the property (such as security gates), improved interior or exterior lighting, security guards, owner membership in neighborhood or local merchants' associations, and attending property management training programs.

Three conditions must be met in applying the Drug Abatement Act:

(1) Illegal drugs are being sold, used, made, or given away.

(2) The drug activity is connected to the property.

(3) There has been continuous activity over a prolonged period of time.

The statute allows the court to punish violations of the abatement order by a fine of $500 to $10,000, imprisonment for one to six months, or both as part of a civil contempt action.

Procedure

Case Screening

Most cases begin when a police field officer identifies a residence that appears to have a history of serious drug dealing. Typically, the field officer reports the problem to a special detective who serves as the full-time police department representative on the city's Drug Abatement Response Team (DART). Other cases begin when the assistant city attorney who represents the city prosecutor on the DART team receives a complaint, typically from a city council member whose constituents have been complaining about drug dealing in their neighborhood or from the fire department when it observes drug dealing in the course of duty.

The three-member DART team (the third member is a building code inspector) then evaluates the case together to determine whether it meets the three legal criteria listed above to target the property for drug abatement. The team does not target casual sales or isolated incidents. It goes after drug trafficking that is substantial and prolonged and that creates a public nuisance. Generally, the city attorney requires that a number of arrests have been made over a period of time before targeting a house as a public nuisance. She may also reject a case because of legal insufficiency with regard to the available evidence.

If there is not sufficient drug activity to warrant DART's handling the case under the abatement act, the DART detec-

tive refers the case to the police department's Narcotics Section for followup. However, if the problem gets worse, the case can always be referred back to DART for an abatement action.

If the property becomes a DART case, the DART detective runs a detailed criminal history of the building, looking for prior successful undercover buys, the results of police surveillance at the location, and any information provided previously by reliable and confidential informants. The team may also gather neighbors' affidavits to bolster its case.

Code Violations

In addition to a course of action under the Drug Abatement Act, the city attorney's complaint almost always alleges municipal code violations under its general police powers to enforce building, fire, and safety and health codes. By forcing the owner to spend money to improve the property, the city raises the costs to the owner who allows drug dealers to resume activity and cause new damage to the renovated property, which may have to be repaired once again. The DART detective coordinates a code inspection to document violations. For example, the DART detective and building inspector may make an initial drive by the building together to see if there are any visible or suspected violations. The code inspector might make an inspection at that time with the tenant's permission. The code inspector also checks his computerized records to determine whether any previous notices of code violations have been sent to the owner.

Office Hearing

Typically, the DART team first invites the owner to an informal hearing in the city attorney's office. The hearing serves to satisfy the statutory requirement to provide the owner with notice, but it also usually ends with the owner agreeing to see to it that the drug dealing stops and to remedy promptly any code violations. Thus, the vignette above of the Titus house abatement took much longer than the typical case. Some owners agree to self-abate at the office hearing to avoid the costs of litigation or because they were unaware of the drug activity and are eager to comply once notified about the problem. Other owners are anxious to avoid court-ordered abatement because they are told that once an order has been issued, and they then fail to get rid of the drug dealing and correct any code violations, the court can mandate that the building be closed for up to a year prior to trial. Owners also comply because the DART team brings such compelling evidence of drug dealing and code violations to the hearing that the owners realize they have little, if any, reasonable legal or factual defense against the overwhelming evidence of the public nuisance.

Temporary Restraining Order and Preliminary Injunction

After the office hearing, the DART team monitors the property for a month to determine whether the owner's promises have been kept. If the owner fails to take action, the city attorney files a civil complaint, with the first court appearance generally held in the law and motion department of the superior court. The city attorney seeks an *ex parte* temporary restraining order (TRO), which, if granted, immediately enjoins the property owner, tenants, or both from further illegal activity, prohibits them from removing any personal property or fixtures from the premises, orders the immediate repair of any serious code violations (like a sewage leak), and requires posting of an "Abatement Notice" on the property. About three weeks later, the city seeks a preliminary injunction, which has the effect of continuing the TRO and imposing additional requirements on the owner.

Since this civil action seeks injunctive relief, the judge has broad equitable powers to fashion the order to fit the facts and circumstances of each particular case. In addition to prohibiting drug activity, the preliminary injunction often establishes a timeframe in which emergency repairs must be made to correct serious housing, fire, and zoning violations. In extreme cases, the order may require eviction of the drug-dealing tenants or family members, or prohibit extended family members from visiting the property. For example, the court ordered the eviction of several tenants at an apartment after the DART city attorney visited the building and found several tenants cooking dinner on barbecue grills inside their rooms because the fire department had turned off all the gas after finding a serious leak.

If the property is an apartment building or a motel, the court may impose a list of management practices to improve control of the property, such as the hiring of private security guards and the installation of lighting and fences. When the building is vacant and abandoned, the court has the authority to order that it be immediately secured and cleaned by city crews or a private contractor, with all such costs assessed against the property itself. Although it has never happened, in extreme situations the court could order the demolition of the structure.

The investigating beat officer and the DART code inspector monitor the property once again to determine whether the owner is correcting the problem. If the owner takes appropriate action, the city discontinues its suit.

Permanent Injunction

If the owner does not correct the problem, the city attorney brings the owner back into court, where the property owner almost always enters into a stipulated final judgment that establishes a permanent injunction prohibiting all drug and housing violations at the location forever, mandating the correction of outstanding building and fire code violations, and, in the case of apartment buildings, requiring the improvement of security by installing lights, hiring security guards, posting signs, and other measures.

The court may also assess civil penalties of up to $25,000, depending upon the nature of the case. The city attorney and police department can also recover their investigation costs and attorney's fees. In two drug abatement cases against two hotels, the city attorney's office obtained $5,000 in civil penalties and recovered another $7,500 in reimbursement for costs and attorney's fees. More typically, however, the owner of the targeted property has declared bankruptcy or has no money, making it impossible to collect civil penalties or prosecution costs.

Usually after the preliminary injunction, but sometimes not until after the permanent injunction, most drug activity ends at the site as the owner hires a new property manager, evicts the offending tenants, and takes other actions to end the nuisance. As a result, it becomes the responsibility of the DART code inspector to monitor the property for six months to ensure that any code violations are being corrected. Property owners or tenants who fail to comply with the terms of the order can be held in contempt and jailed or fined. Owners who cannot afford to rehabilitate their property have the choice of either boarding it up or not renting it and living there themselves.

In an effort to expedite civil cases, the superior court has developed a "fast track" system, with certain judges designated to handle special dockets. As a result, the DART team has at its disposal specific judges who hear abatement cases quickly. In addition, the same judge stays with each abatement case, from first hearing to permanent injunction.

Program Organization, Staffing, and Resources

The Drug Abatement Response Team coordinates each case from referral of a property through stipulated final judgment. DART consists of a full-time deputy city attorney and a full-time police detective, building inspector, legal assistant, and legal secretary. The chief of the city attorney's Code Enforcement Unit devotes about 10 percent of his time sharing management responsibility for DART with the police department.

The police department, in consultation with the city attorney, selects the detective to serve on DART. Together, they look for an officer who is committed to the civil approach, not just traditional police work, is comfortable working closely with lawyers and code inspectors, and, in particular, is committed to the idea that substandard housing promotes criminal activity. However, the beat officer who first investigated a problem property works an abatement case from beginning to end unless the police department has given the officer a new assignment or shift. This investigating officer contacts citizens who live or work in the area of each targeted property and prepares citizen declarations that include suspicious activity occurring on the property. The DART detective coordinates the police investigation, assists the investigating officer in overcoming any obstacles, and obtains the assistance of other city departments and resources. The DART detective is also responsible for arranging surveillance and photographs or videotapes of the illegal drug activity.

The same assistant city attorney has been assigned to DART since the team was formed in 1989. She was selected for her litigation skills, her ability to work with the police, and her commitment to using whatever means were available and effective, including civil remedies and code enforcement, to solve the problem of drug dealing.

The DART budget is part of the city's general fund. As a result, it must compete with the city's fire and police department, libraries, and parks and recreation department for funding. In 1992, the city allocated $279,894 from the general fund for DART activities, including $152,018 for the city attorney's participation (divided into $115,533 for personnel and $37,018 for nonpersonnel), $78,343 for the police department's participation, and $49,000 for the building inspection department's involvement.

Program Evolution

How the Program Started

The California Legislature enacted the Drug Abatement Act in 1972. However, the city did not make use of the act until 1987 when the community put increasing pressure on the mayor, the city council, and the criminal justice system to "do something" about the drug dealing that was becoming increasingly prevalent and visible in some city neighborhoods.

At the same time, the police department was becoming increasingly frustrated by the failure of traditional law enforcement approaches to address the problem. Coincidentally, the lawyer in charge of the city attorney's Code Enforcement Unit had recently filed four injunctions against several massage parlors under the State's longstanding Red Light Abatement Law. As a result, he thought of the idea of using the very similar Drug Abatement Act to prevent drug dealers from operating in homes and apartment buildings by obtaining the same kind of injunctive relief he had just secured against the massage parlors.

The San Diego city attorney's and city manager's office created the Drug Abatement Task Force in January 1988 to coordinate the city's existing resources to use the Drug Abatement Act, including reviews of specific properties and the coordination of building inspections. The deputy city attorney in charge of the Code Enforcement Unit coordinated the efforts of the police, zoning, building, and fire departments, and city attorney's office to use the Drug Abatement Act to target drug dealing properties.

Because he was not provided with additional funding for his new responsibilities or any reduced role in managing the Code Enforcement Unit, the city attorney's Code Enforcement chief arranged with the city council and police department in April 1989 to set up and fund the Drug Abatement Response Team. Initially, the team consisted of another assistant city attorney and a police detective. In 1990, a legal secretary and legal assistant joined DART, while in 1991 a full-time building inspector was assigned to the team. After DART was established, the task force restricted itself to policy questions and oversight of the team and then was dissolved.

Problems Encountered

Management of the drug abatement program shifted frequently during the first few years of the program. The city attorney's Code Enforcement Unit chief ran the task force in 1988 and 1989, but when DART was formed an administrator in the city manager's office was assigned to manage the team. In 1990, the police department was given responsibility to manage DART—first the narcotics unit and later the special operations unit. Since 1991, the community policing section of the city manager's office has been managing DART. These changes in management have hampered the abatement program's effectiveness by diverting resources from abatement enforcement activity and requiring adjustments to different rules of procedure as each new agency takes charge.

Since 1988, several different police officers have been assigned to DART. Some officers have worked out well; others have on occasion hampered case development. For example, a newly assigned DART detective jeopardized a few cases when he decided on his own initiative to search private homes, legally being conducted by housing code authorities, to inspect for narcotics that might be in plain view and record this as evidence for a separate criminal prosecution. The problem arose because, as a new member of DART, the detective was unfamiliar with civil approaches and limitations on police authority. To prevent similar problems in the future, the city attorney's Code Enforcement Unit chief and a police sergeant developed a written policy to guide police conduct during DART inspections. However, as commonly occurs with any kind of police unit, turnover due to promotions among the detectives assigned to DART has continued to be a problem, because each new officer has to learn the team's procedures from scratch, resulting in an initial period of some miscommunication among team members and delays in accepting and processing cases.

Another area of concern is that the beat officer who initiated the drug investigation often has difficulty monitoring the property after the office hearing or an injunction has been issued. Sometimes these officers are reluctant to divert time from their other duties to monitor what appears to no longer be a problem. More often, however, changes in the beat officer's shift or assignment prevent them from returning to the property. (By contrast, the building code inspectors do return to the property because they have to determine whether the owner has corrected any violations within the period of time mandated by the office hearing or injunction.)

Another problem has been the frustration of some police officers who want immediate results from DART and feel frustrated at having to wait 30 to 45 days to get declarations, conduct housing inspections, and hold the office hearing before anything can be done about a thriving and obvious drug business at a property that they have brought to DART's attention.

Finally, the city attorney's Code Enforcement Unit chief believes that the program could be improved if the DART team included a community resource specialist who would educate property owners about the public and private resources available to them for rehabilitating and regaining control of their properties. Many property owners lack the sophistication to manage rental properties that have become infested with drug dealers. The community resource specialist would assist these owners to obtain housing rehabilitation loans, enroll in property management courses, and enlist the

support of other family members. However, funding has not been available to hire such a person.

Program Accomplishments

As of August 1993, DART had received 452 complaints of drug activity. The team referred 288 of these complaints (64 percent) to the police narcotics unit or to other city departments for action. The team conducted investigations in the remaining 164 cases. One hundred of these investigations (61 percent) were closed when the owner put a stop to the drug dealing after an on-site meeting with the DART detective. The city attorney opened cases on the remaining 64 complaints. As of mid-1993, 51 of these cases had been closed, 13 after the city attorney informed the owner about the problem by telephone or letter, 22 after an office hearing, and 16 after litigation. The remaining 13 opened cases were still ongoing. Only one drug abatement case had gone to trial; the case, involving a property owner who was representing himself, had not yet been heard.

Three owners have violated final judgments. One owner allowed people to live in vehicles in his junk yard and use them for drug sales and prostitution. When he failed to remedy the problem in response to an abatement order, the court found him in contempt of court and permitted the city to dispose of the automobiles and bill him for their removal. In the second case, the operator of a local hotel allowed drug dealing to occur in the rooms. When the property owner responded to an abatement action by replacing the operator, the new operator continued to ignore the problem. The court found the owner had violated the order and ordered him to hire new management for the hotel and take several specific actions to clean up and repair the property. The owner complied. In the third violation, two grandchildren who were served restraining orders prohibiting them from coming to their grandmother's house to deal drugs tried to sneak back in. Both were found to be in contempt and sentenced to jail for six months. After their release, one went back to the property again and was jailed a second time for contempt.

Advantages of the Civil Approach

Use of the Drug Abatement Act in conjunction with municipal codes offers several advantages over use of criminal process. First, the city attorney can obtain temporary civil relief in several weeks, whereas in a misdemeanor criminal proceeding the property remains in violation pending a final disposition of the criminal case several months later. Second, the burden of proof is a preponderance of the evidence rather than proof beyond a reasonable doubt. In California, when the State seeks equitable relief it need only show a likelihood of success on the merits in cases where the statute expressly provides for injunctive relief. Once the State has established that it is reasonably probable it will prevail on the merits, "a rebuttable presumption arises that the potential harm to the public outweighs the potential harm [caused by the injunction] to the defendant" (*IT Corporation* v. *County of Imperial,* 35 Cal. 3d 62, 72 [1983]). Third, the Drug Abatement Act enables the city to recover its investigative and trial costs from the owner of the premises. This reduces budgetary concerns about pursuing these cases and helps induce landlords to agree to self-abatement after the civil charges have been filed, as many do. Fourth, by combining the nuisance cause of action with municipal code violations, the city can pressure the landlord to better maintain the property. Fifth, the Drug Abatement Act allows the court to order nondisclosure of the name, address, and any other information about witnesses upon a showing of prior threats of violence against them. Since drug dealers often use intimidation to force neighbors and even other family members to keep quiet about the problem, this anonymity removes one of the common barriers to obtaining evidence of the existence of the nuisance.

Finally, the city attorney's office is convinced that dilapidated buildings send a signal that no one in city government or in the community cares about the neighborhood. This perception of indifference attracts a criminal element to the property. Arresting the offenders does not eliminate the impression of disintegration—incarcerated offenders are usually simply replaced and the properties remain in neglect. In addition, dilapidated property makes many landlords indifferent to the character of the people to whom they rent. By combining the nuisance cause of action with municipal code violations, the city can pressure the landlord to better maintain the property. Once the landlord is forced to spruce up the property, the unit can be rented to more respectable, law-abiding tenants. Renting a rehabilitated unit to drug dealers again may result in renewed property damage, which the landlord may be forced to repair a second time.

The value of the Drug Abatement Act and the San Diego team approach to its application is suggested by the number of other cities in California that have similar programs. Oakland and Los Angeles have specialized units that focus on enforcement of the act, with each city attempting to work with property owners who are not involved with the illegal drug activity before filing a civil action. Sacramento, San Francisco, and Oceanside have also used the act, but on a case-by-case basis without creating a specialized drug abatement team.

Constitutional Issues

To date, there are no published State appellate cases interpreting the Drug Abatement Act, even though several cities in California, in addition to San Diego, have used the legislation. However, in a San Diego case, *People* v. *Bowlen,* Supp. Ct. No. 618129 (1989), an owner represented by a legal aid attorney did file a writ with the court of appeals challenging the city's right to close a building at the preliminary injunction stage. In an unpublished decision, the appeals court reversed the trial court's closure order. The court concluded that closure under the Drug Abatement Act was premature at the preliminary injunction stage because there was no prior court order as required by the express language of the act. In another California municipality, Fountain Valley, an owner petitioned the superior court for a writ review to compel the city to disclose the identity of two confidential informants, challenging the Drug Abatement Act provision that authorizes the court to order that the names of threatened witnesses not be disclosed. The court refused the writ without a hearing and further briefing.

A 1992 amendment of the Drug Abatement Act requires the city attorney to provide notice to owners before filing a civil complaint, unless there are imminent hazards present. However, because the San Diego city attorney has always notified—and in most cases met with—the property owner and managers, the amendment merely codified the city's existing practice. This advance notice frequently results in self-abatement and, in the view of the city attorney's office, accounts for the lack of challenges to the program on due process or other grounds. While some owners have threatened constitutional challenges to the application of the Drug Abatement Act, no cases have been brought, in part, some observers believe, because owners do not want to appear to be "pro drugs." In addition, the DART assistant city attorney has offered seminars to local realtors and members of the local apartment owner association to provide guidance on how to screen tenants and what to do if a drug problem arises. She makes clear that DART is targeting not them but "the slumlord next door."

Although there have been no constitutional challenges, the city attorney's office is sensitive to evidentiary and due process issues. For example, all three contempt trials have been criminal proceedings with the full panoply of rights afforded to the defendants with a finding of guilt rendered only if the evidence proved the contempt beyond a reasonable doubt. In considering which houses to target under the act, the city attorney determines carefully that the evidence shows a pattern of continuous and repeated drug activity.

Although most public nuisance statutes are silent on the amount and type of evidence necessary to obtain abatement orders, and no published cases exist which interpret California's Drug Abatement Act, the prosecutor finds guidance in appellate decisions interpreting the act's sister statute, the Red Light Abatement Law, and in general principles of equity which apply to standard nuisance abatement actions.

One of these principles is that the activity must be of a "continuous nature." Arrests alone, even in the absence of convictions, may be sufficient to establish continuous drug activity. For example, in the Titus house case, 29 arrests for drug charges were made in less than a year. While statements from neighbors are another acceptable source of evidence, neighbors sometimes refuse to sign affidavits because they fear reprisals. Despite their nature as hearsay, statements from neighbors are often included in the police officers' declarations, since the declarations are used not as direct corroboration of continuous drug activity but to explain the officers' response to the neighbors' complaints.

The general reputation of the property is another relevant fact about which neighbors can offer testimony. In California, the general reputation of a business is admissible circumstantial evidence to demonstrate the existence of a public nuisance. (See, generally, *People* v. *Macy,* 43 Cal.App. 479, 481, 184 Pac. 1008 [1919] [lewd acts]; *People ex rel. Hicks* v. *Sarong Gals,* 42 Cal.App.3d 556, 117 Cal.Rptr. 24 [1974].)

Public welfare regulations, which are silent with regard to intent, have been interpreted by the courts to impose criminal responsibility for the prohibited act or omission irrespective of *mens rea* (criminal intent):

> Thus, whether the context be civil or criminal, liability and the duty to take affirmative action flow not from the landowner's active responsibility for a condition of his land that causes widespread harm to others or his knowledge of or intent to cause such harm but rather, and quite simply, from his very possession and control of the land in question. (*Leslie Salt Co.* v. *San Francisco Bay Conservation etc. Com.,* 153 Cal. App. 3d 605, 622, 200 Cal.Rptr. 575 [1983])

To date there have been no challenges to the Drug Abatement Act or to the city attorney's handling of cases on the grounds that owners have been required to evict innocent tenants. However, defendants have been required to provide relocation assistance to innocent tenants in compliance with section 11573.5(d) of the act, which requires that:

> [i]n making an order of closure . . . the court shall order the defendant to provide relocation assistance to any tenant [not involved in the nuisance who is] ordered to vacate the premises . . . . The relocation assistance...shall be in the amount necessary to cover moving costs, security deposits for utilities and comparable housing adjustment in any lost rent, and any other reasonable expenses.

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Endnotes

1. The statute, the Real Property Actions and Proceedings Law, section 715, addresses other illegal businesses besides drug dealing, and the program has used the law against gambling, prostitution, and other illegal activities. However, the case study spotlights only the program's principal focus—drug dealing.

2. There are also Federal civil forfeiture statutes for money laundering, 18 U.S.C. 981; gambling, 18 U.S.C. 1955; and customs violations, 19 U.S.C. 1595(a).

Chapter 4

Making Effective Use of Civil Remedies

This chapter examines five of the most important considerations involved in using civil remedies to achieve criminal justice goals: finding appropriate legislation, securing competent staff for the effort, developing close police-prosecutor collaboration, involving other public agencies in the effort, and gaining community support.

Find Appropriate Legislation

Examine Existing Statutes and Ordinances

The starting point for using civil remedies is to identify one or more high-priority crime problems that have proven impervious to traditional criminal prosecution. The obvious next step is to search through existing civil legislation for statutes and ordinances that can be used to address the problems.

> Under pressure to prevent a repeat of the shooting deaths of 2 children and wounding of 13 others by a mentally ill man, the officer in charge of the Los Angeles Police Department's Mental Evaluation Unit pored over the State Welfare and Institutions Code looking for provisions he could use for seizing weapons from the mentally ill. He found provisions that would allow peace officers to seize weapons without conducting a search incident to an arrest if he made use of a legal search warrant, which he then proceeded to draft in collaboration with the district attorney's psychiatric section.
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> In 1986, under severe pressure from the community to deal with drug dealers who were using apartment units to sell drugs, the Manhattan district attorney held a brainstorming session with his senior staff to determine how his office could deal with the problem. The office counsel came up with the idea of using a section of the Real Property Actions and Proceedings Law—a civil statute that a group of citizens had recently used on their own to obtain a court order to board up a nearby drug-infested apartment owned by a neglectful landlord.

It is necessary for legal counsel to interpret potentially applicable statutes to make sure there is sufficient legal basis for their application to the situation. The U.S. Attorney for Southern New York established a task force to investigate whether the use of civil forfeiture could be used to evict drug dealers from large apartment buildings. (See case study 6.)

When the San Diego city attorney and city manager created a task force to study alternatives for attacking drug dealing in their city, the city attorney's Code Enforcement Unit chief, who had successfully used the California Red Light Abatement Act against several massage parlors, identified the State's parallel but neglected Drug Abatement Act as a promising tool to try out. Other States have nuisance abatement statutes, at least some of which, like the Washington State Moral Nuisance Law enacted in June 1988, include drugs within their purview.

Amend Existing Statutes and Local Ordinances

If there are no available statutes to apply to criminal behaviors, it may be possible to amend existing civil legislation so it becomes usable for this purpose. For example, prosecutors and police administrators in jurisdictions that have nuisance abatement statutes that do not explicitly target drug dealing can either introduce an amendment to add this crime to the statute or, in some cases, amend local nuisance abatement ordinances to include drugs if no State preemption exists. Only when the Federal civil forfeiture statute was amended to define leaseholds as personal property could the U.S. Attorney for Southern New York seize a leasehold used in the commission of a felony.

For years, California had left the confiscation of weapons from the mentally ill person's possession to the discretion of the local police. In addition, even after a legal seizure, officers had 30 days in which to convince the judge that the weapon should not be returned. The California Welfare and Institutions Code has been changed in a number of respects to overcome these and other obstacles to seizing weapons from the mentally ill:

- At the initiative of the Los Angeles Police Department, the law was changed to *require* any peace officer to confiscate and retain custody of weapons known to be accessible to someone who is mentally ill and dangerous, or who has been detained or hospitalized for mental illness in the past.
- Another change in the legislation prohibits any person admitted for 72-hour psychiatric evaluation—because the person is a danger to him- or herself, or to others—to possess or have control over any firearm for five years.
- The Los Angeles County Sheriff's Department lobbied successfully for an amendment that prohibits emergency ward staff from refusing to evaluate a police referral—a necessary step to retaining custody of seized weapons—just because the facility is full.
- Another amendment to the code requires hospital staff to permit the police officer to leave once the paperwork has been completed and orderly transfer of custody has been arranged. (In the past, long waits had discouraged police officers from bringing suspected mentally ill persons in for evaluation.)

When a victim of domestic violence with a protection order was reassaulted after having allowed the abuser back into her home, police officers in Duluth (and other cities in Minnesota) were sometimes arresting the victim and prosecutors were sometimes charging the victim, or charging the victim in addition to charging the batterer, rather than charging just the batterer. At the initiation of women's groups, the State remedied this problem by amending the Domestic Abuse Act to specify that admitting the abusing party back into the home is not a violation by the petitioner of the order of protection—and that reentry by the abuser even with the petitioner's permission is still a violation by the respondent.

Prosecutors and police in several sites warned that someone needs to keep abreast of proposed changes in legislation to make sure that no unnecessary amendments are made to civil statutes which could limit the program's effectiveness. For example, in collaboration with tenant groups, the statewide apartment owner's association, at the request of the San Diego chapter, had the California Abatement Act amended to require notification to owners before city attorneys could file for abatement. Although this was a perfectly reasonable change in the legislation—and a procedural step the San Diego city attorney had already been routinely taking—the amendment illustrates the need to stay informed about efforts to amend existing civil legislation that may hamper or prevent continued use of a statute.

Enact New Legislation

A third option for securing pertinent civil legislation is to enact it. This is what Massachusetts did when it passed the Civil Rights Act of 1979. At the time, the statute was the first in the Nation to permit the attorney general to seek civil injunctive relief on the victim's behalf simultaneously with criminal prosecution of hate crimes undertaken by local district attorneys. Other States have since enacted similar civil hate violence legislation (see, for example, California Civil Code 52.1 [West Supp. 1990]).

Secure Competent Staff

Most programs that require breaking from tradition and risking possible failure need an "entrepreneur" to get them up and running. In nearly all of the sites examined for this report, a single, highly motivated, hard-working, and capable individual took the lead in using civil remedies and making the effort a success. A community activist in Duluth was the driving force behind the community-wide effort to monitor and enforce civil protection orders. A detective in the Los Angeles Police Department made it his mission to seize weapons from the mentally ill as part of a larger effort to divert this population from jail into treatment, while a detective in the Boston Police Department has made it his goal to target perpetrators of hate crimes. Jurisdictions that expect to develop their own programs for using civil statutes need to find self-starting pacesetters to lead the effort.

Having started their program, these leaders took steps to make sure it became institutionalized. This meant that they paid attention to sound organization management principles, initiated collaborative arrangements with other agencies and the community, and, above all, brought talented individuals into the program.

The Need for High-Quality Staff

All of these leaders have been careful to assign only highly talented staff to occupy key positions in the effort. For one thing, they knew they could not afford to lose many cases—and none at the outset—to establish the program's credibility. In addition, programs cannot risk inviting constitutional challenges because a prosecutor or police officer did not screen out ineligible or borderline cases or failed to provide due process of law to all targeted parties. Finally, using civil remedies typically requires close collaboration among justice system agencies, with other government agencies, and with the community. Staff must be able to gain the respect of these disparate groups and to communicate and share authority easily with them.

To ensure high-caliber staff, program leaders have usually secured the right to screen the staff they assign to using civil statutes and to accept only volunteers for the effort. For example, the captain of the Los Angeles Police Department Detective Division allows the Mental Evaluation Unit's officer-in-charge to pick anyone who volunteers for the unit from within the detective division. Finding prosecutors and police officers who want to join the effort may be difficult at the beginning, before the program has had a chance to demonstrate its mettle. However, once programs have won a few cases, other staff are often excited to join the program because they realize it can provide the personal satisfaction of doing something that appears to have a more immediate impact than more traditional approaches. Using civil remedies successfully can also bring visibility within the department and sometimes favorable publicity in the community and local press. Staff can also learn new skills that can advance their career—for example, how to practice civil litigation or conduct high-level investigations.

Staff Selection Criteria

Most of the programs examined for this study look for three qualifications among program applicants:

- A commitment to using creative alternatives to traditional law enforcement, such as civil process, to prevent crime.
- The capacity to communicate well and interact constructively with other agencies and the community.
- Superior investigative or litigation skills—or the ability to develop those skills quickly.

The importance of this last hiring criterion may not be obvious because the reduced standard of proof required in most civil proceedings might seem to demand fewer skills than in a criminal action. However, police and prosecutors who use civil remedies emphasize that although they are legally bound to prove their argument with only a preponderance of the evidence, they routinely investigate each case as if they had to substantiate it beyond a reasonable doubt.

Some programs look for skills or characteristics that reflect the particular type of litigation or investigation they conduct. For example, both the Los Angeles Mental Evaluation Unit and the Boston Community Disorders Unit require their police officers to be able to write clear and complete investigative reports that—in Los Angeles—will convince mental health evaluators and judges alike that a person is mentally ill and dangerous and—in Boston—will convince the attorney general to prosecute the case and the judge to issue an injunction. The Manhattan district attorney requires that new assistants have an interest in spending time after hours to talk with community groups.

Staff Training

Few staff come to the program with all the requisite skills or knowledge, because using civil statutes to achieve criminal justice goals is a novelty. As a result, in most programs the director has to train new staff one-on-one. In addition, new staff may need frequent reminders to think in terms of applying any remedies, not even just civil remedies, to solve each new crime problem. However, on-the-job training, sometimes over a period of several months, is often necessary before staff fully understand how to perform and develop the proper problem-solving perspective. For example, the Phoenix attorney general and police department learned about how to make maximum use of liens and temporary restraining orders the hard way after receiving a $2.2 million judgment in a case only to find that all assets had been dissipated and none were available to satisfy the judgment.

Staff Retention

Keeping staff turnover low is important for several reasons. As with any new assignment, time and effort are required before assistant prosecutors and police officers develop the specific skills they need to use civil statutes effectively; every time a well-trained person leaves, it takes weeks and even months before a replacement gets up to speed. Building trust between prosecutors and police, and between justice system personnel and other agencies and the community, also takes time; so does becoming familiar with each other's procedures. As a prosecutor becomes known to the police department, or a police officer becomes known to a code enforce-

ment unit, the person is given priority as soon as he or she walks in the door. Whenever a staff person is replaced, the process of establishing this credibility must begin all over again.

Some turnover is inevitable, especially where police departments have job-rotation policies or frequent promotions. However, the Los Angeles Mental Evaluation Unit has lost only 17 officers in its decade of operations—all but 3 because they had been promoted. Programs in Los Angeles, Manhattan, and Phoenix try to minimize turnover by requiring candidates to make a commitment to stay with the program for two or three years. For the most part, however, satisfaction with the work itself motivates most staff to stay with the program.

Develop Close Police-Prosecutor Collaboration

While police and prosecutors usually work together on criminal cases, their relationship is typically limited to a brief exchange of information about the case and the officer's testimony in court. Using civil remedies, however, normally involves close and ongoing cooperation in conducting the case. The police officer and city attorney who work full-time on the San Diego Drug Abatement Response Team confer almost every day on tactics to pursue with current cases. When seeking the forfeiture of an apartment building, the U.S. Attorney for Southern New York must make sure that as many as three law enforcement agencies coordinate their efforts—the city police, the Drug Enforcement Agency (DEA), and the United States Marshals Service.

The Importance of Close Cooperation

Because both the prosecutor and police are usually novices in using civil remedies, they can easily lose their first few cases unless they confer frequently about how best to proceed. Even after many successful cases, staff turnover always brings new personnel to the collaboration, and they have to be closely monitored until they have been brought up to speed. A new police liaison in San Diego jeopardized a few cases when he decided on his own initiative to search private homes, legally conducted by housing code authorities, to inspect for narcotics that might be in plain view and record this as evidence for a separate criminal prosecution.

Close police-prosecutor coordination also helps ensure that all parties provide all the required constitutional rights to respondents. While violating an offender's constitutional rights in a criminal case may result in the case being dismissed or a decision overturned, just as neglecting a respondent's rights in a civil case may imperil the State's suit, all the justice system participants in criminal cases are usually more knowledgeable about the protections that have to be afforded than are police, prosecutors—and judges—in a civil case targeting criminal behavior. Prosecutors must also be careful not to jeopardize any parallel criminal case as they pursue their civil case; this requires communication with both police administrators and other prosecutors. In Manhattan, the Narcotics Eviction Program prosecutor checks to see whether an arrest has been involved in every case he initiates and, if so, contacts the assistant prosecuting the criminal case to make sure the target in the civil suit is not cooperating with an undercover operation. The Massachusetts attorney general has to learn whether a district attorney is prosecuting the same hate crime offender so that he can consider staying the civil proceeding pending completion of the criminal cases so that the defendant cannot obtain witness affidavits being used in the civil case.

Obstacles to Police-Prosecutor Collaboration

Interestingly, it has often been the police department that has approached the prosecutor's office asking for assistance with a crime problem that arrests alone have failed to resolve. It was the Phoenix Police Department that asked the Arizona attorney general for help in dealing with chop shop cases; it was the New York City Police Department and Housing Authority Police that approached the Manhattan district attorney for assistance with drug-dealing tenants; and it was the Los Angeles Police Department that requested the district attorney to help find a solution to the uncontrolled possession of weapons by the mentally ill. Furthermore, almost all the civil litigation targeted at criminal behavior initiated in Boston, Los Angeles, Phoenix, and San Diego is a result of police officers bringing a promising case to the prosecutor for further action.

Despite frequently taking the initiative, police departments often have more difficulty than prosecutors in collaborating fully with the effort to use civil remedies. A deputy prosecutor usually does not need the assistance of the entire prosecutor office to work with the police to use civil remedies against criminal behavior as long as he or she has the firm backing of the chief prosecutor and a few committed assistants to work on cases. However, for a police department to collaborate effectively with the prosecutor, it is often necessary for the *entire* law enforcement agency to participate. This is largely because using civil remedies to get at criminal behavior still typically requires a police arrest at some point, and *all* field officers in a department are in a position to make—or refuse to make—these arrests. As a result, even

though a key police administrator and a few line officers may be committed to using civil remedies, other officers can stymie the effort by failing to make the necessary arrests and do the needed followup investigation. For example, using civil process to respond to hate crime in Boston will not happen—or will occur too late—unless patrol officers know how to determine whether bias motivation is involved in a crime and then check off the box labeled "community disorder" on their incident report. Effective enforcement of civil protection orders in Duluth did not occur until every line officer in the city police department became aware of his or her responsibilities under the law—for example, to arrest batterers without a warrant who violated an order for protection. The Los Angeles Mental Evaluation Unit could not be effective in seizing weapons from the mentally ill until field officers became familiar with—and followed—their department's policy to refer all such individuals to the special unit for processing.

In other circumstances, the obstacle to police-prosecutor collaboration is just the opposite—too many police officers *want* to solve every problem with an arrest. According to the prosecutor who heads the multiagency Drug Abatement Response Team in San Diego, some police officers, used to quick action, complain that the civil route takes too long, sometimes months of monitoring a property after a preliminary injunction has been issued. (Ironically, in terms of the ultimate goal of actually shutting down a drug operation permanently, the civil route takes less time than a criminal prosecution.) More generally, according to the head of the Phoenix Financial Remedies Unit—himself a former police officer—many police officers do not see their job as solving problems, despite the popularity of community-policing concepts among many police administrators. Rather, these line officers simply want to get the job done quickly and move on to the next call on the dispatcher's log. In addition, civil process is not exciting for police officers who want to execute search warrants rather than do paperwork.

Although less of a problem, prosecutors, too, sometimes resist using civil remedies. Occasionally, attorneys newly assigned to the Arizona attorney general's Financial Remedies Unit have told the unit chief, "I'm not a civil litigator. What do I know about civil law?" to which the unit chief replies, "*Learn!*"

Promoting Collaboration

The seven jurisdictions have used a variety of approaches to develop and maintain cooperation between prosecutors and police. A general guideline all sites have followed is never to take the relationship for granted; instead, they all devote extra attention to cultivating the linkage and then never flagging in their effort to maintain it.

Another effective approach to securing cooperation between agencies is to make sure the association provides both parties with concrete benefits. For example, police who no longer have to return to the same location as often to handle the same hate crime offender, mentally ill person, batterer, or drug dealer may be grateful for a program that reduces these problems.

Most jurisdictions have also used specific alliance-building approaches that were needed to achieve their particular goals in using civil remedies. The most common strategy is to train all members of the justice and social service system in the procedures necessary to make civil remedies effective. Often staff from one agency trains staff in the other—so-called cross training. Every year a prosecutor, police trainer, and battered women's advocate in Duluth use simulated videotaped scenarios to train the entire police department in its legal obligations in domestic violence situations. The head of the Los Angeles district attorney's Psychiatric Section and the officer-in-charge of the police department's Mental Evaluation Unit spent a year training all city police officers in their responsibilities for handling the mentally ill. The two administrators then took another year to train the entire sheriff's department.

Several program administrators emphasize the importance of educating judges to the proper and legitimate use of civil remedies. In one jurisdiction, when a fully informed judge who heard cases based on a civil statute was replaced with a set of rotating judges, use of the statute became less consistent. Judges may need training to become sensitive to the problem-solving approach and to their powers in a civil proceeding that addresses criminal behavior. Reflecting this need, Minnesota statute requires that all judges be trained in domestic violence and the State's Domestic Abuse Act.

Judges can also become active collaborators in the effort to use civil remedies without compromising their neutral position. City prosecutors in Duluth met with family court judges to agree on specific language to use in civil protection orders that would provide maximum protection for victims and make it easier for prosecutors to obtain convictions for violations.

Involve Other Public Agencies

In keeping with the goal of using whatever means are effective and legal for solving the types of problem behaviors addressed in this report, several jurisdictions have increased

the effectiveness of using civil remedies by involving other government agencies in the effort. Several administrators involved in the programs described in this report emphasize that it is a fallacy for prosecutors or police to think that they have to take care of crime by themselves. Instead, they should see themselves as part of a team—and not always the leader of the team—that includes other public and private agencies and the community. This collaborative approach does not come easily to justice system agencies. Becoming part of a team involves overcoming apprehension about permitting other groups to get involved in "our" activities; giving up some authority to other agencies; and in some instances overcoming historically based animosity between, for example, law enforcement and the mental health system, or between prosecutors and landlord associations. However, by encouraging other agencies and the community to do their share in helping to solve the crime problem, prosecutors and police can save scarce resources—and share the spotlight for having made a dent in chronic social problems.

Who Gets Involved

The San Diego Police Department regularly coordinates its search of premises where drugs have been repeatedly sold with investigators from the city building, fire, and zoning departments who photograph and document code violations. The city attorney, a police officer, and a building inspector then conduct an office hearing with the property owner to correct the outstanding code violations, as well as stop the drug dealing. If the owner refuses to cooperate, the city attorney then petitions for injunctive relief that mandates correction of serious code violations along with enjoining any drug activity. Similarly, the typical settlement that the U.S. Attorney in New York enters into with the landlord provides not only for eviction of the drug-dealing tenants but also for correcting municipal code violations and making improvements in lighting and security at the apartment building.

The involvement of code enforcement agencies in targeting drug dealing is another example of "problem-oriented prosecution and community policing" at work. Justice system officials in these jurisdictions are convinced that poorly maintained property encourages illegal activity by sending a message to criminal elements that "anything goes" in this neighborhood. In addition, landlords with dilapidated property may become indifferent about whether they rent to disreputable tenants who will not maintain the property; conditions in the buildings are already so out of repair that they have no reason to be concerned about further deterioration.

Application of this multiagency problem-solving approach is not limited to fighting drugs. The effort to combat domestic violence in Duluth is unusual precisely because it involves so many elements of the social service system, including shelters where women can live until they can secure an order for protection and whose staff explain the procedures for securing an order, and a publicly funded visitation center that affords a safe place for batterers to visit their children. Through changes in the law and a written agreement signed by the county department of mental health, the Los Angeles Police Department has arranged for every county mental health facility to provide timely evaluations of suspected mentally ill persons whom police officers bring in for assessment. The police department also arranged for most general public hospitals in the county to install metal detectors or scanner devices and effect the surrender (by force, if necessary) of any weapons found on patients who appear for treatment.

How Other Public Agencies Are Recruited

For collaboration with other agencies to succeed, there has to be firm support from the highest administrative level in the prosecutor's office, the police department, and often the city manager or mayor. Aside from the obvious need to clear such arrangements internally, without this encouragement from the top, other agencies are unlikely to take overtures for collaboration seriously. In addition, a written statement of roles and responsibilities signed by the administrator of each participating agency can promote commitment to working together, reduce the chances of misunderstanding and evasion of responsibility, and make clear that no one agency has been saddled with an undue burden for solving the problem. The Los Angeles Police Department negotiated a seven-page memorandum of agreement regarding mutual support in situations involving the mentally ill that was signed by seven regional agency administrators serving the developmentally disabled and by the head of the county department of health services, the city fire department, the district and city attorneys, and the superior court. In Duluth, city police and county sheriffs, prosecutors, judges, probation officers, corrections officials, human service providers, and victim advocates adopted written policies and procedures coordinating their response to domestic violence. It was only after a new police officer assigned to the San Diego Drug Abatement Response Team used a building inspection as a pretext to enter a home and conduct an unwarranted plain-view search that the city attorney developed a written policy describing the responsibilities and limitations of the police's role as a member of the Drug Abatement Response Team.

The key to securing cooperation from other agencies is to ensure that the arrangement will benefit everyone. Los Angeles Mental Evaluation Unit staff explain to hospitals how the unit diverts many mentally ill people *away* from emergency wards by providing outpatient referrals and advice to the family. The officers also offer to assist social service agencies around-the-clock on a priority basis to deal with any violence in their facilities—and then back their promise with quick action when an agency in crisis calls for help. The police department lobbies the State legislature at budget time for increased funding for the mental health system. The police department also makes clear that mental health facilities limit their vulnerability to adverse publicity and costly lawsuits if a disaster occurs that collaboration with the police could have prevented. As an added means of spreading the benefits around, the San Diego prosecutor's office and police department make sure that the full-time housing inspector on the Drug Abatement Response Team receives equal credit in publicity releases and reports describing each successful case.

Collaboration is easier if the prosecutor and police involve other agencies when they are planning their strategy to use civil statutes rather than after the fact. This approach gives other agencies a sense of ownership of the program. Early joint planning can also prevent later embarrassment. Only after sharp criticism from the medical community and the defense bar did the Manhattan district attorney work with the department of social services to prevent evicted tenants from becoming homeless. The Los Angeles and San Diego efforts both set up task forces to plan and coordinate their use of civil remedies and to get the needed agencies on board before the program even began.

The sites learned they had to train cooperating public agencies regarding their legal responsibilities and rights—and retrain them whenever the applicable civil legislation is amended or is affected by court decisions. Mental health workers in Los Angeles did not always know what information the California confidentiality statute allowed and prevented them from sharing. Outpatient clinic staff in one facility thought they were barred from reporting an individual to the Mental Evaluation Unit who came for his regular treatment appointment armed with a rocket launcher and threatening to "get me some cops."

Involve the Community

To apply civil remedies effectively—and as a means of bringing yet another weapon to bear on solving the problem at hand—several jurisdictions have also found it valuable to involve the community, including individual citizens, community-based organizations, advocacy groups, and private-sector associations. Depending on the site, community involvement has been valuable for a variety of reasons:

- To initiate the program.
- To forestall potential opposition to the use of civil remedies and turn possible resistance into support.
- To assist the justice system with some of the time-consuming or expensive tasks of identifying, documenting, and preventing the recurrence of criminal activity.
- To monitor program operations.

Community Support—or Outrage—Can Be Critical for Initiating the Program

Civil remedies were initiated in three sites only after a community uproar forced the justice system to consider "radical" measures to solve a criminal problem. In Los Angeles, it was the public outrage that resulted when a mentally ill person shot 13 schoolchildren, killing 2, that forced the police department to devise a way of confiscating weapons from the mentally ill. The Manhattan district attorney convened the brainstorming session that resulted in the use of a State civil statute to evict drug-trafficking tenants only after newspaper editorials, private citizens, and some landlords complained repeatedly about the city's failure to solve the problem—and after a group of neighbors hired their own housing attorney to litigate a case.

Involving the Community Can Prevent Possible Opposition

Landlords, tenant groups, and the American Civil Liberties Union joined forces in California to lobby for an amendment to the State Health and Safety Code that required city attorneys to provide notice before taking any legal action against homes where drugs were allegedly being sold. While the San Diego city attorney was already providing notice, he was concerned that these groups might urge the legislature to provide further protection for tenants and owners that could frustrate any use of civil remedies to attack drug dealing in private residences.

Precisely to forestall such potential opposition to its plan to take mentally ill persons to mental health facilities and confiscate their weapons, the head of the Los Angeles Police Department's Mental Evaluation Unit tried to get every interested party involved from the start. For example, he met

with the local affiliates of the American Civil Liberties Union and the National Alliance for the Mentally Ill to explain the program, learn what their objections might be, and solicit their support. When both groups saw that the program would ultimately benefit this population (for example, by keeping them out of jail and providing them with needed treatment), they said they would have no objections. In fact, the head of the county chapter of the Alliance for the Mentally Ill agreed to join the interagency task force and sign the memorandum of agreement, and he helped generate public and media support to make sure the arrangement would succeed.

The Community Can Help Identify Wrongdoing

As with most law enforcement efforts, these programs often rely on individual citizens and community groups to take the initiative to report criminal behavior. It is often neighbors who alert the police to drug houses in San Diego and New York City—encouraged by assurances that they do not have to testify in public. The Los Angeles Mental Evaluation Unit relies on citizens to call the police to report mentally ill persons who have access to weapons. In Duluth, battered women have to petition for a restraining order for the Domestic Abuse Act to have its intended effect in reducing domestic violence. To encourage reporting, an assistant in the Manhattan district attorney's Narcotics Eviction Program attends every community board meeting at which an eviction issue will be discussed and regularly attends landlord and tenant association meetings.

The Community Can Help Monitor Enforcement

The community can also be critical to ensuring that criminal activity which civil remedies have been able to halt does not recur. Prosecutors and police rely on the same neighbors who report drug trafficking in apartment units and private homes to recontact them after a civil remedy has been applied if the drug dealing resumes. In Duluth, the community-based Domestic Abuse Intervention Project uses its programs for batterers and victims to watch for any resumption of domestic violence by batterers under restraining orders. By examining police reports every day, the organization also makes sure that anyone who violates an order is always arrested.

Prosecutors and police are often surprised to find that there can be enormous latent community support for using civil remedies that simply needs to be brought to the surface. As noted, when neighbors discover they do not have to testify in public, they can become eager to report criminal activity. The families of the mentally ill in Los Angeles are often the first to report that the person has access to a weapon, and they are usually happy to consent to a search of the premises to seize the firearm. Some abused women in Duluth who are unwilling to file criminal charges against their partner, or who ask to have the case dropped after the batterer has been arrested, are willing to petition for a civil order of protection when they learn their partner will not get a criminal record or retain custody of the children. Many landlords are eager to evict drug-trafficking tenants once they learn the effort will be successful—and not involve endless delays, excessive paperwork, or harsh retaliation by the evicted tenants.

The various roles that the community can play in the effective use of civil remedies is well illustrated by a program in Kansas City, Missouri, in which a community-based organization, the Ad Hoc Group Against Crime, worked in concert with the city police and county prosecutor to shut down dozens of crack houses. When the program first began, Ad Hoc used its anonymous hotline to identify properties—typically, private homes with absentee landlords—where drugs were being sold. Ad Hoc was then able to persuade many landlords to evict the drug-dealing tenants by simply informing the owner over the telephone about the alleged drug activity and about the State's option under the Missouri Civil Code to board up or seize the property for failure to commence eviction proceedings. When the telephone call failed to produce action, Ad Hoc arranged for the owner to attend an informal negotiating session attended by a police officer and an assistant prosecutor who made clear what the consequences would be if the owner failed to take action.

As in Los Angeles, it was outrage expressed by Ad Hoc and inner-city Kansas City residents at the killing of a schoolboy by a crack user buying drugs from a neighbor's home that led the police department and prosecutor to cooperate with the organization to rid the neighborhood of drug-dealing tenants. The Kansas City Police Department trained Ad Hoc volunteers to observe suspected drug activity in a credible and safe manner so they could document the suspicious behavior convincingly for dubious or colluding landlords.

When the program began, Ad Hoc was able to identify drug houses that might otherwise have gone unreported, because many members of the African-American community were reluctant to provide the police with tip-offs but would call a respected community organization when assured they could remain anonymous. Ad Hoc further mobilized the community with a series of Saturday "drug house rallies," involving parades targeted at specific suspected drug houses. With a police escort, automobiles traveled through the community stopping unannounced at each suspected crack house. Neighbors at each location came out of their homes to join the demonstration. Police blocked off each street where the

caravan stopped, while Ad Hoc staff members with a bullhorn announced, "The entire community wants you drug dealers to get out of their neighborhood!" By creating strength through numbers coupled with both visible support by a powerful community organization and the active participation of the police, the rallies encouraged neighbors to continue to call both the hotline and the police to report suspected drug activity.

Ad Hoc also enlisted the support of the local chapter of the National Association of Rental Property Owners. After learning what the effort was all about, the association agreed to give the program favorable mention in its monthly newsletter, advise its members to support the campaign, and develop a rental-application form designed to discourage drug dealers from posing as prospective tenants.

While over time the prosecutor's office has taken over most drug eviction cases, Ad Hoc's activities in initiating the program and making sure it became permanent in Kansas City suggest how significant the community's role can be in helping the justice system to use civil remedies.

A final ingredient in using civil remedies successfully is to make sure all involved parties provide required constitutional protections to targeted individuals. This component of success is addressed in the final chapter, which follows.

* * *

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Chapter 5

Using Civil Statutes in a Constitutionally Defensible Manner

This chapter describes the principal steps programs should take to ensure that they apply civil remedies to criminal behavior in a manner that protects the rights of all targeted individuals. Much of the chapter is based on a law review article by Mary M. Cheh, "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction," *Hastings Law Journal* 42 (5): 1369–1413, 1991, and on written critiques Professor Cheh and Professor Kenneth Mann wrote on the constitutional issues raised in each case study.

While the chapter summarizes benchmark Supreme Court rulings in this area, it does not provide an in-depth examination of existing case law. A thorough discussion of the constitutional issues involved in using civil remedies for criminal acts may be found in Professor Cheh's paper and in an article by Professor Mann, "Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law," *Yale Law Review* 101 (8): 1795–1873, 1992.

Using Civil Remedies Poses Special Problems

Constitutional Challenges Are Likely

Programs that use civil remedies to attack criminal behavior are particularly susceptible to constitutional challenge. One of the reasons that civil remedies can be so effective against antisocial behavior is that they usually do not require *all* the due process protections that must be afforded in a criminal case. As a result, prosecutors and police may be tempted to maximize this advantage by failing to provide protections that by statute or case law can*not* be neglected. For example, the U.S. Attorney for the Southern District of New York continued to seize property from landlords and tenants without first providing notice or an opportunity to be heard despite case law suggesting this practice was unconstitutional (see section on proper notice below). In 1989, in *United States* v. *Premises and Real Property located at 4492 S. Livonia Road,* 889 F.2d 1258, 1264 (2d Cir. 1989), the Second Circuit made this explicit, and the prosecutor had to abandon the practice.

Another reason these programs are especially exposed to challenge is the lack of case law that can provide guidance as to what is permissible. The Supreme Court has consistently ruled that criminal protections do not always have to be afforded in most civil cases, but its decisions have typically been tied to the special circumstances of the case under appeal or been encumbered with exceptions. For example, the Court has ruled that appointment of coun el is required in juvenile "hearings," but not necessarily in other civil proceedings. As a result of this ambiguity, prosecutors and police may in good faith fail to offer certain due process protections that a court may subsequently rule are required. Perhaps nowhere is this potential for pushing the due process boundaries in civil cases more evident than in the accusations that some Federal prosecutors are violating constitutional rights in their use of the civil provisions of the Federal Racketeering and Corrupt Organizations (RICO) statute.[1]

Every program but one described in this report has been challenged at least once, and in some cases the decisions have gone against the program. While all the sites have survived the challenges, other programs can learn how to avoid similar problems from the experience of these jurisdictions.

Challenges Need Not Be Fatal

In response to a successful challenge, several sites have either adjusted their procedures to accommodate the adverse ruling or amended their civil statutes to make the disallowed practice legal. After the *Livonia Road* ruling, the U.S. Attorney's office in New York continued its civil forfeiture program but took care to provide the required notice and opportunity to be heard before effecting any seizures. The California Court of Appeals ruled in *Bryte* v. *City of La Mesa,* (207 Cal.App. 3d 687 [1989]) that a section of the Welfare and Institutions Code that the police had been using to seize and retain weapons from the mentally ill was unconstitutional because it compelled the owner of the property to initiate a post-deprivation hearing for the return of the property. As a result, the State legislature revised the portion of the statute found unconstitutional by requiring the police department to petition the court to retain the weapons, leaving the rest of the program intact.

Programs Can Protect Themselves by Taking Specific Precautions

Several program staffing considerations, described in detail in chapter 4, can play an important role in ensuring that targeted individuals are afforded all required protections. First, hire competent staff and take steps to minimize turnover to prevent blunders caused by mediocrity or inexperience. Second, thoroughly train every participant involved in the program in correct procedures for using civil remedies. Third, for each case use a team approach that links personnel from different agencies—particularly, police and prosecutors—on a regular basis so that each group can advise others on a timely basis regarding potential errors. Fourth, involve potentially hostile organizations in the planning phases of the program to allay or address their concerns before they decide to mount a challenge.

The programs described in this report also learned to follow certain critical case-processing guidelines to prevent constitutional challenges.

Pursue Only Strong Cases

All the programs have taken great care to target only those cases they are virtually certain they can win. This is particularly important when the program is just starting, because losing a case or two at the beginning can jeopardize the whole effort by risking support from the top and creating crippling mistrust between the prosecutor, police, and other involved agencies. For example, the San Diego city attorney requires at least 10–15 arrests over a six-month period before targeting a house as a public nuisance. The office also keeps track of successful undercover narcotics buys and gathers neighbors' sealed affidavits to further bolster its case.

Collect Evidence Diligently

Even though they need to prove their case only by a preponderance of the evidence, all the programs collect evidence as if they had to prove each case beyond a reasonable doubt so as to leave no suspicion that the targeted individuals are guilty.[2] A Federal magistrate in New York City who was initially concerned that the U.S. Attorney would not have sufficient evidence of an ongoing criminal enterprise to justify forfeiture of a property was pleased to report that in all the cases he had heard the evidence was always "overwhelming."

Welcome Legal Representation

Respondents in civil cases do not ordinarily have a constitutional right to legal counsel. Nonetheless, several programs go out of their way to welcome—and even provide—representation to avoid any impression that they are trying to circumvent respondents' due process rights. For example, the city attorney in San Diego always encourages landlords and property owners to bring an attorney to the office hearing. The Manhattan district attorney gives every tenant a list of legal services and provides time to seek representation from the civil division of the city's legal aid society. The Los Angeles Mental Evaluation Unit provides every mentally ill person it evaluates with a list of legal and social resources. Because a tenant was an indigent grandmother whose eviction might raise sympathy among the general public and the defense bar, the San Diego city attorney persuaded the Legal Aid Society to represent the woman. Because the Arizona attorney general's office in Phoenix almost always pursues a parallel criminal case against chop-shop operators, it ensures that all defendants in the civil case have access to counsel.

Even though, as a rule, appointed counsel need not be provided in adult civil cases, making an extra effort to afford legal representation may be advisable. The Supreme Court has indicated that under certain circumstances respondents in civil cases may be entitled to appointed counsel. In *Lassiter* v. *Department of Social Services* (452 U.S. 18 [1981]), the Government initiated a civil action to terminate the parental rights of a defendant whose infant had been removed to foster care after a determination that she had

neglected him. The State argued that she had willfully left the child in foster care and that her parental rights were therefore terminated. The Court determined that since the defendant was indigent, she should have been provided with appointed counsel for the civil hearing to protect her rights. While it is unlikely that this principle will be extended outside of the area of parental rights, a person who is represented by counsel has a markedly diminished basis on which to claim a violation of due process.

Six Potential Constitutional Pitfalls Programs Can Avoid

There are six areas in which prosecutors and police who use civil remedies for criminal behavior are especially likely to encounter constitutional difficulties: seizing the property of innocent parties, excessive forfeitures, failing to give proper notice, coercing self-incriminating statements, failing to afford due process protections in criminal contempt hearings, and subjecting respondents to double jeopardy. Programs are especially likely to founder in these areas because of lack of familiarity with applicable Federal case law, or because existing Federal case law is limited to the particular case appealed. Below, a brief review of applicable case law in each of these areas is provided, along with accounts of how programs have tried to avoid running afoul of these constitutional challenges. Programs need to be careful to make sure that what Federal courts have permitted is not prohibited by local legislation or case law.

Forfeiture Involving Innocent Respondents

The two New York City programs rely on civil forfeiture statutes that could be used against property owners who, although themselves innocent of any illegal activity, knowingly allow a tenant to use their property to sell drugs. The Supreme Court has consistently held that forfeiture laws do not violate due process simply because they are made applicable to the property interests of innocent owners. In *Calero-Toledo* v. *Pearson Yacht Leasing Co.* (416 U.S. 663, 680 [1974]), the Court upheld the civil forfeiture of a yacht because a single marijuana cigarette was recovered on board. The Court issued its ruling despite the fact that the boat was being used by tenants under a long-term lease and even though the owner-lessor was innocent of any involvement or even knowledge of the drug's presence on board. The Court's reasoning in upholding the forfeiture was that "confiscation may have the desirable effect of inducing [innocent lessors] to exercise greater care in transferring possession of their property."

However, the Court went on to observe that:

> It would be difficult to reject the constitutional claim of an owner . . . who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property; for in that circumstance, it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive.

Given this ruling, the programs that target drug-dealing tenants have been careful to screen cases so that they do not sue innocent landlords unless it can be shown that the landlord was aware of the illegal activity and either would not or could not take action. The Manhattan district attorney has represented a few landlords in eviction proceedings rather than require them to take action when they have been unable to afford the expense of litigating the case or have been threatened by a tenant if they pursued the case. When a legal services lawyer called the U.S. Attorney's office in New York to report that a mother whose three adult sons were allegedly dealing drugs from her apartment was not personally involved in any criminal activity, the prosecutor decided not to pursue the case. Programs also exercise caution to avoid evicting innocent leaseholders whose apartment is being used by other tenants for selling drugs. The safest course of action is to ensure that the property owner exhibits some degree of culpability, even if only negligence, in permitting the illegal action to continue.

Programs are also careful about whether, in seeking to evict a guilty leaseholder, they may in the process have to evict clearly innocent parties such as minor children. While not unconstitutional, prosecutors sometimes choose to avoid these cases or try to make arrangements to house the children to avoid a possible public backlash against the program. To avoid such negative publicity, the U.S. Attorney's office has asked that the Marshals Service inform it of any innocent people its officers find in each home they seize.

Excessive Forfeiture

A recent Supreme Court decision, *Austin* v. *United States,* No. 92-6073 (June 28, 1993), may have implications for the constitutionality and procedures involved in forfeiture of property such as the actions taken by the Arizona Financial Remedies Unit against chop shops and by the U.S. Attorney for the Southern District of New York against drug-involved properties. While executing a legal search warrant, police found convincing evidence of drug dealing in an auto body shop and mobile home belonging to Richard Lyle Austin.

Austin pleaded guilty in State court to possession of cocaine with intent to distribute and was sentenced to seven years in prison. The United States then filed an *in rem* action in the U.S. District Court of South Dakota seeking forfeiture of Austin's auto body shop and mobile home under 21 U.S.C. section 881(a)(4) and (a)(7). Austin contended that forfeiture of the properties would violate his Eighth Amendment right against "excessive fines."

The district court rejected this argument, as did the Eighth Circuit Court on further appeal. However, the U.S. Supreme Court unanimously reversed, ruling that the Eighth Amendment does apply to *in rem* civil forfeiture. The Court remanded the case to the Eighth Circuit Court to make a determination as to whether forfeiture of an auto body shop and trailer house involved in the commission of a drug offense constitutes an "excessive fine" within the purview of the Eighth Amendment.

Austin did not involve forfeiture of contraband or proceeds of crime. It was applicable only to "instrumentalities,"—that is, property used to commit a crime. But even as to instrumentalities, the implications of *Austin* for using *in rem* civil forfeiture actions is unclear. The Supreme Court majority provided no guidance as to how to measure excessiveness. The matter may turn on how closely connected the property was to carrying out the crime or the value of the property compared with a criminal fine for the offense involved. According to the chief of the Arizona attorney general's Financial Remedies Unit, "The courts will be grappling with the concept of excessiveness for at least several years, until the development of this concept is ripe for Supreme Court review." However, the unit chief goes on to observe that:

> *Austin* does not support wrenching forfeiture from its historical foundations to serve criminal punishment goals or judicial redistribution of property. Prosecutors must strive to maintain the goals of removing property from criminal uses and creating economic disincentive for acts or omissions inconsistent with the public's health, safety and welfare.

The unit chief further maintains that several key classes of forfeiture are entirely remedial and, therefore, not subject to the excessive fines clause of the Eighth Amendment. He concludes that:

> Courts may be willing to accept this view if they are assured that other constitutional limitations apply to all forfeitures, including civil punishment and civil remedial forfeitures. They do, and the practical effect of non-applicability of the excessive fines clause may not be very significant.... [However,] many key questions are raised but not answered by *Austin,* and it is impossible to accurately predict the ultimate solution to most of these issues.[3]

Providing Proper Notice

Every program in this report is involved in seizure of property that, if improperly confiscated, could violate the procedural due process right to notice and an opportunity to be heard. However, the Supreme Court ruled in *Fuentes* v. *Shevin* (407 U.S. 67, 81-82 [1972]) that notice and opportunity to be heard can be postponed until after the seizure has been effected if there is an "extraordinary situation" and a "special need for very prompt action." The Court identified three criteria for the exceptional case:

- The seizure has to be necessary to secure an important governmental or general public interest.
- There has to be a special need for very prompt action.
- The State has kept strict control over its monopoly of legitimate force in that the person initiating the seizure is a government official who is responsible for determining under the standards of a narrowly drawn statute that it was necessary and justified in the particular instance.

Four years later, the Court enunciated a "balancing test" in *Matthews* v. *Eldridge* (424 U.S. 319 [1976]) for determining whether *ex parte* termination of disability benefits violated due process. The Court held that relief without prior notice could be granted to petitioners in those cases in which the private interests being abridged were outweighed by the governmental interests being protected. However, the Court noted that it was essential to consider the fairness and reliability of the existing procedures for providing due process review of the *ex parte* decision and the probable value, if any, of additional procedural safeguards.

Based on these rulings, and because of such procedural safeguards as the availability of an immediate hearing to contest the decision, lower courts have consistently upheld the issuance of *ex parte* civil protection orders in domestic violence cases even though they involve excluding the batterer from a home or apartment of which he is the lawful owner or tenant-of-record (for example, *State ex rel. Williams* v. *Marsh,* 626 S.W.2d 223 [Mo. 1982]), citing *Matthews* v. *Eldridge*). However, with respect to real property, the Supreme Court recently held that, absent Government proof of exigent circumstances and no less restrictive way to protect its interests, seizure *ex parte,* without notice or an

opportunity to be heard, violates due process of law *(United States* v. *James Daniel Good Real Property,* 114 S.Ct. 492, __U.S.__ [1993]). The results in an earlier second circuit case are in accord. In *United States* v. *Premises and Real Property at 4492 Livonia Road* (889 F.2d 1258, 1264 [2d Cir. 1989]), a Federal district court ruled that the U.S. Attorney's summary seizure of 120 acres with a house and other buildings without notice to the homeowner and opportunity for an adversary hearing violated due process. The court noted that a showing of exigent circumstances seems unlikely when a person's home is at stake, since a home cannot be readily moved or dissipated. Furthermore, the Government's interest in preventing real property from being improperly transferred could readily be satisfied by filing a *lis pendens* along with a restraining order or bond requirement. As a result, the Government could not introduce evidence gained by the improper seizure. However, the court still ruled that the unconstitutional seizure did not bar forfeiture and that the forfeiture one year later was valid.

Similarly, in *Richmond Tenants Org.* v. *Kemp* (753 F. Supp. 607 [E.D. Va. 1990]), a U.S. district court enjoined the Federal Government's Public Housing Asset Forfeiture Demonstration Project from evicting tenants, as contemplated by Federal statute (21 U.S.C. 881(a)(7)[1988]), based on only an *ex parte* showing before a Federal magistrate of probable cause to believe that a member of the household was using a housing unit to sell drugs. In applying the *Matthews* v. *Eldridge* "balancing test," the court emphasized the significant harm that seizure causes tenants, while it discounted the Government's interest in using no-notice summary seizures to prevent further crime, which could, the court said, be served just as well by seizures after notice and an opportunity to be heard.

As noted above, the U.S. Attorney's program to evict drug-dealing tenants from private housing in New York City used to seize leaseholds without notice or opportunity to be heard until *Livonia Road* put a stop to the practice. By contrast, the city attorney in San Diego attributes the lack of due process challenges to the city's Nuisance Abatement Program partly to the care he has always taken (now required by an amendment to the Drug Abatement Act) to notify the property owner at an office hearing before filing a civil complaint.

Coerced Self-Incrimination

The Fifth Amendment to the Constitution provides that "no person . . . shall be compelled in any *criminal* case to be a witness against himself" (emphasis added). Nonetheless, the Supreme Court has held that a witness in any government proceeding—civil or criminal—can invoke the privilege against self-incrimination if the answer will lead to or provide evidence that could be used in a *subsequent* criminal case (*Lefkowitz* v. *Cunningham,* 431 U.S. 801, 805 [1977]). However, in civil cases this use of the privilege is limited by the requirement that the evidence concealed must in fact tend to incriminate the witness, and the burden is on the person who challenges the privilege to show it would not have this tendency (see, for example, *Hoffman* v. *United States,* 341 U.S. 479, 486-87 [1951]). The more ambiguous question for this report, however, is whether the State must grant the privilege in a civil proceeding even if disclosure cannot possibly lead to a criminal prosecution.

In *United States* v. *Ward* (448 U.S. 242 [1980]), the Supreme Court examined a challenge to a reporting requirement in the Federal Water Pollution Control Act, which provided a civil penalty. The appellant claimed the penalty was punitive and argued that the act's reporting requirement through which he was found to have discharged oil into the Arkansas River violated his Fifth Amendment privilege against self-incrimination. The appellant claimed that he was forced to report the spillage and that the use of this "coerced" statement in a penalty proceeding had the effect of forcing him to testify against himself. Although recognizing that the scope of the privilege against self-incrimination is broader than the scope of purely procedural protections applicable only in criminal proceedings, the Court found that the civil proceeding in question was remedial, since it apportioned the fine in accordance to the harm done. Since it was a remedial penalty, the protection did not adhere. By contrast, in *United States* v. *United States Coin and Currency* (401 U.S. 715 [1971]), the Court held that the trial court in a civil forfeiture action *erred* in denying the appellant the right not to say anything that might incriminate him precisely because the forfeiture was *punitive* in nature.

The Supreme Court issued another relevant pair of contrasting rulings. In *In re Gault* (387 U.S. 1 [1967], the Court ruled that juvenile hearings were so similar to criminal trials that they required almost all the protections afforded in criminal proceedings, including the right not to incriminate oneself. However, in *Allen* v. *Illinois* (478 U.S. 364 [1986]) the Court refused to find that a civil hearing on whether to commit a mentally ill defendant who posed a danger to society to the guardianship of the State Department of Corrections was not entitled to the constitutional privilege against self-incrimination even though the civil proceeding was almost identical to the criminal prosecution of sex-related crimes.

The following rule seems to emerge from these and other Supreme Court cases:[4] Defendants may invoke the privilege

against self-incrimination in any civil proceeding in which they are alleged to have engaged in conduct that constitutes a crime or public offense *and* in which they may be given penalties associated with criminal punishment—that is, fines, incarceration, or forfeiture of contraband or the proceeds or instrumentalities of their crime. However, defendants are not entitled to the privilege if the fine, forfeiture, or incarceration is remedial in nature—that is, is intended and either is reasonably related to providing recompense to the government or to an injured party or involves coercion to obtain compliance with a court order.

Prosecutors can enlist the courts to issue stays of the civil action or protective orders to prevent the disclosure of protected information and thus minimize danger to a criminal defendant's constitutional rights in these circumstances. Stays and protective orders may also aid the prosecutor because, otherwise, the greater discovery rights available to a respondent in a civil case may give the defendant in the parallel criminal case a much greater advantage than will accrue to the prosecutor. Finally, there may be statutory remedies to these dilemmas. For example, the Minnesota Domestic Abuse Act protects the defendant's privilege to refuse to give incriminating evidence in a criminal case despite an admission of guilt in the civil case by providing that "any testimony offered by a respondent in a hearing pursuant to this section is inadmissible in a criminal proceeding."

Contempt Proceedings

The effectiveness of civil remedies is sometimes based on the use of injunctive relief, most notably when restraining orders are issued against domestic violence, as in Duluth, and against illegal drug use by property owners or tenants, as in San Diego. Obviously, these remedies will be effective only if enjoined parties who violate the order know they can be prosecuted for contempt.

Courts have grappled with the question of whether contempt proceedings are civil or criminal so that they can decide which constitutional protections must be afforded. The Supreme Court addressed this issue most recently in *Hicks* v. *Feiock* (485 U.S. 624 [1988]), a case in which a California court ruled that a parent who had failed to make court-ordered monthly child support payments was in contempt and imposed a three-year period of probation. As a condition of probation, the court ordered $50 monthly payments to erase his accumulated arrearage. The defendant challenged the constitutionality of the hearing, arguing that the proceeding was criminal in nature and that, therefore, because the State required him to shoulder the burden of proof on his ability to comply with the order, the State acted unconstitutionally in shifting onto him the obligation to disprove every element of the crime charged. All parties involved agreed that placing the burden of proof on the defendant would be unconstitutional if the proceeding were deemed criminal but acceptable if considered civil.

In a 5 to 3 ruling, the Court stated that the test for distinguishing between criminal and civil contempt lies in the character of the relief the proceeding will afford:

> If the relief provided is a sentence for imprisonment, it is remedial if "the defendant stands committed unless and until he performs the affirmative act required by the court's order," and is punitive if "the sentence is limited to imprisonment for a definite period." If the relief is a fine, it is remedial when it is paid to the complainant, and punitive when it is paid to the court.

The Court specifically declined to examine whether the underlying purpose of the proceeding was to vindicate the Court's authority (that is, to punish the defendant) or to force the parent to conform his conduct to the original order (that is, to remedy the situation). This question is difficult to answer, the Court said, because often the court is attempting to accomplish both objectives at the same time.

According to Professor Cheh, under the Court's approach in *Hicks* v. *Feiock,* the enforcement of statutes that permit protection orders to stop domestic violence or injunctions against drug nuisances will be regarded as criminal if the judge orders a determinate jail term or a fine for violations. It follows, she adds, that the procedure will be constitutionally deficient if it does not afford the defendant all of the procedural protections associated with a criminal proceeding.

It appears that some jurisdictions have imposed determinate sentences in contempt hearings for violations of civil protection orders without affording defendants all the due process rights of a criminal proceeding. Furthermore, some courts have erroneously asserted that criminal contempts are not criminal prosecutions. (See *People* v. *McGraw,* 138 Misc. 2d 349, 524 N.Y.S.2d 343 [1988]; *Eichenlaub* v. *Eichenlaub,* Pa. D & C.3d 59 [Allegheny Co. 1983] aff'd 340 Pa Super. 552, 490 A.2d 918 [1985].) Programs that confuse civil and criminal contempt in this manner may founder in their use of civil remedies to address criminal activity.

By contrast, judges in Duluth are careful to distinguish between civil and criminal contempt hearings. If the judge holds a contempt hearing because a respondent has failed to

attend court-ordered counseling sessions and refuses to return to them, he treats the hearing as a civil proceeding because he will jail the person for an indefinite period until the person agrees to comply with the counseling requirement. As a result, the judge does not provide a jury trial and bases his decision on a preponderance of the evidence. (He does provide an attorney, however, because he feels a defendant who may be jailed should have legal counsel.) When the respondent has violated the order's stay-away provision by returning to the victim's home, the judge holds a trial on a misdemeanor charge of violating a protection order and affords the defendant all the protections of a criminal proceeding.

The San Diego city attorney has asked the court to bring contempt charges in three cases. The Drug Abatement Act provides for the court to punish violations of an abatement order by a fine of up to $10,000, imprisonment for up to six months, or both. Since the contempt hearings were held for a violation and the judge intended to apply one or both of these sanctions in a determinate manner (as opposed, for example, to a daily fine of $50 until the activity was abated), the defendant at the contempt hearing was afforded all the due process protections of a criminal trial.

Double Jeopardy

Double jeopardy may arise when the respondent punished in the civil case is subjected to punitive sanctions in a criminal case brought for the same act. In *United States* v. *Halper* (490 U.S. 435 [1989]), the Supreme Court addressed the case of the manager of a medical laboratory convicted of filing 65 false Medicaid claims resulting in an undeserved Government payout of $585. The manager was sentenced to two years' imprisonment and fined $5,000. Following his criminal conviction, the Government sought a civil statutory penalty of approximately $130,000 as well. In *Halper,* the Court determined that unless the Government could prove that its actual damages were of that order of magnitude, the civil statutory penalty constituted "punishment," since the amount sought was on its face disproportionate to the Government's actual costs and damages. The Court held that proceeding civilly against a defendant already criminally convicted for the same offense when a punitive rather than remedial sanction is sought violates the double jeopardy protection against multiple prosecutions. The Court stated:

> The rule is one of reason: Where a defendant previously has sustained a criminal penalty and the civil penalty sought in the subsequent proceeding bears no rational relation to the goal of compensating the Government for its loss, but rather appears to qualify as "punishment" in the plain meaning of the word, then the defendant is entitled to an accounting of the Government's damages and costs to determine if the penalty sought in fact constitutes a second punishment.

In the context of double jeopardy jurisprudence, *Halper* renders irrelevant the distinction between criminal and civil proceedings—a distinction, according to the Court, that is an "abstract approach"; a violation of the prohibition against double jeopardy "can be identified only by assessing the character of the actual sanctions imposed." However, as Professor Cheh points out in her article, the guidance that can be obtained from *Halper* is limited in that it is not always clear whether a given civil proceeding actually operates to "punish." Certainly, she goes on to observe, history suggests that the multiple punishments against which double jeopardy protects are those traditionally associated with criminal proceedings, such as fines and incarcerations. However, she adds, common experience and common sense dictate that sanctions will not be deemed "punishment" if they are reasonably calculated to constitute a rough compensatory remedy (such as a rough approximation of damages and costs), reasonably serve regulatory goals adopted in the public interest (such as evicting drug dealers from rented property), or provide treatment for persons unable to care for themselves (such as some mentally ill persons). However, as the Court's decision itself indicated, judges must determine on a case-by-case basis whether a given burden is reasonably calculated to achieve and actually does achieve the nonpunitive goals of recompense, regulation, or treatment.

Under *Halper,* punitive civil sanctions cannot be imposed for conduct that has already been punished by a criminal conviction. It appears that punishment, likewise, cannot be imposed in a criminal prosecution for conduct for which the Government has already obtained punitive *civil* sanctions. Several Federal district courts have ruled that "the *Halper* principle that a civil penalty can be factored into the double jeopardy matrix should apply whether the civil penalty precedes or follows the criminal proceeding." (See *United Sates* v. *Sanchez-Escareno,* 950 F.2d 193,200 [5th Cir. 1991]; *United States* v. *Mayers,* 897 F.2d 1126, 1127 [11th Cir. 1990); and *United States* v. *Bizzell,* 921 F2d 263, 266-67 [10th Cir. 1990].)

Defendants who are held in criminal contempt for violation of a protective order sometimes face a subsequent prosecution for the criminal act that gave rise to the contempt proceedings. For example, a respondent may be found guilty of contempt for violating a civil protection order and later prosecuted for the underlying assault. Double jeopardy

potentially applies in these situations irrespective of *Halper,* which addressed the relationship between a criminal and a related *civil* proceeding—because *both* of these proceedings are criminal prosecutions. Nevertheless, because double jeopardy applies only to double punishment for the *same* offense, some courts have held that violation of a contempt order and commission of an underlying crime such as assault can be deemed separate offenses. The key question then becomes what is the same offense. If, in the second prosecution, the Government can prove the second charge only by proving the same elements of the crime for which the defendant was already found guilty, double jeopardy will bar the second action as a multiple prosecution. For example, suppose a respondent violates a civil protection order that has a stay-away provision by entering his wife's apartment and assaulting her. If the respondent is tried first for contempt of court for violating the stay-away provision and tried subsequently for the criminal offense of battery, an appeals court might not necessarily consider this unconstitutional. However, if the contempt proceeding found the respondent guilty of violating the protection order because of the assault, double jeopardy will bar a second prosecution for the same offense as a multiple prosecution.

In Duluth, no prosecutor has tried to seek criminal contempt penalties against a respondent who violated a protection order and then prosecuted the same individual for the substantive crime that constituted violation of the order. Normally, the prosecutor avoids charging contempt at all in these cases because the criminal charge for a second assault, with its enhanced penalties, can result in a much stiffer sentence and because a criminal charge makes clear on the offender's criminal record that the person committed an act of violence. As a result, the respondent is instead charge with a two-charge criminal count including the new assault and the violation of the order for protection, with the violation charge typically dropped as part of a plea bargain.

As *United States* v. *Dixon* (113 S. Ct. 2849 [1993]) makes clear, if a prosecutor in Duluth *were* to seek criminal contempt penalties following violation of a protection order and then prosecute the individual for the substantive offense prohibited by the order, the double jeopardy clause would be implicated. In *Dixon,* the U.S. Supreme Court recently determined that double jeopardy prohibits prosecution of an estranged husband for assault on his wife following prosecution for criminal contempt for violating a civil protection order that prohibited assaulting her. At the same time, however, prosecuting the defendant for violating the order forbidding assault did *not* bar a subsequent prosecution for assault with intent to kill. That offense requires proof of a specific intent to kill, which the contempt offense did not. The two crimes are different offenses. Justice Scalia noted that the double jeopardy clause "looks to whether the offenses are the same, not to the interests that the offenses violate." If the substantive offense (here, assault on the wife) does not include any element not contained in the earlier contempt offense, subsequent prosecution offends the Constitution.

Under *Halper,* the monetary fine provisions of the civil statutes used in San Diego could potentially raise a double jeopardy issue. If a homeowner in San Diego is prosecuted for the sale of narcotics in an apartment and, in a separate civil action, is also fined for that activity, then as much of the fine as is deemed to be punishment will constitute double jeopardy. However, a challenge on these grounds is unlikely to be brought and, if brought, would probably not be upheld. First, since the landlord will not face prosecution for the tenant's illegal acts, there is no prospect of double punishment of the landlord. Second, even if the Government sought to pursue the tenant criminally and civilly, a civil fine before or after a criminal fine may be justified as long as the Government proves that the fine is reasonably related to compensating the Government for its eviction efforts.

Conclusion: Treat Each Case as Unique

The key to avoiding constitutional challenges is to examine each individual case to make sure it does not call for any of the procedural or substantive protections offered defendants in a criminal proceeding. In ordinary civil suits, procedural due process requirements are satisfied under the interest-balancing approach of *Matthews* v. *Eldridge* with a preponderance of evidence standard for the burden of proof and no right to appointment of counsel. For example, applying the *Matthews* due process balancing approach of weighing the interests affected, the risk of error under existing practices, and the public interest, courts have repeatedly found that conventional civil procedural rules are constitutionally adequate in civil protection order cases, rejecting challenges to the use of *ex parte* relief, the preponderance standard of proof, and the absence of appointed counsel.

However, as summarized below, the Supreme Court has on many occasions demonstrated that, when the stakes are high enough in a given case, due process may mean according civil defendants more stringent procedural protections:

- *Standard of proof.* The Supreme Court has not required proof beyond a reasonable doubt in a civil context. However, it has imposed the stringent requirement of proof by clear and convincing evidence in certain circumstances. In *In re Gault* (387 U.S. 1 [1969]), the Court elevated the preponderance standard of proof to that of clear and convincing evidence in juvenile hearings. The Court also ruled in *Santofsky* v. *Kramer* (455 U.S. 745, 748 [1981]) that the risk of error in an action to terminate parental rights because of child neglect mandates a clear and convincing standard of proof.

- *Appointment of counsel.* Courts have not required appointment of legal counsel in civil cases except in instances involving potential loss of basic liberties, such as incarceration or the severing of a fundamental relationship such as that between a parent and a child. *In re Gault* was the first civil case in which the Supreme Court found a due process right to appointed counsel in juvenile hearings. In *Lassiter* v. *Department of Social Services* (452 U.S. 18, 26-27 [1981]), the Court restated that the appointment of counsel may sometimes be required in civil cases—for example, when an indigent defendant stands to risk custody of her child. However, in *Lassiter,* the Court also explained that there was a presumption against such a right when liberty interests were not at stake. Consistent with this line of reasoning, the Court in *Resek* v. *State* (706 P.2d 288 [Alaska 1985]) rejected the right to a counsel claim in a forfeiture case.

- *Notice and hearing.* While the Court has consistently held that *ex parte* seizures may be constitutional with proper safeguards, in *United States* v. *James Daniel Good Real Property* the Court held that summary seizures of property are unconstitutional when they involve forfeiture of real property unless the government proves exigent circumstances—a difficult burden with something like a home, which cannot be readily moved.

Social and economic legislation that criminalizes or regulates certain conduct is presumed constitutional if it rationally serves any permissible police power objective—public health, morals, convenience—as long as it does not interfere with specific, fundamental rights (such as marrying and having children). As a result, there is ordinarily no meaningful substantive due process basis on which to attack the use of civil remedies to control, sanction, or regulate antisocial behavior. For example, legislatures rationally may adopt measures making the possession of dangerous drugs illegal and providing for seizures and forfeitures. Once again, however, the Court has found that substantive due process protections may adhere to civil actions brought by the State when the stakes are high enough.

- *Forfeiture and innocent owners.* The Supreme Court has consistently held that forfeiture laws do not violate due process simply because they are made applicable to property interests of innocent owners (as in *Calero-Toledo*). However, *Calero-Toledo* and, more recently, *Austin* v. *United States* also suggested that a forfeiture may be unconstitutional if the defendant can prove not only that he or she was not involved in and was unaware of the wrongful activities, but also that he or she had done all that reasonably could be expected to prevent the proscribed behavior.

- *Self-incrimination.* Defendants in civil proceedings are entitled to this privilege if they are subject to penalties that are punitive, rather than remedial. Punitive penalties are defined as fines and forfeitures that are disproportionate to the harm done, and determinate prison sentences. Defendants may also remain silent if the information they would provide would be incriminating in a subsequent criminal proceeding.

- *Double jeopardy.* According to *Halper,* the Government may not proceed civilly against a defendant already criminally convicted for the same offense if it seeks a punitive rather than a remedial sanction. Moreover, according to lower court interpretations of *Halper,* a criminal action may not be brought against a person who has already been punished punitively for the same behavior in a civil case.

Finally, *Halper* also makes clear that any contempt hearing that may result in a determinate sentence must provide all the procedural and substantive protections of a criminal trial.

Avoiding constitutional challenges requires paying close attention to what case law—and the enabling civil legislation—permits. However, a successful challenge does not have to mean the end of a program; as seen in Los Angeles and Duluth, sometimes the enabling legislation can be amended, or, as in New York, program procedures can be changed to conform to the court ruling. However, it is easier to avoid challenges than to accommodate to them after the fact. Both the achievements and mistakes of the programs described in this report suggest a variety of ways in which other prosecutors and police administrators can take the necessary precautions to ensure that all targeted individuals are afforded the protections to which they are entitled.

Endnotes

1. See, for example, "Symposium: Reforming RICO: If, Why, and How?" *Vanderbilt Law Review* 43 (3): 621–1101, 1990.

2. According to *Black's Law Dictionary* (St. Paul, Minnesota: West Publishing Co., 1990), beyond a reasonable doubt means the judge or juror must be "fully satisfied, entirely convinced, satisfied to a moral certainty." Preponderance of evidence is "evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not." Clear and convincing proof requires "more than a preponderance of the evidence but less than proof beyond a reasonable doubt . . . the truth of the facts asserted is highly probable."

3. Cameron Holmes, "*Austin* v. *United States*: Calls for a Steady Prosecutorial Hand," *Civil Remedies in Drug Enforcement Report* (published by the National Association of Attorneys General) (July/August 1993): pp. 9–12.

4. Mary M. Cheh, "Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction." *Hastings Law Journal*, 42 (5): 1369–1413, 1991.

Glossary

ex parte — when the person adversely affected in a judicial proceeding has not been notified of the proceeding or of the action taken against him or her

leasehold — the right to use rented (leased) property

in personam — court proceedings or actions against a person, in contrast to actions against property (see *in rem* below)

in rem — court proceedings or actions that involve disposition of property and which makes no recognition of the owner (in contrast to actions against persons—see *in personam* above)

lis pendens — control that courts acquire over property involved in a lawsuit until the case has been resolved

mens rea — criminal intent

*U.S. G.P.O.:1994-387-167:39