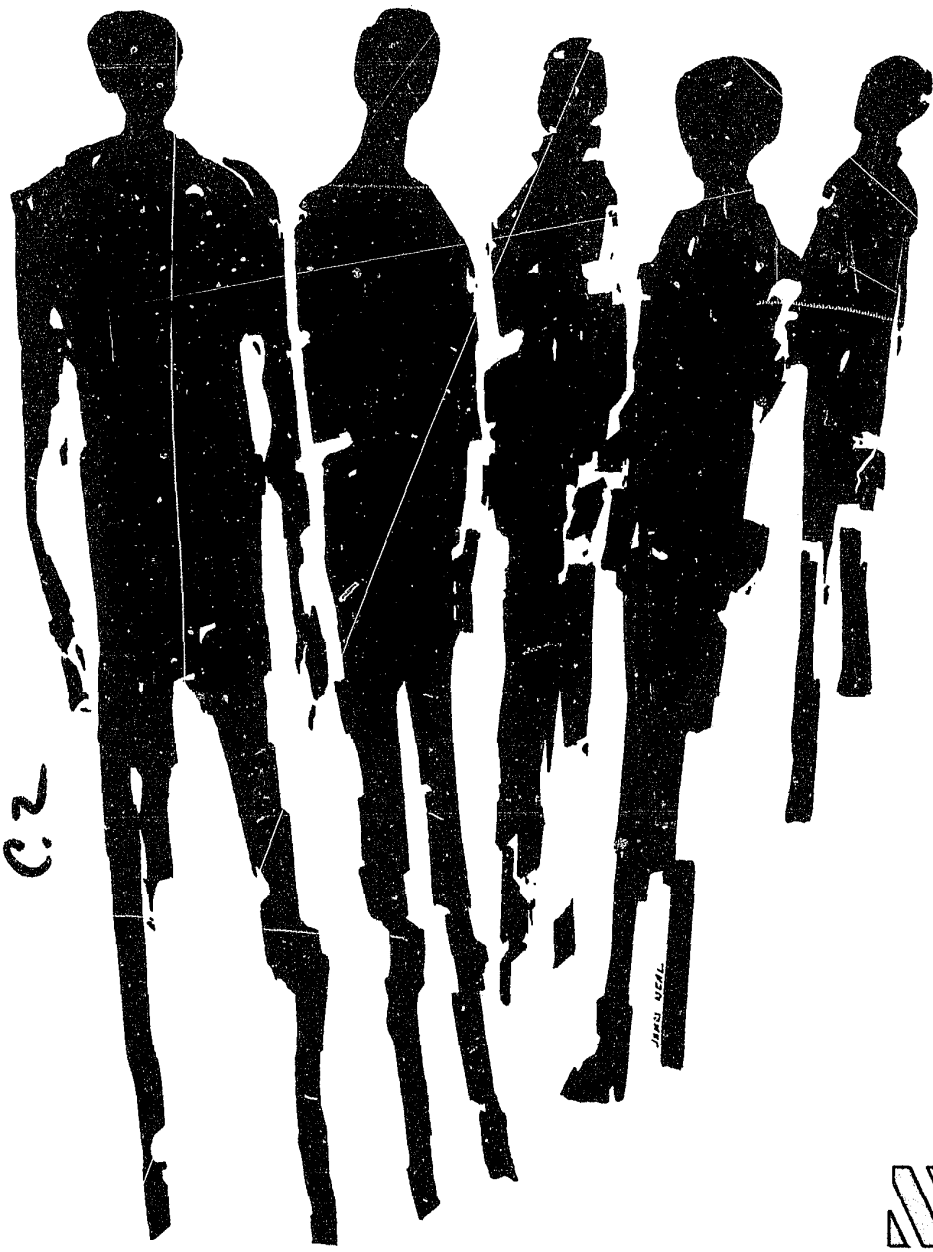
RACKETS BUREAUS:

investigation and prosecution of organized crime



National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
United States Department of Justice

RACKETS BUREAUS: INVESTIGATION AND PROSECUTION OF ORGANIZED CRIME

By

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This project was supported by Grant Number 75-NI-99-0122 awarded to the Cornell Institute on Organized Crime by the National Institute of Law Enforcement and Criminal Justice, Law Enforcement Assistance Administration, U.S. Department of Justice, under the Omnibus Crime Control and Safe Streets Act of 1968, as amended. Points of view or opinions stated in this document are those of the authors and do not necessarily represent the official position or policies of the U.S. Department of Justice.

March 1978

National Institute of Law Enforcement and Criminal Justice
Law Enforcement Assistance Administration
U.S. Department of Justice

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Washington, D.C. 20402
Stock Number 027-000-00592-6

CONTENTS

PART 1. ANALYTICAL DESCRIPTION

PART 2. GENERAL STANDARDS FOR THE OPERATION OF UNITS

PART 3. METHODOLOGY AND SITE VISIT REPORTS

ABSTRACT

This study surveys the organization of present efforts directed at the investigation and prosecution of organized crime on the state and local level. Political corruption and white collar crime control programs are tangentially examined. Aspects of organized crime control units considered include scope of targeted activity, attorney assignment, investigative resources, support services, attorney-investigator relations and training. Standards are then proposed for the establishment, organization, and operation of specialized units in the organized crime field. The standards reflect the views of the researchers, which were critically reviewed by a knowledgeable and experienced panel of independent evaluators.

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PREFACE

Organized crime represents a special challenge to law enforcement. Traditionally, law enforcement reacted to individual criminal behavior through the individual agencies of the criminal justice system—police, prosecutors, courts and corrections. The most sophisticated response to organized crime today, however, integrates investigators and prosecutors into a proactive effort. Only a handful of such units exist on the state and local level. There is no consensus among them on what areas of group criminal behavior should be targeted. At best, this reflects differing state and local conditions; at worst, it reflects confusion over goals and strategy.

Recognizing the need for a study of efforts to integrate investigators and prosecutors in proactive units, the National Institute of Law Enforcement and Criminal Justice commissioned the Cornell Institute on Organized Crime to undertake an examination of such units. Site visits were made to a representative sample of investigative and prosecutive units on the state and local level by a team of experienced scholars and prosecutors. Surveys were conducted of other units. Findings were made; recommendations were formulated. The recommendations reflect an effort to implement operationally many of the more general standards of the President's Commission on Law Enforcement and Administration of Justice, the American Bar Association, and the National Advisory Committee on Criminal Justice Standards and Goals. The recommendations were reviewed by a distinguished panel of experienced prosecutors. This study reports those findings and recommendations.

Attorney-investigator relations are crucial to the successful operation of proactive units targeted on organized crime. Several patterns of such relations have emerged. Attorneys assigned to such units are too few in number, insufficiently experienced, and not adequately compensated. Investigators, too, reflect comparable, but not as severe deficiencies. Support staff, particularly in the area of the intelligence analyst and accountant, need to be provided or upgraded. Equipment and space available vary widely in quantity and quality. Training is woefully inadequate.

There is a clear and pressing need to think through and raise the quality of specialized units designed for the investigation and prosecution of organized crime. Careful attention needs to be given to establishing such units when a serious organized crime problem is present. Goals need to be set and strategies adopted. The units must be organized to meet the assigned tasks. The operation of the units, too, needs to be thought through. A careful allocation of limited investigative and prosecutive resources must be made. The units must look beyond investigation and prosecution to penal disposition. Finally, thorough internal and outside review and evaluation must be integrated into the functioning of the unit.

This study was made by G. Robert Blakey, Ronald Goldstock, and Charles H. Rogovin. Mr. Blakey is a professor of law at the Cornell Law School and director of its Institute on Organized Crime. From 1960 to 1964, he was a special attorney in the Organized Crime and Racketeering Section of the U.S. Department of Justice. In 1966 and 1967, he was a consultant on organized crime to the

President's Commission on Law Enforcement and the Administration of Justice. From 1969 to 1974, he served as chief counsel to the Subcommittee on Criminal Laws and Procedures of the United States Senate. In 1976, he served as a member of the Task Force on Organized Crime of the National Advisory Committee on Criminal Justice Standards and Goals. Mr. Goldstock is the executive director of the Institute on Organized Crime. From 1969 to 1975, he was an assistant district attorney in New York County, where he served as chief of the Rackets and Criminal Investigations Bureaus. Mr. Rogovin is the president of Criminal Justice Associates, Inc. In 1966 and 1967, he was the director of the Organized Crime Task Force of the President's Commission on Law Enforcement and Administration of Justice. He has also served as an assistant attorney general in Massachusetts and chief assistant district attorney in Philadelphia; he recently accepted a position as visiting professor of law at the Temple University Law School.

This study contains, as such, no bibliography on organized crime. Nevertheless, note is taken of the bibliography on organized crime recently completed by the Cornell Institute on Organized Crime. It contains 1,357 entries in its first edition, and it has been computerized. A second, more comprehensive edition is being prepared. As such, it is the most complete in existence. Access to it can be had through the Cornell Institute on Organized Crime, Cornell Law School, Ithaca, N.Y. 14850.

ACKNOWLEDGMENTS

A number of people have contributed to this study. It could not have been completed without the support of Richard W. Velde, the former Administrator of the Law Enforcement Assistance Administration, and Gerald M. Caplan, the former Director of the National Institute of Law Enforcement and Criminal Justice. Particular note must also be taken of the assistance of Mary Ann Beck, the project monitor; without her neverfailing support, careful guidance and inexhaustible patience, little could have been accomplished.

An earlier draft of the study was critically evaluated by a panel of knowledgeable and experienced professionals in the organized crime field. The panel included Bruce E. Babbitt, Attorney General of Arizona; Garrett Byrne, District Attorney, Suffolk County, Massachusetts; Michael J. Codd, Police Commissioner, New York City; Denis Dillon, District Attorney, Nassau County, New York; William Hyland, Attorney General of New Jersey; Jeremiah B. McKenna, General Counsel, New York State Select Committee on Crime, Its Causes, Control and Effect on Society; Robert M. Morgenthau, District Attorney, New York County; Henry Petersen, former Assistant Attorney General, Criminal Division, U.S. Department of Justice; Alfred J. Scotti, former Chief Assistant and Head of Rackets Bureau, District Attorney's Office, New York County; Herbert J. Stern, United States District Judge, District of New Jersey; and Carl A. Vergari, District Attorney, Westchester County, New York. Except as otherwise specifically noted, however, the conclusions and recommendations of the study are solely those of the Cornell survey research team.

The cooperation of a number of others must also be acknowledged. Site visits were conducted to prosecutor's offices in several states. A number of people assisted in these site visits. They included Eugene Gold, the District Attorney of Kings County, New York and Albert Koch, the head of its Rackets Bureau; Denis Dillon, the District Attorney of Nassau County, New York, and Lawrence Leff, the Executive Assistant District Attorney; Robert M. Morgenthau, the District Attorney of New York County, New York, Kenneth Conboy, the head of its Rackets Bureau, and Austin Campriello, its deputy chief; Garrett Byrne, the District Attorney of Suffolk County, Massachusetts, and Thomas Dwyer, the head of its organized crime control unit; Carl A. Vergari, the District Attorney of Westchester County, New York, and William McKenna, the head of its Rackets Bureau; Bruce Babbitt, the Attorney General of Arizona; John D. MacFarlane, the Attorney General of Colorado, and John Hornbeck, the head of the Colorado Strike Force Against Organized Crime; James McDonald, Counsel to the Governor of Florida for Organized Crime; William J. Guste, Jr., the Attorney General of Louisiana, and William Faust III, the Head of the Louisiana Organized Crime and Racketeering Unit; Frank Kelly, the Attorney General of Michigan, and Vincent Piersante, the head of the Organized Crime Division of the Attorney General's Office; William F. Hyland, the Attorney General of New Jersey, Edwin A. Stier, Deputy Director of Investigations and Peter Richards, Assistant to the Director in Charge of Grand Jury Administration of the Division of Criminal Justice, New Jersey; Bronson C. LaFollette, the Attorney General of Wisconsin and Michael Zaleski, Assistant Attorney

General. The cooperation of these offices and the individuals in them is hereby gratefully acknowledged.

Special mention must also be made of the contribution of Frank J. Rogers, the Commissioner of Criminal Justice Services of the State of New York. His guidance, suggestions and advice were invaluable. Henry Dogin and Professor John A. Gardiner also reviewed the manuscript and made helpful suggestions. Mention, too, must be made of the several people who read the study and commented on it confidentially. Their help is gratefully acknowledged.

Finally, the quality of the editing, typing, and reproduction of the study was immeasurably improved by the able efforts of Linda Weise, Frank Smithson, and Winifred S. Bayard of the Institute staff.

G. Robert Blakey
Ronald Goldstock
Charles Rogovin

Institute on Organized Crime
Cornell Law School
May 1977

INTRODUCTION

A. Scope of Study

America has new folklore: organized crime.[1] Next to Westerns, war, and sex, it is one of the chief sources of materials for TV plots, books, and newspaper exposes. It is not the purpose of this prescriptive package, however, to add to that folklore, for more than folklore is involved: organized crime is real, and it is a serious challenge to the criminal justice system. Presidential Commissions, Congressional reports and hearings, as well as public and private studies have repeatedly documented the nature and scope of organized crime in America. It has been shown that organized criminal groups are active in professional gambling—chiefly bookmaking and numbers—the importation and distribution of narcotics and other illicit drugs, loan sharking, theft and fencing, prostitution and pornography, and the manufacture and distribution of illicit alcohol. These groups have not, moreover, confined their activities to traditional criminal endeavors, but they have increasingly undertaken to subvert legitimate businesses and labor unions. Extortion, bribery, price-fixing, market allocation, securities and other frauds, including tax evasion, have all become common organized crime efforts. Just as important, these groups have in many places established corrupt alliances with the police, the prosecutors, the courts, and members of the executive and legislative branches of government.

Enough has been written about these exploits to make a general knowledge of organized crime part of the common understanding of our culture. This study will, therefore, focus on a relatively unexamined phenomena: those investigative and prosecutive efforts to control organized crime centered in the offices of state and local prosecutors.

B. Background: Prosecutor and Police

Traditionally, the role of the public prosecutor had been to present to the court and jury evidence of criminal activity developed by the police or brought to him by a citizen independent of the actions of his own office. The concept of the rackets bureau as developed in New York County by Thomas E. Dewey[2] and widely copied elsewhere on the Federal, state and local level was a significant and radical departure from that traditional role. From 1935 through 1937, Dewey conducted a special rackets investigation in New York County at the direction of Governor Herbert H. Lehman. When Dewey became District Attorney in 1938, he carried into the District Attorney's Office the experience of that special rackets investigation.

Dewey found that evidence of organized criminal activity did not walk in off the street in the form of a citizen complaint, the source of the vast majority of law enforcement investigations, nor was it to be had merely for the asking. Victims of underworld terror or exploitation do not volunteer to testify. Documentary proof of extortion or graft is usually carefully concealed in doctored books and records. Dewey found, therefore, that the traditional role of the district attorney—merely that of courtroom accuser—was inadequate if the challenge of organized crime was to be met.

What was needed, he found, was proactive investigative and prosecutive work. Victims had to be sought out. The crimes committed by professional criminals had to be uncovered before they could be solved. Close police-prosecutor cooperation was essential from the beginning of an investigation if maximum and effective use were to be made of the special investigative tools peculiarly available to the prosecutor: the grand jury subpoena, immunity grants, wiretap orders, search warrants, etc.[3] an integrated approach to each investigation and prosecution had to be undertaken. A careful effort had to be made to use all possible legal resources at every stage: investigation, grand jury presentation, preparation, trial, and appeal.

[1] On the many meanings of "organized crime," see Appendix A.

[2] *See Task Force Report: Organized Crime,* The President's Commission on Law Enforcement and Administration of Justice pp. 12–13 (1967) [hereinafter cited *Task Force Report: Organized Crime*].

The success of the rackets bureau concept in New York County has been significant, and it underlies much of the work now being accomplished elsewhere by organized crime control investigation and prosecution units.

Nevertheless, the evolution of the investigation and prosecution function in the area of organized crime was not unique. Similar processes have also occurred in the evolution of other aspects of the prosecutor's office, including efforts to deal with homicide and other major felonies, public corruption, and white collar offenses. Homicide and other major felony prosecutive efforts, however, have tended, and probably will necessarily remain reactive. Proactive police work in the area of homicide, for example, is seldom feasible, since most homicides are unexpected occurrences between relatives or neighbors. Nevertheless, close police-prosecutor cooperation in the process of investigation is possible, and early involvement of prosecutors for the purpose of securing legal advice in the gathering of evidence is not uncommon in major homicide investigations.

The evolution of the investigative and prosecutive function in the area of public corruption and white collar offenses, on the other hand, has followed a path not dissimilar to that found in the organized crime field. Indeed, many of the same issues faced in an organized crime control unit will be faced in a public corruption or a white collar crime control unit. Significantly, too, the activities of organized criminal groups usually involve corruption: they frequently embrace offenses traditionally associated with white collar crime. Consequently, although the touchstone of the sophisticated organized crime group—the systematic use of violence—will usually be missing in most public corruption or white collar investigations and prosecutions. Many of the same investigative and prosecutive techniques as well as other legal or administrative problems will be common in each of these three areas. Hard and fast lines, therefore, cannot be drawn between these areas; each represents a similar effort of the criminal justice system to respond to certain modern crime control problems.

[3] *See generally id.* at 14–19, 80, 83–100; *Organized Crime: Report of the Task Force on Organized Crime,* National Advisory Committee on Criminal Justice Standards and Goals, pp. 137–60 (1976) [hereinafter cited *Organized Crime*].

C. Limitations of Study

This prescriptive package (Part 1) describes and comments on the general state of the art today in investigation and prosecution units on the state and local level. It also identifies the most significant aspects of their work, discusses their problems, evaluates their efforts, and proposes standards for their establishment, organization and operation (Part 2). The package also includes detailed information on selected units (Part 3). Hopefully, this study can contribute to increasing the quantity and quality of such efforts.

The study, however, must be read with certain caveats in mind. Since the study speaks of standards, it is possible to speak of violations of those standards. Yet it would be unfortunate if the study were mindlessly so used, particularly in the context of political campaigns. The standards are not intended to be inflexible rules. They have as their purpose the identification and reasoned resolution of significant management issues in the establishment, organization and operation of specialized investigative and prosecutive units. It is explicitly recognized that other issues may exist and that other solutions may be reasonable. The standards are also framed in general terms, yet it will always be necessary to implement them in specific contexts. Consequently, it will generally be necessary to modify them in practice. In addition, it may not always be possible to implement them at all. Some of the standards call for changes in organization or procedure; they can be implemented at a minimal cost. But others call for the commitment of new or upgraded resources. The provision of those resources, however, is generally beyond the power of those responsible for the establishment, organization or management of the units. Consequently, a failure to provide those resources is not necessarily a failure that can be chalked up to them. As one of those who commented on the study put it:

". . . I am concerned . . . When you talk about standards. Once you have standards, you have people . . . alleging that you are in violation of those standards. . . . I think you can see the [problem]. . . . [A] lot of people are running around making standards and during times of election or times in which someone may want to get involved in a political controversy, they always allege that a prosecutor is in violation of some type of a standard. Now, if he is absolutely powerless to imple-

ment a program because he is not given the resources by his city, county, state or whatever you have, it is manifestly unfair to say he is dragging his feet or he is in violation of them."

The issue of perspective also has to be explicitly considered. How these standards will be viewed therefore will vary sharply. In conducting the study and in analyzing the standards, it became evident that at least two different sets of problems and perspectives on how to meet them existed among those with experience in establishing and operating organized crime control units. Those persons who had such experience were not always conscious of the differences. The large, well-established, relatively well-supported unit faces one set of problems; the small, newly established, relatively insecurely supported unit faces another.

Several people who either served on the panel of advisors or commented on an earlier draft of the study voiced concern at the character of certain standards and urged that they be modified or eliminated. Language in the final draft dealing with sensitive issues was, of course, clarified and standards were, where possible, modified to meet legitimate criticism, but candor requires the acknowledgment that difference of emphasis and judgment remain.

Ultimately, of course, the concrete resolution of difficult issues will have to be left tc the good sense and integrity of those who have final responsibility in the field in each case. No effort here is made to lay down a blueprint for individual cases. This study will have served its purpose if it occasions thoughtful concern with general issues before they arise in specific instances.

PART I
ANALYTICAL DESCRIPTION

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Part 1 of this prescriptive package contains a composite picture of, and commentary on, the current operations of investigative and prosecutive units centered in the offices of local district attorneys or state attorneys general. This picture is drawn from a field analysis of twelve representative units.[1] Not all of the units studied, however, have a major role to play in both investigation and prosecution. Some of the units play an essentially coordinating role. Others have their attention focused primarily on either investigation or prosecution, but not both. Not all of the units, moreover, are targeted exclusively on organized crime. Some of them may be more accurately described as public corruption or white collar crime control units. Nevertheless, these units are illustrative of the best efforts local and state law enforcement are making in the organized crime field.

Those already familiar with the operation of these kinds of specialized units may wish to skim or skip this part and proceed directly to Part II, which deals with the proposed standards.

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[1] The local units surveyed were Kings County, New York; Nassau County, New York; New York County, New York; Suffolk County, Massachusetts; Westchester County, New York. The state units surveyed were the Arizona Attorney General's Office, the Colorado Attorney General's Office, prosecutive efforts in Florida; Louisiana Attorney General's Office; Michigan Attorney General's Office; New Jersey Attorney General's Office; and the Wisconsin Attorney General's Office.

A similar study was recently undertaken of the Federal Strike Forces by the Comptroller General of the United States. Its general conclusions parallel those described in this study. The Federal study found, for example, that the Strike Forces lacked a comprehensive strategy, had no clear definition of their target, failed to set specific goals, had unsatisfactory relations with investigative agencies, were not evaluated systematically, and did not obtain adequate sentences in organized crime cases. *War on Organized Crime Faltering:* Report by the Comptroller General of the United States (March 17, 1977).

SECTION I. GENERAL DESCRIPTION OF THE UNITS

A. Criminal Activity Targeted—No Consensus

Organized crime may be defined in a variety of ways.[1] Most often, the content of the definition reflects the perspective of the discipline or profession of the author, and different perspectives have led to different definitions. Definitions, too, reflect purpose. To meet varying needs, organized crime may, of course, be quite legitimately defined by members of the same profession in quite different fashions; for example, to limit or expand investigative jurisdiction, create special crimes, or to assess extra punishment for those who engage in certain kinds of criminal behavior. In the absence of a generally accepted definition of organized crime for administrative purposes, however, police and prosecutors have tended to focus their attention upon conduct that can be clearly labeled criminal: conspiracy, extortion, bribery, etc. Nevertheless, these categories of the substantive penal law do little to distinguish persons involved in individual criminal acts from those individuals involved in larger criminal networks. They do not, for example, distinguish those who pay bribes in furtherance of an organized crime interest from others who pay bribes for other purposes. Unfortunately, this fact is not always perceived by those in law enforcement. The failure to give due attention to specialized knowledge about the manner in which crimes are committed and its relation to substantive crime definitions gives an accordion-like quality to operating definitions of organized crime and organized criminals. Definitional flexibility may be desirable for some purposes, but it clearly does not give rise to a great deal of consistency between units charged with organized crime control.

No one suggests, however, that there is no consistency among such units. Site visits, interviews and the review of documents and cases in organized crime control units throughout the country confirm an institutional acceptance of the existence of an association of criminal organizations that the President's Commission on Law Enforcement and Administration of Justice characterized in 1967 as the core of organized crime in the United States.[2] These Mafia or La Cosa Nostra (LCN) groups, where they exist, therefore, are invariably characterized as organized crime by rackets bureau personnel. Definitional difficulties and differences emerge, however, in the absence in particular jurisdictions of such a hard core group, or the absence of intelligence information linking other persons or groups directly to one of them.

The most traditional view of organized crime as embracing primarily the activities of persons who are members or associates of Mafia or LCN families is, not surprisingly, found in units located in areas where such families have received the greatest publicity over the past twenty-five years and where antiracketeering units are or have been directed by alumni of the Federal Organized Crime and Racketeering Section or United States Attorneys' Offices that were engaged in antiracketeering work. Elsewhere, especially where personnel have not been associated with the Federal organized crime effort, broader operating definitions tend to exist.

In even the most traditional units observed, however, some personnel reflected increasing awareness of the need to consider the negative economic impact of the actions of criminal groups other than the LCN in targeting investigative resources. Apart from an intellectual recognition of organized crime as an "economic enterprise," there are other forces apparently at work reshaping the traditional and narrower operating definition of organized crime. One important factor is the emphasis in recent years on white-collar or economic crime. The newly-emerging focus upon security frauds, insurance swindles, false advertising, embezzlement, etc. and the corresponding availability of Federal grant funds for investigation and prosecution in this area combined to attract the interest of specialized investigative and prosecutive units. Since hardcore

[1] *See* Appendix A on the definition of organized crime; *see* Appendix H for a chart of law and unit resources.

[2] *Task Force Report: Organized Crime*, p. 6.

organized criminals and their associates are frequently involved in activities of this type, organized crime control personnel are giving such matters increased attention.

Organized crime prosecutors and investigators, moreover, tend to be activist and pragmatic rather than contemplative and ideological. Thus, broadened definitions of organized crime emerge more in practice than in theory. Yet, one articulate chief of an Eastern, urban rackets bureau explicitly rejects the idea that all organized crime is the product of some rigidly controlled "mob" structure. He argues strongly for a reconceptualization of the basis for racketeering work: one which would focus resources upon situations where economic analysis indicated illegal concentrations of power.

A comparison of Eastern urban and suburban anti-rackets units and Eastern State-level capabilities with Southern, Western and mid-Western organized crime units reflects clearly the absence of a common definition of the organized crime problem and a workable administrative approach to it. The oldest, established rackets bureau—in New York County (Manhattan)—is vastly different from newer units such as the Colorado Attorney General's Organized Crime Strike Force and the Special Prosecutions Section of the Arizona Attorney General's Criminal Division.[3]

Various and disparate factors influence the types of criminal violations pursued by different offices throughout the United States. The presence or absence of an LCN group, for example, unquestionably affects such issues as the perception of the organized crime probe, questions of administrative jurisdiction, and the selection of targets. Gambling and loan sharking, traditionally thought to be substantial revenue generators for LCN families, get a good deal of attention in areas where such families are thought to operate. In addition, the presence and perception of corruption in labor unions will help determine whether investigative and prosecutive programs will encompass labor racketeering as a target. In New York City, on the other hand, the creation and presence of a Special Narcotics Prosecutor with city-wide jurisidiction (covering the five metropolitan counties) resulted in the pre-emption of this area. Elsewhere, constitutional or statutory limitations upon the authority of Attorneys General will preclude pursuit of certain possible violations.

[3] *See* Part III for summary descriptions of the three units.

It is, therefore, impossible to generalize about the range of specific kinds of criminal violations that organized crime control units pursue nationally, with one important exception: in all of the units reviewed, political corruption was a matter of distinct interest and concern. As has been suggested, the breadth or narrowness of a unit's operating definition of organized crime may or may not be flexible enough to permit the exploration of public corruption in all cases. In some units, for example, there must be a prima facie showing of linkage between an organized crime group or enterprise and a public official; in others, corrupt public officials are independently regarded as important and desirable targets. One rackets unit, the Special Prosecutions Section of the New Jersey Attorney General's Department, now devotes, moreover, more time and resources to political corruption than to traditional organized crime cases. That section had always emphasized the important relationship between organized crime and official corruption, but it has now made the strategic judgment that public corruption is its most critical target.

Another factor operating in the selection of unit targets is the range and volume of investigative opportunities presented. In this connection, what is or might be regarded as a significant potential gambling case in Colorado might be appraised as *de minimis* in Manhattan. This is most likely reflective of the vintage and durability of gambling networks in New York City, the volume of such illegal activity given the size of the populations in New York City and Colorado, and in all likelihood, a realistic view of what can be accomplished through the commitment of resources to gambling investigation and prosecution in a metropolitan area. Differences in targeting among and between offices are also explicable in terms of the level of sophistication and experience of personnel in different offices, the complexity of the activities of the organized criminals in particular jurisdictions, and the idiosyncrasies of elected prosecutors.

B. Function of the Unit—Four Patterns

The functional relationship between a rackets unit, police departments within its jurisdiction, and even other prosecutive agencies is as varied as the personalities and experience of the unit's director. Such units, however, can be roughly divided between variations of those that are essentially self-sufficient for investigative and prosecutive pur-

poses; those that work with an external, but closely related police organization; those that work with multiple police agencies within a single prosecutive district or state; and those that lack prosecution authority, but attempt to perform a coordinating role with local prosecutors and police departments. This classification, it should be emphasized, is somewhat artificial, since none of the units examined fits with absolute precision any particular category. Nevertheless, for discussion purposes, these categories are helpful.

The Suffolk County Investigation and Prosecution Project (SCIPP) based in Boston, for example, is a vertically integrated, autonomous element within the District Attorney's Office. Eighty-five percent or more of its investigations are internally generated, and the percentage of referrals from local law enforcement agencies that it will accept for investigation is expected to decline further.

The New Jersey Attorney General's Special Prosecutions Section deals almost exclusively with the New Jersey State Police and only rarely with local police agencies. Similarly, in New York City, one rackets bureau (Manhattan) utilizes a New York Police Department Squad, housed within the District Attorney's Offices for nearly all of its work, and it accepts only limited matters from other units of the Police Department. In contrast, the Brooklyn District Attorney's Unit finds half or more of its workload being generated by police units or "commands" external to the office's detective squad.

Reflecting still another pattern, the Westchester County, New York, District Attorney's Rackets Bureau functions in a jurisdiction that has forty local police departments, a Sheriff's Department, elements of the New York State Police and a Parkway Police Force. Because a low level investigation may mature into a high level prosecution, the bureau will assist these agencies in any investigation the agency generates. Managing relations with all these police agencies requires substantial diplomacy and tact.

The Colorado Organized Crime Strike Force meets the problem of dealing with a variety of police agencies statewide by recruiting its in-house investigators from cooperative local departments. This arrangement provides a mechanism for the two-way flow of intelligence between local and state agencies, and it draws local departments closer to the purposes of the Strike Force.

The Michigan Attorney General's Organized Crime Division, on the other hand, commits a substantial part of its limited in-house investigative resources to working with local police agencies, and it is strongly committed to developing investigative task forces of cooperating police agencies. The unit puts a high priority upon feeding intelligence information it develops to receptive local users. The division's single attorney will also assist local authorities in the preparation of affidavits for search warrants and help in funding or protecting an informant.

Operationally, the units surveyed tend to function at one of three levels in terms of their relationship to police agencies. Like SCIPP, they may have attorneys and investigators housed together within one unit under the direction of a lawyer-unit chief. Investigations are essentially internally generated, and there is little external police contact or assistance provided. This pattern seems to be one of the more sophisticated and successful; it is also stronger because it is institutionally independent. But because it is largely self-contained, it tends to have more serious resource problems.

On the second level, the unit's attorneys will respond to police agency requests for assistance during the course of an externally generated investigation, and lawyers will help with search and electronic surveillance affidavits as well as with case reviews regarding the quality of evidence being gathered. In some units, attorneys will be assigned to work with agents during the investigative stage in the development of the case for prosecution. Variations upon these themes, of course, do exist. Reflecting a more traditional approach, the operating ethic of the Arizona Special Prosecutions Section, for example, is that the unit should "focus on a case that is, and strengthen it" rather than select targets and develop evidence against them. In that regard, much of the attorney work is reactive to what investigative units develop.

On the third level, units operate like the Manhattan Rackets Bureau or New Jersey's Special Prosecutions Section (SPS). In both, attorneys work almost exclusively with agents operating under the umbrella of the larger offices of which they are a part. The New Jersey State Police are organizationally responsible to the Attorney General as are the attorneys in the SPS. The Manhattan District Attorney's Office, too, has a relatively large detective squad—composed of New York City Police

Department detectives—quartered within the office. They work for the various bureaus in the office. In both units, attorneys and investigators work closely throughout the course of investigations, usually undertaken as part of a preconceived strategy.[4] This pattern, too, seems to be one of the more sophisticated and successful, and because it is not as small or self-contained, its resource problem, although real, admits of flexible responses.

Quite obviously, among those factors that determine the posture a particular rackets unit will adopt toward a local or other police agency are the age of the unit, the perceived quality of the particular police agency, the experience and sophistication of the managing attorney, constitutional or statutory limitations upon the legal unit, traditions existing within the state or county and the philosophical views of the elected or appointed prosecutor relating to the proper role of the prosecutor. Illustratively, a new unit may consciously offer legal assistance whenever possible, in order to develop police confidence in its attorneys. The corrupt reputation of a police force, on the other hand, will militate against cooperation from rackets prosecutors. Inexperienced prosecutors may not be aware of the need to generate an outreach capability in a new unit. The law of a particular jurisdiction may limit rackets attorneys in terms of their original jurisdiction, giving them only assisting authority in certain classes of cases. Certainly, one of the most sensitive areas of relations between county and state prosecutors is what constitutes a "trespass" into areas—geographic as well as criminal—which have been customarily regarded as the province of the local official.

C. Attorney-Investigator Relationships: No Consensus

Several models of attorney-investigator relationships were revealed in the course of this study. In one office, the unit is composed exclusively of attorneys, with civilian and clerical support personnel. Its investigative agents are provided by an external police agency and the officers are supervised by police commanders.[5] In contradistinction, another unit combines police officers drawn from several police agencies—city, metropolitan and state—under the command of a designated chief investigator (himself a sworn officer) and places them all under the direction of the unit's managing attorney. This unit also employs civilian investigative accountants who report to and are directed by the principal attorney. This was the most highly integrated unit observed during the site visits.[6]

Another arrangement involves the assignment of a group of city detectives to the office of a district attorney where members of this squad—operating under their own supervisors and commander—were available to conduct investigations for the rackets unit.[7] A separate group of civilian financial investigators, with its own supervisor is also available to assist in matters requiring their expertise.

In the Michigan Attorney General's Organized Crime Division—the only unit among the eleven offices surveyed that is directed by a non-lawyer—investigative agents, clerical and support personnel and one attorney are combined.[8]

Wisconsin presents yet another organizational model. There, a separate element of the department, the Division of Criminal Investigation, provides investigative services for all attorney units in the department. The division recruits, trains, and employs under civil service, investigators who are either former police officers or civilians with specialized skills or aptitude for investigative work. In operation, this arrangement resembles the relationship between the Federal Bureau of Investigation and United States Attorney's Office.

In all the units reviewed, investigative agents had peace officer powers, either as a consequence of their original commissions as police officers or through the statutory authority conferred upon them as agents of a prosecuting official. There were variations between units providing peace officer powers to financial investigators, but the majority confined such powers to the criminal investigators.

Attorney interaction with investigators appeared, therefore, to be a function generally of the degree of integration of personnel—civilian, sworn and lawyer—within the unit.

[4] Within the units referred to above, there are frequently variations from the operating patterns described in the text. Attention is invited to the site visit report summaries appearing as Part III and to the full text of the site reports, which are available at the Cornell Institute on Organized Crime, for a fuller exposition of particular unit functions.

[5] See site visit report, New Jersey Part III, p. 95

[6] See site visit report, SCIPP, Part III, p. 71

[7] *See* site visit reports, Manhattan and Brooklyn, Part III, p. 59, 67.

[8] *See* site visit reports, Michigan, Part III, p. 92.

In this connection, SCIPP, Manhattan, Wisconsin and Arizona presented the basically different approaches to the issues of attorney-investigator relationships. Nevertheless, all the attorneys directing the rackets programs reviewed reflected an awareness of the sensitivity police have to attorney involvement in investigative work. Such sensitivities vary with particular lawyers' experience and age, traditions that have developed in particular offices, institutional arrangements and often, whether investigative agents are or were sworn police officers rather than commissioned civilians.

In SCIPP, the principal attorney is fully informed of investigative progress and deals directly with assigned agents and his chief investigator at every stage of an investigation. He participates substantially in tactical decisions and assigns unit attorneys as needed for preparation of search and electronic surveillance warrant documents.

The Manhattan Rackets Bureau is the most senior unit of its type in the country. The District Attorney's Squad, described earlier, provides investigative assistance to the bureau whose work is substantially internally generated. Long standing tradition in this office dictates that the bureau chief will respect the authority of the squad commander (a deputy inspector), his lieutenant and the superivising sergeants to direct the field work of the detectives. Yet, bureau attorneys in fact informally play a significant but flexible role in actually guiding the course of particular investigations by working directly with particular agents. The elite status of this bureau over the years has no doubt contributed to police willingness to accept attorney direction of investigations. Since attrition has diminished the number of bureau attorneys with lengthy experience in anti-racketeering work, these working relationships may become less flexible. To the extent that this bureau accepts some matters from outside police commands, there is also reduced attorney-investigator interaction and more formality in the relationships.

Relations between attorneys in the Wisconsin Department of Justice's legal units and personnel of the Division of Criminal Investigation are highly formalized. The division chief and subordinate supervisors direct all investigations and request legal assistance when they feel it necessary. Attorney involvement in such circumstances generally means assistance with search warrant and electronic surveillance applications.

One aspect of the department's legal program, however, does involve greater coordination between attorneys and investigators. In the antitrust area, attorneys operate a proactive program; the lawyers assign targets for investigation and advise agents during their exploration of leads and the building of specific cases. In part, this reflects the general feeling of division investigators that the legal and factual complexity of antitrust matters requires early and continuing attorney involvement; a second factor is the personality of the Antitrust Unit's chief attorney. The agents respect him professionally and like him personally; they are, therefore, more amenable to accepting guidance from him.

As review of the site visit report summaries in Part III makes clear, a number of the offices reviewed are not rackets bureaus within the traditional meaning of that term, as epitomized by the Manhattan Rackets Bureau. Nevertheless, their operating styles are instructive on the question of attorney-investigator relationships.

The Arizona Attorney General's Special Prosecutions Section (SPS), for example, was created with a white collar crime orientation. While the office has a complement of civilian investigators, most of the unit's work is generated by external agencies. The SPS essentially reviews cases submitted to it for prosecution, and attorney involvement is basically limited to identifying case deficiencies. Files are returned to submitting agencies for additional work rather than being further developed by departmental investigators. The department's civilian investigative group is not assigned specifically to work on SPS matters, but will pursue a particular matter or facet of a case if requested. In sum, attorney-agent involvement is limited.

The single attorney in Michigan's Organized Crime Division is utilized by the unit chief for multiple purposes. One of his functions is to provide legal advice to requesting local police agencies in the preparation of search warrants and to provide advice on the quality of cases being developed. Within the unit, he maintains daily contact with the in-house investigators and provides informal and continuing legal advice for the development of cases.

The Louisiana Organized Crime and Racketeering Unit (OCRU), a section of the attorney general's office, has statewide investigative jurisdiction, but only limited prosecutive authority. While it

combines attorneys under a chief prosecutor and investigators under a chief investigator, both elements report to the OCRU chief. Attorneys and investigators have police officer powers and may be used interchangeably as case agents. If an investigation appears to require a higher level of legal skill than that possessed by an investigator—white collar crime and some public corruption matters—an attorney will be assigned as the principal case agent. This variation in attorney-investigator relationship is probably attributable to three factors; the OCRU chief is a former FBI agent, the unit's work is almost exclusively investigative, and attorneys are uniquely empowered as peace officers. By and large, investigators needing legal assistance seek the advice of the chief prosecutor, since most other unit lawyers are relatively young and inexperienced.

It is extremely difficult to define precisely the reality of such complicated relationships. Differences in philosophy, tradition and skill among attorneys significantly shape and affect their relationships with investigators. The amount of legal manpower available to an anti-racketeering project will also influence the relationship with investigators. Obviously, delayed attorney responses to requests for advice and assistance from investigators will militate against the evolution of closer working relationships. Further, the volume of internally generated legal work will reduce the availability of time for such interaction. Finally, of equal importance, the presence or absence of a sensitivity to the appropriate division of responsibilities between lawyers and police officers materially affects working relationships. The only facet of the relationship that was common to all of the units examined was its importance.

D. Attorney Assignment: Two Patterns

The issue of attorney assignment—recruitment and utilization—tends to follow two basic patterns: the integrated unit that is part of a larger office that secures its people from general recruitment and employs its attorneys in specialized functions, and the self-contained unit that recruits its own people and employs them in investigations and trial.

The chiefs of the various units surveyed are fairly evenly divided on the question of the value or importance in recruitment of prior trial experience for rackets assistants. Some feel that such experience develops the confidence necessary for effective handling of the often complicated trials undertaken in organized crime work. Others suggest that the "garden variety assaults," minor thefts and even most of the felonies that constitute the bulk of urban prosecutors' work are of little, if any, importance as background for rackets work, especially since most metropolitan criminal trial courts are production-line enterprises that tend to lead to sloppy legal habits.

Assignment patterns, too, vary from unit to unit. Some, like SCIPP, are newly established, fully integrated units of attorneys, police officers, civilian financial investigators and support personnel with investigative and prosecutive authority. Others, like the Louisiana Attorney General's Organized Crime and Racketeering Unit have statewide investigative power, but only limited prosecution authority.[9] Like the Louisiana unit, Arizona's Special Prosecutions Section and Colorado's Organized Crime Strike Force are elements of the State Attorney General's Department. As a consequence of statutory, court imposed, or traditional constraints that operate to limit their prosecutive authority, these units do primarily investigative work. Attorneys are recruited directly to them and devote full time to investigation and the limited trial work the sections are permitted to handle.

The New Jersey Attorney General's Special Prosecutions Section[10] is staffed by attorneys and civilian support personnel. Unit lawyers work almost exclusively with State Police agents in the investigation of organized crime and public corruption matters. Only rarely does an attorney become involved in the trial of a case developed by the section. Rather, trials are handled by lawyers assigned to a separate trial section within the same division.

The Brooklyn Rackets Bureau divides its attorneys between those handling investigations and those who do trial work exclusively, but they are organized into sub-sections within the same bureau. New Jersey recruits lawyers directly into its Special Prosecutions Section, usually from law school or private practice. Brooklyn has followed the Manhattan model and elevates assistants from other bureaus within the office.

The predominant practice among Attorneys General and District Attorneys with organized

[9] *See* site visit summary report, Louisiana, Part III, p. 88.

[10] See site visit summary report, New Jersey, Part III, p. 95.

crime-white collar crime capability appears to be the assignment of attorneys to full-time work in such areas with the formal designation of a section or unit having such responsibilities.[11]

E. Jurisdiction: A Variety of Limitations

One obvious distinction among the organized crime units or projects visited was their geographic jurisdiction. The variations were greater in the state level units reviewed, since authority of an attorney general in the criminal law field varies substantially from state to state. In contrast, the New York County (Manhattan), Kings County (Brooklyn), Westchester, Nassau and Suffolk County (Boston—SCIPP) district attorneys are county officials. Their prosecutive authority is limited to criminal events that take place within county boundaries or those that have an effect there. Each of these officials have investigating grand juries available for the pursuit of organized criminal activities. Generally, grand jury subpoenas and search warrants are effective state-wide.

Unlike district attorneys, attorneys general vary significantly in terms of both their investigative and prosecutive authorities. Limitations exist in both areas, state to state, although New Jersey presents an interesting exception. There the Attorney General may, if he chooses, exercise jurisdiction to investigate and prosecute any violation of the criminal law. For such purposes he has available a grand jury with statewide inquiry power as well as access to the county grand juries. Nevertheless, the overwhelming portion of the state's criminal law work is, of course, still handled by county prosecutors (district attorneys).

Jurisdictional differences among the attorneys general are substantial and include the specific crimes they may investigate or prosecute; whether investigations may be initiated in the absence of a request by a local prosecutor or a specific direction from the state's Governor; the circumstances under which trials may be conducted by the Attorney General's assistants; whether a grand jury with statewide inquirey authority is available to the Attorney General or staffed exclusively by his lawyers. Put succinctly, valid and useful generalizations regarding attorneys general jurisdiction to investigate and prosecute organized criminal activities are not possible.

Apart from the legal distinctions in the jurisdiction among attorneys generals' organized crime units, there are policy differences that affect the exercise of available jurisdiction. For example, in Wisconsin the Attorney General's authority is exclusively derived from statutory law. This provides substantial discretion to the Attorney General to define his criminal jurisdiction, and the present Attorney General has consciously shifted the focus of his organized crime efforts from initiating investigations and prosecutions to assisting local prosecutors.

Several state units with jurisdiction over narcotics law violations undertake such investigations to assist and upgrade local capability, rather than as the means to eliminate distribution networks. In such instances, agents and attorneys are, in a formal sense, assigned to play a supportive role to local officials, although they may actually carry principal responbsibility in the investigation.

Grand juries with statewide investigative authority are increasingly popular in law enforcement circles, as their effectiveness and utility are being documented. New Jersey's Attorney General has used this vehicle with great success since it was created in 1968. Arizona's SPS and Colorado's Organized Crime Strike Force both have authority to use such juries, but the Arizona unit is limited in the crimes it may explore. Murder and extortion, for example—often associated with organized criminal activities—are outside the jurisdiction of the SPS. Unfortunately, too, under a recent state Supreme Court ruling, Colorado's OCSF must refer indictments it obtains from the statewide grand jury to local district attorneys for prosecution.[12] It is expected that this will break continuity between investigation and trial.

Only when invited to do so by a local district attorney, or if "cause is shown," may the Louisiana Organized Crime and Racketeering Unit initiate criminal proceedings, empanel or present evidence to a grand jury or prosecute indictments.

Except in Wayne County—whose principal city is Detroit—there are no regularly constituted grand juries in Michigan. Thus, neither the Attorney General's Organized Crime Division nor local prosecutors utilize them with any frequency.

[11] The summary report on Florida presents an interesting review of one state's anti-organized crime program efforts, in the absence of a specific section or unit of this type. Part III, p. 85.

[12] *People ex rel. Dale Toole V. District Court,* —— Colo. ——, 549 P. 2d 774 (1976).

While Wisconsin law provides for grand juries at the County level, but none with statewide authority, the present state Attorney General—concerned about overreaching witnesses and potential defendants—is not enthusiastic about using them. An alternative known as a "John Doe" investigation does, however, exist. With the exception that witnesses are permitted to have counsel present to advise them during interrogation, John Doe procedures and processes are quite similar to grand jury proceedings,[13] and attorneys in the Wisconsin Department of Justice use that vehicle.

[13] *See* site visit summary, Wisconsin, Part III, p. 99.

SECTION II. RESOURCES AVAILABLE TO THE UNITS

A. Attorneys—Not Political, But Too Few, Too Inexperienced, and Too Poorly Paid

Attorney complements in the rackets projects reviewed vary in size from a one-man office in the Michigan OCD to nineteen stalwarts in the Brooklyn Rackets Bureau. Office policies vary from allowing attorneys to maintain private law practices (civil), or limited outside activities such as teaching and writing articles on their own time, to flat prohibitions upon any non-governmental work. Whatever the arrragement, in the offices examined, attorneys were assigned full-time to their particular units and did not handle unrelated matters.

Wisconsin appeared to be the only agency with sufficient flexibility to increase on an ad hoc basis the number of attorneys available for anti-organized crime work.

With the exception of unit chiefs and an occasional deputy, it is unusual to find assistants with more than four years' experience. An exception is Wisconsin Justice Department attorneys who are civil service employees and tend to make careers in public service.

A number of the project chiefs had had prior experience with the Federal government in either the Organized Crime and Racketeering Section of the Department of Justice, the Federal Strike Forces or United States Attorneys Offices. Prior Federal experience was more characteristic of lawyers employed in state units than urban district attorneys offices, probably reflecting there newness of several of the state projects.

There is no consistency among salaries for lawyers in this work. The Manhattan Rackets Bureau Chief was paid $32,000 per year while the Attorney-in-charge of the New Jersey SPS earned $36,000. A new assistant at SCIPP earned $10,900 while his counterpart in Manhattan earned $15,000. Few units offered premium pay to attorneys working on organized crime matters and only in Boston is the pay of rackets assistants higher than elsewhere in the District Attorney's Office. This is explained by the absolute prohibition of any outside practice of law for unit attorneys—permitted elsewhere in the office—and the fact that the unit is Federally funded under an LEAA grant.

At the lowest and midlevels of most projects examined, it is clear that attorneys are underpaid. In New York City, for example, top law firms today pay new graduates $25,000 per year; $10,000 more than the entry salary for new assistant district attorneys. Yet, that office had more than one thousand applications for employment in 1975.

Since salaries are low in comparison to earnings in private practice, and rackets attorneys are attractive to many firms because of the demonstrated quality of their legal skills, the longevity of service that was characteristic of personnel in the older bureaus is ending. It is increasingly common to find lawyers with as little as a year's prior service staffing rackets units. It is rare to find many with as much as five years in the effort.

A number of the older rackets bureaus—Manhattan and Brooklyn—request a commitment of three years' service from new attorneys, on the grounds that they will not reach their real potential in less time, and the unit will not otherwise recoup its in-house training investment. As the gap between public service salaries and income from private practice widens, it may not be possible to recruit the same calibre of person to work in those bureaus under the same requirement. Other agencies do not usually request a service commitment, but all chiefs do seek attorneys who are likely to give their offices substantial periods of service.

No units acknowledged that political considerations play any role in the hiring of attorneys. Random sampling among lawyers indicated that nearly all unit staffs were bipartisan. No evidence of political partisanship in the work of the units was revealed—most reflected, too, real sensitivity and concern about even an allegation of that kind. In several offices, however, nonpolitical hiring represented a significant shift from past practices.

Most projects have policies prohibiting political activity by attorneys, with the qualification that a

lawyer—on his own time and in the absence of even the appearance of conflict of interest—may work in support of a political candidate of his choice.

Refreshingly, a highly developed sense of ethics was reflected by attorneys and unit managers in all of the offices surveyed. Whether law schools are infusing recent graduates with a better sense of the propriety with which they should handle their prosecutive authority or lawyers know better the costs in wasted resources of ethical errors, most units appear to be functioning with sensitivity and restraint. Rarely are indictments sought that are unlikely to produce convictions, and there is universal concern about prejudicial pretrial publicity.

B. Investigators—Two Models: Adequate, But Not Sufficient

Investigative support for the units reviewed is provided in a variety of ways. Two principal models prevail, but there are substantial variations. The first model involves a group of investigative agents working directly for the rackets unit or project. The agents may be employed by or assigned to the larger office within which the attorney element functions. In Brooklyn and Manhattan, as noted earlier, New York City detectives and police officers are detailed—with sergeants and commanders—to the respective D.A.'s offices and service the rackets bureaus. These D.A. squads are composed exclusively of sworn personnel. In Wisconsin, a separate Division of Criminal Investigation provides investigative support for attorneys. These agents—many with prior police experience—are civil service employees of the state with police powers. Colorado OCSP attorneys are supported by an in-house investigative unit composed of officers detailed from police departments throughout the state. Arizona's SPS receives assistance from an internal, civilian investigative group as well as outside police agencies.

SCIPP relies almost exclusively upon its own small investigative group comprised of police officers drawn from the Boston Police Department, a metropolitan authority police agency and an agent from the State Police. The Westchester County Rackets and Frauds Bureaus depend heavily upon twenty-two civilian investigators, directed by a retired chief of the New York State Police Criminal Investigations Bureau.

The New Jersey SPS presents a distinct, second model for attorney-investigator relationships. That unit relies exclusively upon sworn officers of the New Jersey State Police Intelligence and Organized Crime Strike Force Bureaus. Exceptionally close, effective, and harmonious working relationships between attorneys and officers in the New Jersey program are the product of the combined efforts of the former co-directors of the SPS and an informed and interested command group in the State Police Division. Salaries for investigators employed directly by prosecutive agencies tend to be competitive with those in police agencies within their jurisdictions, although these vary substantially between regions of the country and between rural and urban areas. Since the in-house, investigative groups, where agents are directly employed rather than detailed for service, are relatively small, supervisory and management positions are limited in number. This tends to limit upward mobility for agents as well as salaries. By and large, political considerations did not appear to be a significant factor in either the employment or assignment of investigative personnel.

Where rackets units tend to work more heavily with outside police agencies in particular investigations, manpower resources are less constrained than where they rely principally upon internal investigators.

Investigative accounting skills—critical to successful investigation of many aspects of organized crime—were in short supply in nearly all units. SCIPP represents an exception; it has been able to hire three accountants. Two are former IRS Intelligence Agents with organized crime experience, while the third is a young public accountant. Several of the D.A.'s offices have few investigative accountants on their staffs and they are available to assist the rackets bureaus. Various state projects borrow auditors from other state agencies for particular investigations but few have sufficient, trained personnel available. Some police investigators working with organized crime projects have limited financial training, but they are of essentially limited utility in complex financial situations.

All too frequently police officers reflect both a dislike for this type of work and a disdain for investigative accountants. One comment by police officers about accountants heard in several units was that "they don't do real police work." What the police fail to realize, however, is that as one accountant, who works with police agents, put it, "They don't realize that a guy with a pencil can open jail doors." Not surprisingly, accountants and

police are seldom effectively integrated into one unit at state or local levels.

C. Support Staff—Little Intelligence Efforts, but the Rest Adequate

Intelligence functions are generally much discussed, but pursued among the various rackets projects with varying degrees of sophistication and enthusiasm. Unfortunately, too, the state of the intelligence art within most is essentially reflective of the pedestrian quality of intelligence work in most American law enforcement agencies. Put simply, intelligence activity continues essentially as a collection effort, with little effective analytical work achieved. New Jersey was a sole, but outstanding exception. The State Police there conduct a sophisticated organized crime intelligence program with trained analysts assimilating data and producing intelligence studies—tactical and strategic.

Only one unit other than New Jersey's had a person specially trained in organized crime intelligence analysis techiniques,[14] and that agent was not actually functioning as an analyst. Several units designate persons as intelligence analysts, but their real functions did not appear to include any technical work of that kind. The people so classified often maintian files and indexes, liaison with other police departments for the collection of information and act as custodians of evidence, including tapes generated through electronic surveillances.

Secretarial and clerical support in most units was adequate, although hardly up to the standards of major private law firms where the rule of one attorney-one secretary tends to prevail. The most glaring deficiency in this connection was observed in units that are authorized to conduct electronic surveillances. Few had adequate clerical assistance to relieve investigators of the tedious and time-consuming work of auditing and transcribing tape recordings of conversations. While assignment of investigative agents to such tasks is frequently explained as essential for an accurate reproduction of the words recorded, at least some of such conversation could be handled effectively by a clerk—if available.

[14] Since training in organized crime intelligence analysis has been available to law enforcement agents for approximately three years, the absence of more trained personnel is hard to understand. With LEAA funding the State of California's Department of Justice provides a two-week, intensive training course for police officers and civilian employees of law enforcement agencies, without tuition charges.

Interestingly, morale among the secretarial and support personnel in most offices appeared high. While there were some notable exceptions in several urban D.A.'s offices—where overdue salary increases were being further delayed—most seemed to view their assignments to organized crime work as a cut above working elsewhere in their offices.

D. Civil Jurisdiction: Underutilized

Most of the units reviewed do not have civil jurisdiction, even though civil powers may exist in other elements of the larger office of which the unit is a part. Practices with regard to the communication—intradepartmentally and interagency—of information and evidence to support civil actions vary. Ordinarily, however, the potential for tax fraud or civil tax action by a coordinate or outside unit is readily recognized by project directors and such leads will be transmitted, unless, of course, a collateral investigation is deemed likely to interfere with other activities of the rackets project.

State and local cooperation and collabortion with Federal agencies with criminal jurisdiction varies too substantially to permit generalizations, although the availability of Federal "buy" money in the narcotics area is a frequent and positive stimulus to joint ventures.

The Wisconsin Attorney General's Antitrust Unit has pursued both criminal and civil remedies very effectively, and Louisiana's Organized Crime and Racketeering Unit has used its civil authority to enjoin the operation of several houses of prostitution.

Nevertheless, although the criminal orientation of these units must be acknowledged, it is reasonable to suggest that insufficient attention is given to the availability and application of civil law approaches to organized crime. While substantive civil law and civil procedure is quite foreign to many career prosecutors, the current, apparent lack of awareness of the benefits available through civil remedies needs corrective action.[15]

E. Equipment and Facilities: Wide Variations in Quantity and Quality

The quality, age—antiquity in some cases—and condition of word processing, electronic, photo-

[15] *See* appendix C.

graphic, and automotive equipment possessed by the units surveyed vary as widely as do salaries of the lawyers and geographic distribution of the projects. There is no correlation, moreover, among and between these factors. The availability of Federal grant funds, however, is highly relevant. Offices that have pursued organized crime and white collar crime grant funds assiduously literally have a surplus of high technology surveillance equipment. In contrast, one urban district attorney's rackets bureau, which employs electronic surveillance effectively, has equipment so obsolete that technicians work with tape and a lot of prayer to keep it working. Universally, photographic equipment appeared to be of high quality, in excellent condition and adequate supply.

In some projects, government owned or leased vehicles were available for investigators—and even for attorneys in some units, while others required agents to use their private cars and reimbursed them for mileage. Government owned cars were frequently radio-equipped, and leased cars were generally new and in good condition. Government owned vehicles varied dramatically in vintage and condition. Agents required to provide their own vehicles were generally philosophical about the problem—especially where mileage reimbursements were pegged at a reasonable level.

Office space ranged in appearance from quarters that resembled the basement of the Bastille to one suite that would do credit to medium-sized business enterprise. Working space for attorneys, investigators and clerical personnel was adequate if not luxurious. An observer traveling among these units is inevitably struck with the realization of the enormous quantity of "Government green" manufactured and sold by paint companies over the years. Eastern district attorneys' staffs tended to work in the least attractive space. Generally quite comfortable quarters were the rule for most state unit personnel.

Security precautions ranged between very tight to almost nonexistent. Some offices are protected by electronic alarm systems and security officers, while others relied upon the general security provisions applicable to the state facilities in which they are housed. Some personnel appeared hypersensitive to security considerations and others alert, but relaxed.

Some agencies employ counter-electronic surveillance measures periodically and a number have obtained protected telephone lines for office use. Some combination-lock file cabinets are in use, especially in the newer units. The predominant style, however, is the older version—a five drawer green steel cabinet with welded catches at top and bottom and a vertical steel bar secured in place with a large padlock: an arrangement familiar to any old detective or prosecutor.

F. Training—Woefully Inadequate

Formal training is not characteristic of rackets bureaus or projects. With limited exception, the training that is done is carried out in-house and primarily on-the-job. Following an initial orientation lecture or discussion provided for new assistants by the chief or deputy chief, lawyers learn their craft or trade from more senior assistants. A general practice is to pair a new lawyer with an older one and let the recruit work through the problems presented in the particular investigations underway. When judged ready for independent activity, a new assistant is assigned matters directly. There are variations upon this theme, especially when or if a unit operates with assistants assigned to teams for investigations. Yet, even in those circumstances, attrition is so high and turnover so fast that a new assistant is often senior to another attorney in less than a year. Thus, trainees become trainers far more rapidly than would have been conceived less than ten years ago.

Some units do hold formal training sessions for assistants covering evidentiary and procedural matters and occasionally secure an outside expert to present a seminar.

The consensus of chiefs interviewed—before the first, specialized, organized crime prosecutors' training program at Cornell's Institute on Organized Crime in August of 1976—was that there was no formal, outside training program that adequately addressed the specific needs of rackets prosecutors. While many felt that the National District Attorneys' Association's prosecutor training was helpful for a new prosecutor—or one new to the organized crime field—it was not sufficiently specialized for their purposes. The seminars of the National Association of Attorneys General were also characterized as informative for new personnel, but not designed to educate specialized prosecutors in the intricacies of investigation and prosecution in the field.

SECTION III. ANALYSIS OF THE OPERATION AND STRUCTURE OF THE UNITS

A. Attorney-Investigator Relationship—At Best Difficult

As noted above in discussing the function of the units and their relationship to investigative personnel, the quality and character of the relationship between attorney and investigator involved in the effective investigation of organized crime is an elusive issue. Generalizations about the presence of good or bad relations in the various units are difficult to make. Generalizations about the common problem itself come more easily.

Obviously, the particular personalities of a certain lawyer and an individual police officer may make such a joinder either harmonious or unpleasant. An imbalance in the requisite quantum of skills or experience on either side may strain the relationship. More, however, is involved than the personal aspect of the joint enterprise. What is at issue is the essence of the institutional relationship: lawyer to policeman.

Unfortunately, many persons—some with long experience in this type of work—tend to dismiss the suggestion that this is an area requiring close exploration with the simplistic aphorism: "Let the cops investigate and the lawyers practice law." Such cavalier statements contribute nothing to solving an intricate and complex problem.

The issue really emerges most clearly when two professions must interact over a problem—attacking organized crime through investigation and prosecution—and reach effective resolution as to how and what to do in accomplishing it. Site visits, interviews and the review of documents and cases in organized crime control units throughout the country demonstrate the universal character of the issue. Both groups see themselves as professionals. The police, who tend to be older and more experienced, feel hostility toward attorneys, who tend to be younger and less experienced. In addition, the police see themselves frustrated in getting their job of crime control done by the workings of a criminal justice system dominated and controlled by lawyers, who always seem to find a hundred reasons why something can not be done and never any way that something can be done. Police, just as lawyers do, insist that only police officers can practice their "profession" and that outsiders ought not tell them how to do their jobs.

Attorneys, on the other hand, tend to regard the police—whom they often view as nonprofessionals—as individuals who only exist to serve their needs and who should, therefore, accept direction, but never ask why or offer suggestions. The conflict emerges, not so much in determining objectives and priorities, but in the tactical movement toward achieving those objectives. Put another way, police do not resent being told what to do, but they do resent being told how to do it. Police supervisory personnel, too, must retain control over the allocation of their resources: they feel, quite understandably, that they cannot afford to delegate this responsibility outside their command structure.

This inherent tension is less obvious when agents and attorneys are combined in a single unit under the direction of a lawyer-chief. Most of the current rackets investigators are drawn from the ranks of police departments that are paramilitary in character. Thus, police personnel are trained to take and follow orders or directions from superiors. They will take directions from a lawyer-chief—even when perceived as an invasion of their area of expertise—albeit with varying degrees of enthusiasm. When an attorney unit must deal with an external police organization, however, relations can be far more complicated. Lawyers then find police commanders saying, "Tell us what you want and we'll do it (in our own way)."

The primary characteristic of the best attorneys observed in the units reviewed appears to be awareness of the necessity to accord personal dignity to investigative agents and to have a positive philosophy of law enforcement. The need to accord dignity to others speaks for itself. The question of philosophy is more difficult to articulate. Yet it appears that little is more frustrating to the operation of a unit than an attorney who seems

unable to figure how in a sophisticated investigation to do something lawfully, but is filled with reasons why the law prohibits various courses of action. The success of the investigation usually demands a positive imagination.

Consequently, the most successful posture for attorneys appears to be a willingness to seek and explore police insights on work in progress or about to be undertaken. Those attorneys who recognize that police officers, too, are capable of making substantial contributions to problem solving appear to be the most successful in the field. In sum, it is not essential to be a "nice guy," but rather an individual who respects the institutional and personal qualities of his partner in a joint venture approached with a "can do" not a "can't do" philosophy.

B. Decision Making: Acceptance, Referral and Termination of Matters

As described earlier, most rackets units chiefs have either direct access to the principal prosecutive official in their offices or report to him through only one intermediary. Under whichever arrangement they function, most have the authority to accept or reject cases for investigation by their units. An obvious qualification is a matter that the principal official personally directs be handled in the unit. Since certain units have established reputations for high quality work, matters of a type falling outside normal jurisdictional lines are sometimes processed at the district attorney's or attorney general's direction. Most unit chiefs, however, do have authority to refer irrelevant matters elsewhere in their larger offices. Where manpower resources are limited and investigative work loads high, this authority is critical to avoid resource expenditures on minor matters. Some units have authority to refer extraneous items to other agencies without specific clearance, while others must send such matters "upstairs" for clearance and external transmission.

Equally critical in the operation of an effective rackets project is the authority of the unit chief to terminate an investigation when he regards it as potentially unproductive. In all of the units surveyed, the chiefs made such judgments independent of their superiors. In some units, it should be emphasized, however, that decisions to terminate appeared to be made more rapidly—in similar circumstances—than others. This very probably reflects the disparity in length and type of prior experience in the field among unit chiefs and investigative supervisors.

C. Assignment of Cases Within the Unit: Teams and Specialization

There are two principal systems employed in the assignment of cases to attorneys. Some units assign investigations to attorneys individually, while others regularly utilize their lawyers in two-person teams. As noted earlier, this second approach is in part a function of the constant need to train new attorneys as attrition reduces the average length of service in the unit. It further reflects the view of some chiefs that complicated organized crime investigations are best addressed by two attorneys. In some units, the capability, interest and aptitude of particular attorneys is carefully weighed before an assignment is made. In others, personnel are too limited to allow the chief such a luxury. Elsewhere, especially in the units recently created, there is too little basis upon which distinctions can be made among attorneys as to aptitude and capability.

Some units have encouraged the specialization of attorneys to fields like labor racketeering, waterfront problems, private service businesses (such as cartage) loan sharking, extortion, etc. In such circumstances, attorneys are assigned matters falling into their area(s) of expertise. In some state units, attorneys are assigned geographic areas and handle all investigations arising there. Another factor sometimes considered in the assignment of cases emerges in dealings with an outside police agency. Where one attorney has established a high level of personal credibility with that department—or specific investigators who will be working on the matter referred—some chiefs will specifically assign that lawyer. Other chiefs, however, deliberately resist doing so in the interest of further establishing the unit's institutional credibility. Where unit attorneys have both investigative and prosecutive functions and it is reasonable to predict that complicated trials will result from an investigation, attorney trial skills are considered by some chiefs in the assignment process.

D. Prosecution of Completed Investigations: Two Basic Models

Institutional arrangements for the trial of cases developed by the units surveyed varied. One

model—the Brooklyn Rackets Bureau—has attorneys divided between an investigations section and a trial section. The bureau chief directs the work of both groups, assisted by deputy chief and a supervising assistant. The deputy is primarily concerned with the trial attorneys and the supervising assistant with investigating lawyers.While the trial attorneys have no responsibilities during the investigative phases of cases, an investigating lawyer may assist during a complicated trial.

In New Jersey, the Special Prosecutions Section refers its cases to a separate Trial Section within the Division of Criminal Justice. There, the trial specialists operate under their own chief and handle a variety of matters, in addition to organized crime and public corruption cases referred by the SPS. If the SPS chief believes it desirable for an investigating assistant to try a particular matter, the trial chief will usually accommodate the request. The practice is infrequent, however, although investigating assistants will occasionally assist at a trial where the matter is particularly complicated.

The Manhattan Rackets Bureau and SCIPP reflect the other basic model. In these units, the practice is that the assistant who develops a case will present it at trial. In SCIPP, however, since only the chief has had any substantial trial experience, complex cases may be transferred to him for trial from the investigating assistant. Some agencies—the Michigan OCD, for example—usually have the attorney who develops a case try it as well as handle a trial at the request of a local prosecutor.

As noted earlier, more than administrative preference may be involved in the issue. Jurisdictional constraints upon several of the attorneys general whose offices were examined required that criminal cases developed by them be transferred to local prosecutors for trial. Several chiefs in older units felt that permitting investigating assistants to try cases diverted resources from the primary function of investigation, and they did not encourage assistants toward trial work.

Attrition rates are high among rackets assistants as state and local salaries fall further and further behind compensation in the private practice of law. Thus, even where units have sought to develop specialties among investigating and prosecuting attorneys—as in loan sharking or labor racketeering—it is increasingly hard to maintain such schemes for the distribution of work.

E. Strategy—Much Discussed, Little Implemented

Few management issues are more crucial to the ultimate success of an organized crime control unit than that of careful planning in light of well-defined goals. Nevertheless, the blunt fact is that planning is too often hit or miss or little more than the boiler-plate that accompanies a Federal grant: good on paper, but largely unrelated to the day-to-day resolution of a never ending series of crises. Planning issues, too, vary from unit to unit, place to place, and time to time.

New units, for example, are invariably concerned with the need to establish credibility within their agency, with outside police departments, with other government agencies, and with the public. Since skeptics abound in the ranks of the law enforcement establishment and the media, establishing bona fides—personally or institutionally—is not easy. This is particularly true of the relationship between attorneys working for elected public officials—attorneys general and district attorneys—and police officers employed by external departments. Frequently—and often with great legitimacy—police view the creation of an organized crime or anti-corruption capability in a prosecutor's office as a transitory, politically motivated response to a permanent problem.

Quite often, organized crime units are created with great fanfare and unusual steps are taken to guarantee success. A "fast gun" is imported to lead the effort and—as in the 19th century range wars—a team of legal "gunslingers" is assembled to fight for the brand. To attract the new talent, salaries higher than those prevailing elsewhere in the agency are offered. Even when, as has often been the case, salaries are part of a Federal grant, the negative impact elsewhere in the larger office is predictable. Older attorneys and support people, therefore, tend to resent the new group, and sometimes they actively attempt to subvert it. Such problems are only compounded when either the principal official or the unit chief make excessive statements about what the new unit will achieve.

In some instances, new units have opted to ingratiate themselves with local or other police agencies by accepting low-level organized crime cases for investigation and prosecution. Gambling matters are typical. Police are burdened or burden themselves with inappropriate measures of effectiveness like arrest statistics. New units will sometimes

248-593 O—78——3

devote their resources to minor gambling arrests, both to satisfy the police need to show productivity and to secure early publicity regarding unit activity. If such action is short term, part of a carefully developed approach to building relationships with law enforcement agencies and part of a coherent, long-term strategy, then it may be useful. Unfortunately, some units never progress to some higher stage and their operations continue essentially pedestrian and ineffectual.

As suggested above, the pressure for quick results is a function of the perceived need to establish public credibility. Generally, citizens lack the sophistication to appreciate how difficult and time consuming effective anti-racketeering investigation actually is. Barraged by the incessant television successes of fictional police agents, much of the public assumes that real-life efforts should proceed at the same pace. Thus, "quick hits" become—or are regarded in some new units—as essential to survival. Elsewhere, however, the rapid development of several cases is a carefully considered tactic in a compaign to develop long-term public support. This is especially true where unit funding is dependent upon legislative action. Where such bodies are hostile, the rationale is that well publicized early action will generate a public which will support the unit, in the face of demands by legislators to dismantle it.

Simply put, how is it possible to establish credibility consistent with long-term goals? This is particularly relevant in building relations with Federal agencies, which are likely to have pre-existed the new unit and which will survive if it is abolished.

Some new units have adopted a hard-nosed posture toward outside agencies. As the site visit reports disclose, some have proceeded with little apparent concern about offending brother prosecutors. Essentially independent and self-sufficient, a unit of this type will do little to conceal contempt for outside agencies inadequacies. This posture suggests an attitude toward the external world of, "You don't have to like us, but you'll damn well respect us." Others take the view that it is better to try to get along with peer agencies and try to establish a cooperative relationship. How much is accomplished, however, when "offend no one" is a key operating maxim, is open to question.

Unfortunately, too, most of the newer units do not show evidence of well developed strategies. It is apparent that little thought has been given to long-range objectives. Nevertheless, this is not surprising, since few of the older units can legitimately claim to operate with such strategies either. Michigan's OCD, for example, is a unit that has had the time and interest, to consider strategic questions, but has lacked the resources to implement them. A grand strategy has been lacking and much of the OCD's effort has been devoted to intelligence collection and analysis designed to support the creation, maintenance and enhancement of anti-organized crime capabilities in local and county law enforcement and prosecutive agencies. While part of OCD's manpower is devoted to direct investigation of LCN figures and associates in the Detroit area, the unit's principal thrust seems to be the stimulation of primary efforts by other agencies. Their strategic objective appears to be achieving a "full-court press," statewide, upon organized crime persons and activities, recognizing that they have been playing with less than a full team.

Most units—new and old alike—are, moreover, essentially reactive rather than proactive. In its simplest form, reactivity is nothing more than the taking of a target of opportunity and pursuing it with vigor. For example, information about a bookmaking operation will come to a unit's attention—either from external or internal agents; an investigating attorney will be assigned and, finally, a bookmaking case will be developed. Little, if any, thought is given to what impact this prosecution will have upon illegal gambling in the jurisdiction, or what the impact will be upon the criminal organization, if any, that operates the enterprise. Questions about the efficacy of committing manpower and material resources to investigative efforts are rarely examined.

Little questioning is done of much of the conventional wisdom that abounds in the organized crime field. Illustrative is the often articulated rationale for rackets units to pursue gambling investigations, that is, that by working first upon low-level operatives, rackets investigations will move up into the management levels of gambling enterprises and there find hard-core organized crime figures. Productivity in this regard is usually assumed, although rarely documented.

Similarly, gambling and loan sharking are nearly universally regarded as the two primary sources of illegal revenue for organized crime; most anti-racketeering efforts proceed upon this assumption.

Whether or not the proposition is accurate as to a particular group being targeted for anti-racketeering efforts is less clear. Yet most units tend to operate upon such assumptions, usually untested. By and large, investigative approaches tend to follow activity categories rather than being developed to achieve an economic impact, such as the disruption of communications or the destruction of corrupt alliances, which support allegedly legitimate business enterprises.

These general comments are not intended to suggest that there is no creative, proactive work underway among the units surveyed, at least on the tactical level. Brooklyn, for example, undertook some imaginative investigations of legitimate businesses which organized crime has penetrated. The rackets bureau actually entered the private cartage business (trash removal) where organized crime was exercising monopolistic power. The investigation was conducted creatively and included the purchase and operation of a garbage truck, and a number of convictions were obtained. There is, however, little to suggest that the project was or is part of a well developed, coherent general strategy to pursue organized crime.

Among the units reviewed several indicated an awareness of the evolving sophistication of organized crime groups not affiliated with the national syndicate. All personnel interviewed regard the Mafia or LCN families as the premier organized crime groups, but various attorneys indicated concern over emerging Black, Hispanic and Chinese organizations. Michigan and Manhattan see such groups evolving from a single focus activity—as in gambling or narcotics—to criminal organizations with multiple and complicated interests; illegal enterprises and legitimate business interests.

Michigan's OCD is pursuing a strategy of attempting to interdict the growth of such organizations—containing them—in order to preclude their evolution into organizations as powerful as the LCN family. Michigan intelligence suggests that Black groups are apparently following a growth pattern which, if unchecked, will result in groups with a broad and diverse set of legal and illegal activities, buttressed and supported by a strong web of corrupt alliances. In this connection, successful targeting of top officials or bosses may be effective, since such groups have not yet achieved the LCN-like insulation of their leaders.

Manhattan has—when particular investigative opportunities are presented—pursued grand jury investigations of Black and Chinese groups in order to develop a general data base on which to assess their strength and directions. There is no long-term strategy yet, but if efforts of this kind are pursued, it is at least likely that the rackets bureau could develop such a general program.

New Jersey's SPS in recent years has focused heavily upon public corruption. There, unit leadership has apparently decided that since corrupt relationships are essential to the success of organized criminality, an emphasis in this area is essential. The tactical implementation of that judgment does not, moreover, limit the section only to matters where the organized crime nexus is demonstrable. Rather, public corruption is pursued vigorously, whether organized crime is related or not. The rationale appears to be that by exposing the problem and successfully prosecuting the corrupt, potentially corrupt individuals will be deterred from involvement with organized crime activities.

Even where investigative tools, including electronic surveillance, investigating grand juries and immunity are available and capable personnel exist, some units are still not operating at their full potential. In part, this reflects a basic failure to develop rational and coherent strategies for the pursuit of organized crime or public corruption. Too frequently, a review of an agency's work will find inadequacies in the analysis of the existing organized crime problems and the nature and structure of functioning organized crime groups.

SECTION IV. METHODS OF INVESTIGATION

A. Undercover Officers

A few units, including the Nassau County District Attorney's Rackets Bureau, have a high regard for the use of undercover police officers. While the program there is too new to assess its long-term value, officials anticipate positive results in the areas of labor racketeering, loan sharking and narcotics. Manhattan, as another example, has used undercover agents to infiltrate gambling enterprises and to pursue public corruption. The use of undercover agents in narcotics work is a widespread practice of long standing, and a number of the units have pursued cases developed in this way. Obviously, where the pool of potential agent-manpower is large, there is a greater opportunity to employ the technique. Unfortunately, many units operate in jurisdictions where there is little, if any, sophisticated training in undercover techniques. Thus, learning on the job mistakes are made, and costly organized crime investigations are sometimes disrupted.

B. Search and Seizure Techniques

The use of search and seizure warrants is common to all the units, although few utilize them for anything other than the collection of evidence for use in prosecution. Only infrequently are search warrants employed to cause economic damage to a criminal organization or to embarrass inactive local agencies.

C. Electronic Surveillance Techniques

Electronic surveillance authority among the agencies surveyed ranges from incredibly restricted, as in Michigan, to broadly available, as in New York State.[1] Where such authority exists each unit examined displayed extreme sensitivity to the need to conform to the requirements of State and Federal laws. In general, there has been heavy use of electronic surveillance in the pursuit of gambling investigations.

The Manhattan Rackets Bureau and several other units that devote substantial resources to public corruption investigation have found that the use of the one-party consensual body recorder or transmitter has been an extremely effective tool for investigation. Obviously, where the recording or transmission is of decent quality, a prosecutor is armed with persuasive corroborative evidence of the testimony of an often corrupt source about his dealings with the targeted defendant.

D. Informants

All units surveyed utilized informants; many pay for information supplied. None that acknowledged paying for information admitted maintaining informants and salaries, and there was no evidence to suggest that any units did. The Michigan OCD had the best developed informant control system, but all units took some steps to register persons providing information. Rules for informant control varied among the offices, but most adhere to the view that attorneys should never debrief informants unless a police agent is present. None of the units encourage informants to engage in criminal activity, although several permit well placed persons to remain in illegal enterprises for information collection or the introduction of an undercover agent. Nearly all units indicated that they would, if necessary, bring an informant's cooperation to the attention of other authorities if such person were to be sentenced on an unrelated charge.

Michigan and New Jersey conduct active informant development programs in the penal institutions of their respective states as well as with other persons in the criminal communities. Agents servicing investigative units are universally encouraged

[1] On the use of these techniques, *see generally Electronic Surveillance: Report of the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance* (1976) and particularly its background studies and hearings.

to develop both criminal and non-criminal information sources.

E. Grand Jury

Investigating grand juries are regarded as essential for evidence gathering by units operating in states where law and tradition favor their use. At the state level, New Jersey's SPS has the best developed program for using a statewide grand jury. The Manhattan Rackets Bureau pioneered the concept of evasive contempt and its use has spread among other New York State prosecutors. In the absence of grand jury process or some similar vehicle or authority to compel the production of documents and the appearance of witnesses, it is difficult to conceive of successful and sophisticated organized crime investigations being conducted.

SECTION V. POST INVESTIGATIVE ACTIVITY

A central tenet of the rackets bureau concept has been the recognition that the traditional courtroom accuser must expand his vision and assume responsibilities in the gathering of evidence in specialized areas. That there may well be a similar obligation to look creatively toward the question of sentence is not yet widely shared. None of the units reviewed regularly seek aggravated penalties for convicted defendants whom the unit believes are significant organized crime figures. In some jurisdictions, prosecutors are limited by law or tradition from making recommendations on sentence. In others, the failure to do so is explained by the absence of provisions analogous to those of Federal law. Other units frankly admit that they have never considered the possibility of offering information to a court that might achieve a more serious sentence—even within the bounds of the existing maximum available.[1] Since organized crime figures frequently receive sentences shorter than the statutory maximum available, several units intend to pursue this approach in the future.

There is also no clear policy pattern for these units as to whether or not they will make presentations before parole authorities when an organized crime figure is involved. Many operate on an ad hoc basis as individuals are presented to such boards.

[1] *See* Appendix E for an analysis of some of the relevant legal principles applicable to sentencing in rackets cases.

SECTION VI. COSTS

Major concerns in the decision to establish a rackets bureau are the amounts and sources of the money to pay personnel, to purchase, maintain or lease equipment and office space, and to conduct the daily operations of the unit. These concerns vary in large measure according to the nature of the parent office and the sources of manpower for the new unit. Where a local prosecutor's office assigns several attorneys to work with a local police agency and utilize existing police equipment, the additional expenses may be minimal. Where a State's attorney general is given the authority to set up a unit of attorneys and investigators to pursue certain inquiries the expenses may be considerable.

It is, therefore, impossible to say how much a rackets bureau costs. Nevertheless, since external funding is available (LEAA is the most common source) and in applying for such funding, consideration must be given to the potential needs of the projected unit, the estimated expenses of one such office (SCIPP) over a 3-year period (1974–1976) are set forth below. The grant applications from which these figures were abstracted are public documents, and copies may be obtained from the grantor (LEAA) or the Cornell Institute on Organized Crime.

Salaries	*1974*	*1975*	*1976*
Project Director/Chief Counsel	28,000	29,000	29,000
Ass't. Chief Counsel/Assoc. Chief Counsel	24,000	22,000	22,000
Ass't. Chief Counsel/Assoc. Chief Counsel	16,000	18,000	18,000
Ass't. Chief Counsel/Assoc. Chief Counsel		18,000	18,000
Associate Counsel			18,000
Legal Ass't	11,000	10,500	10,500
Legal Secretary	9,000	11,500	11,500
Legal Secretary		11,500	11,000
Legal Secretary			11,000
Receptionist/Typist			9,500
Research Ass't	10,000	11,000	11,000
Research Ass't	10,000	11,000	11,000
Research Ass't		11,000	11,000
Research Ass't		7,000	10,000
Financial Inv	*	20,000	20,000
Financial Inv		20,000	20,000
Financial Inv		20,000	20,000
Financial Inv		5,500	20,000
Financial Inv./Grant Manager		15,000	15,000
Overtime—Project Investigators	9,600	33,600	33,600
Overtime—nonproject Police Investigators	4,800	5,000	6,000
Total Personnel	122,400	278,600	336,100

Figures do not include salaries for police assigned to project which are paid by their respective departments or fringe benefits for salaried project employees. (approx. 15% of salary)

*See professional contractual services (accountant)

Travel	*1974*	*1975*	*1976*
vehicle gasoline costs—local	2,933	7,560	5,040
transportation and subsistence for out-of-state investigations	2,270	2,000	1,500
witness relocation	3,000	1,011	5,000
Total travel	8,203	10,571	11,540

Office Equipment—1974	
2 Executive Double Pedestal Desks (@ $270)	540
2 Executive Swivel Chairs (@ $90)	180
6 Double Pedestal Desks (@ $230)	1,380
6 Swivel Desk Chairs (@ $35)	210
2 Typists Desks (@ $230)	460
2 Chairs (@ $35)	70
10 Locking Filing Cabinets (@ $125)	1,250
1 Floor Safe	800
2 Book Cases (@ $150)	300
1 Conference Table	275
10 Office Chairs (@ $65)	650
2 Equipment Lockers (@ $75)	150
1 Chalk Board	70
1 Paper Shredder	355
1 Portable Pocket Calculator	150
2 Selectric IBM Typewriters (@ $600)	1,200
Total	$8,040
Office Equipment–1975	
4 Office Chairs	250
1 Conference Table	150
6 Legal size file cabinets	900
3 Letter size file cabinets	450
1 Telecopier	500
1 Memory Typewriter (rental)	2,000
Total	6,250
Office Equipment–1976	
1 Memory typewriter (rental)	$1,176
Surveillance and Communications Equipment–1974	
4 Leased Automobiles @ approx. $2,220 per auto/yr.	8,800
Radio communication equipment	
4 Mobile Transceivers (@$1,600)	6,400
1 Base Station	12,800 4,000
2 Portable Walkie-Talkies (@$1,200)	2,400
Additional Surveillance Equipment	
4 5" Attache Cases (@$25.00)	100
4 SX Polaroid Cameras (@$150)	600
4 7-12 x 40 MM 200M Monocular with case (a $25.00)	2,200 100
4 TC55 Sony tape recorders (@$100)	400
4 Motorola Pageboys (@$250/yr.)	1,000
2 7" Reel Sony 105A Tape Recorders (@$300)	600
Photographic Equipment	
1 35 MM Camera with Lenses	1,800
Telephone Intercept Decoder	

2 Touch-tone Decoders (@$1,815)	3,630
Total	$29,830

Surveillance and Communication Equipment–1975

8 leased automobiles	23,400
1 leased van	3,300
repairs (tires)	1,000
Leaps-NCIC teletype terminal	2,345
Paging system	1,200
Miniature tape recorder	2,000
Microfilm camera (rented) and reader printer	3,400
Total	36,445

Surveillance and Communications Equipment—1976

miniature tape recorder and attachments	2,300
videotape equipment	5,500
8 leased automobiles	20,640
1 leased van	3,300
Leaps/NCIC teletype terminal (leased)	2,340
Paging system	1,400
Microfilm camera (rented) and reader printer	3,400
Total	$38,380

Supplies	*1974*	*1975*	*1976*
postage	120	200	300
stationery	1,020	2,500	4,800
books and periodicals	1,000	1,000	1,200
membership	300		
reproduction and printing	4,000	7,000	7,200
film and processing	600	400	600
telephone	1,800	7,350	11,000
misc		750	600
Total	$8,840	$19,200	$25,700

Professional Services (Contractual)	*1974*	*1975*	*1976*
Accountant	3,000		
Security consultant for office and witness protection	750		
technical consultant for electrical equipment, training and maintenance	500	2,000	
independent evaluator		3,000	
service contract for equipment		1,000	
Total	4,250	6,000	

Other	*1974*	*1975*	*1976*
Office rental/security/utilities	16,800	27,700	28,400
confidential expenditures	15,000	9,500	18,000
training	3,000	2,000	2,000
Total	$34,800	$39,200	$48,400

Witness Protection Facility–1974

Security (Equipment & Installation)		7,680
Closed Circuit TV		
4 cameras		
2 monitors	3,025	
sketching mechanism		
Fire Alarm Sensors	235	
Exterior Lighting	850	
Intercom System	320	
Intrusion Alarms (and Master Control)	1,800	
Perimeter Fence	1,450	
Maintenance		
Equipment (shovels, rakes, lawnmower, etc.)		400
Aluminum storm windows, and doors (13 windows, 3 doors)		520
Outside storage shed		200
Furnishings		
Furniture (sofa, chairs, tables, kitchen set, etc.)		1,000
Curtains, towels, sheets		150
Recreational Equipment		500
Total		$10,450

1975 Maintenance	1,000	
1976 Maintenance	1,000	4,000
Security	3,000	

PART 2
GENERAL STANDARDS FOR THE OPERATIONS OF UNITS

Part II of this prescriptive package is an effort to move beyond a description of, and a commentary on, what exists and offer some positive suggestions on what ought to be. The materials that follow consist of standards with analysis of such issues as when an organized crime control unit ought to be established, how it ought to be organized, and how it ought to be operated. The standards are offered with the idea that they reflect the mature judgment of those who have had to face and to live with the consequences of these kinds of decisions; they are not offered with the idea that they are positions with which reasonable persons cannot disagree. As indicated in the Preface the recommendations reflect an effort to implement operationally many of the more general standards of the President's Commission on Law Enforcement and Administration of Justice, the American Bar Association, and the National Advisory Commission on Criminal Justice Standards and Goals. The standards will have achieved their purpose if they assist those responsible for the creation and supervision of organized crime control units in systematically thinking through and resolving the difficult issues that face them.

SECTION I. ESTABLISHING AN ORGANIZED CRIME CONTROL UNIT

1.1 Criteria for Establishment: Problem and Resources

An office charged with prosecution should establish an organized crime control unit when it has sufficient resources to justify specialization and when it faces within its jurisdiction significant organized criminal activity. Significant organized criminal activity may be indicated by the existence of one or more of the following factors:

(1) the wholesale distribution of narcotics or other dangerous drugs;

(2) unlawful gambling enterprises;

(3) professional theft and fencing networks;

(4) the lending of money at usurious rates of interest to be collected by force by individuals connected to criminal groups;

(5) racketeering, including bribery, extortion, embezzlement and fraud, in the operation of legitimate unions or businesses;

(6) systematic public corruption, including bribery, extortion or embezzlement; or

(7) the manufacture and distribution of illicit alcohol.

Commentary

The special character of our nation's system of crime control and the complex nature of organized criminal behavior compels differing approaches to law enforcement by state and local agencies. Differences, too, exist between states in political structure and size. The role that an attorney general from a major industrial state might play in crime control may well differ from that which his counterpart from another, quite different state might play.[1] Similarly, the role of a local district attorney in a major metropolitan area would obviously be other than that which could be played by a district attorney in a smaller area somewhere else in the state. Organized crime control programs must, therefore, be tailored to facts and circumstances as they exist in each place.

All of those offices charged with prosecutive responsibilities must, of course, play the traditional role of courtroom accuser. In light of the growing complexity of the legal limitations on police procedures, it seems evident, moreover, that all offices must also increasingly concern themselves with the legal aspects of such procedures. The decision to establish an organized crime control unit to participate in the investigation and prosecution of organized criminal behavior represents a further commitment to specialize the prosecutive function and to an affirmative involvement in the process of evidence gathering. That commitment need not be made unless the office faces within its jurisdiction significant organized criminal behavior; it ought not be made unless it has sufficient resources, including personnel and legal tools, to make an impact.

Significant organized criminal activity ought to be the touchstone of the decision to establish an organized crime control unit.[2] Obviously, what would be considered significant organized criminal activity might well vary from place to place. The presence of active members of the Mafia or La Cosa Nostra would, of course, usually be an indication that a unit should be established. The concept of organized criminal behavior need not, however, be so limited. Even in the absence of active national syndicated members, the presence of the wholesale distribution of narcotics or other dangerous drugs, unlawful gambling enterprises, including numbers and bookmaking, bootlegging, professional theft and fencing networks, loan sharking by members of criminal groups, racketeering in unions or businesses, systematic public corruption may all indicate the need for a specialized law enforcement response.

[1] The National Advisory Commission on Criminal Justice Standards and Goals recommends establishing a statewide organized crime prosecutor where needed. *Organized Crime*, § 7.1, p. 142.

[2] For an interesting effort to find imaginative ways to determine the presence of organized crime, *see New Effectiveness Measures for Organized Crime Control Efforts: Development and Evaluation* (LEAA 1973).

A word of caution here, however, is in order. As Attorney General William F. Hyland notes, "The presence of any of [these] . . . activities . . . does not necessarily require the establishment of a specialized organized crime unit." In some instances, for example, traditional law enforcement efforts can adequately cope with forms of organized gambling and the illicit manufacture of liquor. The list in the standard, therefore, represents factors indicating an organized crime problem. The crucial question comes next: is there a need for a specialized law enforcement function? The factors lead to asking the second question; they do not by themselves resolve it.

This list of possibly significant organized criminal endeavors is not, moreover, exhaustive. Other areas of significant activity would include cigarette smuggling, organized prostitution, and pornography enterprises. The important point is that as criminal behavior moves beyond its traditional forms of murder, rape, robbery, etc. and begins to organize its activities, it will be necessary for law enforcement to consider whether or not to respond in more than traditional ways.

A special word of caution is also in order in reference to point (6) (systematic public corruption, etc.). A number of those who evaluated or commented on this study misjudged its thrust. Judge Stern, for example, expressed his feeling that a public corruption unit was more important than an organized crime unit, and that corruption cases should not be turned away if they were not "systematic." Far from disagreeing, this study shares those values. But it was not addressed to the issue of the establishment, organization or operation of such units, although much of what is said here of organized crime units is relevant to public corruption units. Where the volume or sophistication of public corruption cases justifies it, such units should be established. Routine cases may, however, be handled without specialization, as part of the general work of an office. Some special cases may be handled by an ad hoc task force approach. Where there is systematic corruption, but the volume or sophistication does not warrant a separate unit, such cases may be appropriately assigned to the organized crime unit. Such cases, moreover, belong in the organized crime unit, where the source of the corruption is itself organized crime. Nothing in this or the other standards in this study should, in short, be read to deprecate the importance of committing all the resources required to meet the challenge of public corruption, even at the expense of organized crime related prosecutions. The point here is simply that public corruption is not the central focus of this study.

The presence of sophisticated criminal behavior calls for correspondingly sophisticated law enforcement. Nevertheless, realism ought to require policymakers in the criminal justice system to face up to the question of limited resources. All aspects of the criminal justice system are undernourished. Resources expended in one area are resources not expended in other areas. Those resources that are available, therefore, ought to be committed where they will have the greatest impact. An organized crime control unit that is little more than a sign on a door may do as much harm as good; it may lead the public into thinking that something is being accomplished when, in fact, it is not. Consequently, a careful inventory must not only be taken of the organized crime problem; it must also be taken of the resources that can be employed in meeting the problem.

An organized crime control unit might be appropriately established with only two or three attorneys and a small complement of investigative resources, but the decision to establish it should also include a commitment to expand it until it reaches a realistic size, given the nature of the organized crime problem and the other priorities of the office.

Two or three attorneys can only manage a small case load. At best, they may only be able to stir up activities with otherwise dormant outside investigative and prosecutive agencies.

More than personnel issues are involved, too. To be sure, the personnel must be adequately trained and motivated, sufficient in number, and well led and organized. But they must also be adequately equipped with carefully drafted substantive and procedural legislation.[3] Indeed, there are serious differences within law enforcement ranks on this issue, but it is suggested by some thoughtful individuals that unless an organized crime control unit can have access to compulsory process (a grand jury or similar body) and immunity techniques, it is probably not worth establishing such a unit with operational responsibilities. Others would add that without court ordered electronic surveillance, it is doubtful, too, that much can be accomplished. Unless a minimum of procedural tools is available,

[3] *See generally, Organized Crime,* pp. 137–60.

therefore, it may well be that legislative reform, and not the establishment of an operational unit, should be the first priority.

Among the evaluators, Henry Petersen sharply disagreed with this last point. He argued that:

> the organization be formed and given operational responsibility so that the predicates for needed legislation can be established and demonstrated. . . . [W]ithout the force and impelling impact of an operational unit, there are few who can be motivated to legislate in a vacuum.

The question is obviously one over which reasonable people can disagree.

1.2 Mission Paper: Problems and Goals

An organized crime control unit should have well-defined priorities. These should be based on a realistic appraisal of its capabilities. An analysis of the organized crime problem the unit faces, along with the identification of its specific goals should be expressed in a Mission Paper. The Mission Paper should be periodically revised as additional knowledge is gained or conditions change.

Commentary

The first step in the establishment of an organized crime control unit is determining the problem and setting realistic goals. There is, however, a question of which comes first. A realistic assessment of goals and priorities may only be possible after a unit has been in place for some time. A blueprint cannot be drafted without some preliminary survey work. Nevertheless, it is extremely helpful to put the resulting action plan, or Mission Paper, in writing, even during the beginnings of a unit's life. Yet the goals must be realistic; they ought also to be concrete and keyed to a reasonable timetable. Eliminating organized crime in any of its current forms within the foreseeable future is, for example, not a realistic goal to try to achieve within a reasonable timetable.

In an important measure, the effectiveness of a unit will be directly proportional to its accountability. Without a definitive set of realistic and concrete goals keyed to a similarly realistic timetable, members of the unit will not know what is expected of them; it will also not be possible to evaluate their work. A word of caution, however, is in order. There is a danger in overemphasizing effectiveness measured by objective standards. All organizations run the danger of goal distortion. When an organization is engaged in working towards an ultimate goal (justice) that cannot be measured, but the organization is evaluated by measuring aspects of its work (convictions), there is a real danger that the organization will begin to lose sight of its goals in an effort to meet the expectations of evaluation. Traditionally, this has been a troublesome problem in organized crime control. *See Task Force Report: Organized Crime*, p. 15 (energy diverted to meaningless low-level gambling arrests). Nevertheless, a Mission Paper is an important tool for management in achieving general evaluation; it can also serve as a valuable guideline in determining the acceptability of a potential investigation and the worth of intelligence or leads. Despite the difficulties it might raise, a Mission Paper ought to be drafted.

The contents of the Mission Paper of a particular unit should be unique. Each jurisdiction has its own problems. Statewide units have one perspective; county units will have another. New units will face a different set of problems than established units. Units with other agencies operating within their jurisdiction will face still other problems. Here units should cooperate, if feasible, in the setting of goals. The ideal is exchange of information, the mutual use of common facilities, technical assistance, and mutual respect. Joint task forces for particular problems are possibilities. Candor requires the acknowledgment that other units may be politically inspired or staffed by incompetent personnel; corruption, too, may be a problem. Obviously, where a Mission Paper must realistically take into consideration such sensitive factors, a certain measure of lack of concreteness would seem to be prudent.

To determine the more specific character of the organized crime problem it faces, the new unit during its formative stages should consider the following:

—sponsor a conference to be attended by knowledgeable members of enforcement units within its jurisdiction. Such a conference should have the added advantage of establishing relationships that may prove beneficial at a later time.

—review media exposés and accounts of matters relating to organized criminal activity in the jurisdiction. In depth interviews of key reporters is also advised.

—conduct jailhouse interviews. Indeed, a regular program of debriefing prisoners is advisable once the unit is fully established.[4]

—conduct interviews of citizens who take advantage of the illicit markets provided by the underworld.

—in addition to police department intelligence personnel, conduct in-depth interviews with patrol officers who are aware of conditions in the jurisdiction.

If feasible, enlist the aid of outside professionals who may be able to assist in measuring or estimating and evaluating the extent and impact of organized crime activities.

Almost every investigation that is completed, no matter what the ultimate purpose or degree of success, will add to the unit's understanding of the structure and operations of the underworld within the unit's jurisdiction. Indeed, as investigators and attorneys add to their experience, they will gain new skills, learn new methods, develop new insights, and attract knowledgeable sources of information. As a result, it is crucial that the mission paper be periodically reviewed and revised.

This standard and a number of others necessarily envision adequate staff resources. As Carl A. Vergari notes, "Shortage of personnel, high case loads, and the press of operational duties [may] make such 'staff' work an unaffordable luxury." Here, as elsewhere, the standards must be read in light of everpresent resource limits.

Indeed, too, there is not universal agreement on the need for a mission paper. As Robert M. Morgenthau notes:

> This Office does not share your conviction on the utility of the Mission Paper. We prefer to define our public obligations in the Rackets Bureau in general subject matter terms of official corruption, organized crime and labor racketeering, and assess each potential investigation on an ad hoc basis. We find that concrete goals and time tables suggested generally in such a Mission Paper unrealistic in our circumstances. We prefer careful initial assessment and regular monitoring by the Bureau Chief as a control on the effective utilization of resources and personnel.

[4]For a debriefing form, see *Basic Elements of Intelligence,* pp. 74–78 (LEAA 1976, Rev. Ed.).

1.3 Political Considerations

Political considerations should play no part in the establishment of an Organized Crime Control Unit or its hiring policies.

Commentary

Unfortunately, politics has traditionally played a significant role in the criminal justice system. Attorneys general and district attorneys are, in most cases, elected officials. Consequently, it is little more than a truism to say that they are creatures of politics. Nevertheless, it is also true to say that politics has been the bane of the criminal justice system.

A unit that is established to attract public attention as a ploy to win votes promises little of law enforcement value. Assistant district attorneys hired because of what they did in the last election or whom they know in a patronage system present problems enough in the general administration of justice.[5] In the area of organized crime control, they threaten the success of the program itself, particularly as it impacts on political corruption.

An organized crime control unit established or operated for purely political reasons will be identified as such by other elements of the criminal justice system and knowledgeable segments of the community in both the legitimate world and underworld. Such a unit will not receive the cooperation it needs to survive and succeed.

A politically partisan organized crime control unit will also be particularly unable to deal effectively with corruption in government. All too often, those who owe their positions to the party in power will not impartially or fairly investigate those in power or the activities of the opposition. Even if they choose to conduct investigations and make an effort at impartiality or fairness, their actions will be viewed as "vengeful," or a "whitewash." Consequently, the first rule of an organized crime control unit should be to be above politics.

In addition, it may be, as Attorney General William F. Hyland notes, advisable to give thought "to the establishment of mechanisms to prevent politi-

[5]Nonpartisan hiring is the standard of the American Bar Association. *The Prosecution Function and the Defense Function,* A.B.A. Project on Standards for Criminal Justice, § 2.3(c) (1971). It was also recommended by the National Advisory Committee on Criminal Justice Standards and Goals, *Organized Crime,* § 1.3, p. 38.

cal reprisals against members of the agency." "Appointments," he suggests, "for specified periods of time and granting tenure to a small number of talented individuals might be considered."

This standard is addressed to the issue of politics in a narrow sense. In a broader sense, however, politics must play a part in the establishment, organization, and operation of an organized crime control unit. Henry Petersen writes:

> The statement is made that political considerations should play no part in the establishment of an organized crime control unit. Clearly, that is incorrect both as a practical matter and as an ideal. The simple fact is that a part of the political or governmental system cannot rise above the system or change its nature. The exercise of substantial political power as in the operation of a system of justice must, in the final analysis, be subject to the political control of the people. What . . . [the standard] is trying to establish is, I think, that unworthy or corrupt political considerations should be guarded against. * * * Clearly, however, honest and effective law enforcement involves the exercise of legal and social responsibilities about which honest people of good will may differ. Those responsibilities should, therefore, be subject to careful scrutiny by appropriate governmental process to insure that they are properly discharged in accordance with predetermined standards of fundamental fairness and due process.

1.4 Attorney Assignments

Attorneys assigned to head up and to work in an organized crime control unit should be carefully selected to embody mature judgment and an affirmative personality. They should be required to commit themselves to service in the unit for at least three years. Salaries should be commensurate with ability and the added commitment.

Commentary

It is perhaps trite to characterize the qualities that assistants ought to have who head and work in an organized crime control unit. To say that they should be honest, intelligent, articulate, imaginative, dynamic and self-confident and so on is not very helpful. All prosecutors should possess these qualities. Nevertheless, there are at least two special qualities that ought to be sought for in those who work in the organized crime field: mature judgment and an affirmative personality.

The ability to investigate and prosecute organized crime necessarily involves the innovative use of statutes, case precedent and general legal theory. Because organized crime figures can and do hire the best legal talent available, they are often able to frustrate conventional means of enforcement. The creative use of law by the organized crime prosecutor is the only way this challenge can be met.

Moreover, mature judgment is involved, particularly where the prosecution of public officials is undertaken. Those who would adapt existing legal tools to meet unique and challenging situations must be appreciative of the possible consequences of their efforts. Newly developed theories are certain to be attacked and carefully scrutinized by the judiciary; mistakes will be treated harshly and often with severe repercussions. Since what one office does will affect the potential of others, each carries a substantial burden in making an effort to break new ground.

At the same time, the organized crime prosecutor must have an affirmative personality, that is, a special combination of a constructive imagination coupled with the courage to act. One who is too cautious under the guise of mature judgment will frustrate the efforts of the unit. Particularly in law enforcement, there are always a hundred reasons why some things should not be done. The typical training of an attorney equips him to find those reasons or to invent them. All too often, negativism is an occupational vice of the lawyer trained in the common law. Imagination in determining how something can or should be done consistent with legal restraints is a unique talent. It must be consciously sought out and encouraged in organized crime control personnel. Those who have it must also have the courage to act on it. The "can do" lawyer with mature judgment is, therefore, the *sine qua non* of the success of the organized crime control unit.

Since the success of the organized crime control unit is dependent on the sustained commitment and accumulated experience of its personnel, those who staff the unit should remain there for a sufficient period of time to make a contribution. Young

members of the unit will have to be trained; their usefulness to the unit, therefore, is frankly minimal during the early years of their service. Three years is probably the minimum period of time to make the period of training worthwhile.

Those who have had experience in managing organized crime units differ on an important issue in recruitment. Should young attorneys be brought directly into the specialized unit rather than first allowed some period of maturity in other areas of an office before assignment to a specialized area? One person who commented on the study observed:

> I think it is a great mistake to hire persons without any experience directly from law school. The cases that will be worked on by the organized crime prosecutor are usually always complicated, sophisticated, with many difficult legal and factual issues. . . . [T]he lawyers that . . . [these] prosecutors will face, by definition, are usually the best criminal lawyers in the country. * * * I would, therefore, insist upon a screening process which called for extensive interviews, mandatory prior experience, academic excellence, and required complete financial disclosure of the prosecutor's assets.

Others feel, particularly in the large urban offices, that the experience gained in the first few years in such offices does not equip a young attorney for sophisticated investigations or trial work. Instead, it is too often limited to plea negotiation or single fact question trials. Given the relatively short total time a lawyer will remain in prosecution, it would be better to give him on-the-job experience in his area of specialization. Here, as elsewhere, there is apparently much to be said for both views.

A commitment of three additional years in a prosecutive office should, of course, be reflected in a correspondingly higher salary. Premium pay may be justified by an extra commitment; it is doubtful that the benefit of premium pay otherwise is worth the resentment and feeling of elitism generated in other areas of the prosecutor's office. Obviously, adjustments in the commitment and salary should be made to reflect previous experience or unanticipated personal problems. The three year guide set out here need not be an inflexible rule.

Apart from the question of premium pay, salary levels in an organized crime unit as well as the office generally must be competitive, at least to some degree, with private practice. Where they are not, financial consideration will compel the best assistants, who might otherwise extend their public service, to leave for more lucrative private employment. Where salary levels are not competitive, the economy practiced is false; while new assistants are paid less, their productivity is so drastically curtailed, particularly in sophisticated areas like organized crime control, that more is lost than gained.

1.5 Investigative Resources

An organized crime control unit should have access to an adequate complement of investigators. The complement should include, in addition to those chosen for proficiency in general areas, a number of specialists who have developed expertise in particular areas of organized crime of concern to the unit.

Commentary

An essential premise in the rackets bureau concept as developed in New York County has been the integration of lawyers and investigators in a common effort. Ideally, this is best accomplished if the organized crime control unit has its own complement of investigators. They need not be the direct employees of the prosecutor's office; it is possible to have external units assign personnel to the prosecutor's office. It is also possible, although difficult, to make do with the services of outside agencies on a case-by-case basis. The key point is integrated effort, not integrated personnel, even though the relation between the two is obviously close. Obviously, too, the concrete limitations of time and place will affect the degree to which the ideal may be realized in practice.

To the extent possible, the investigative complement should aim at being self-contained. This increases security, establishes control over priorities, and helps to guarantee resources when required. Thus, while all investigators should have polished detective skills, some of them should be chosen for other abilities. For example, the unit should have access to recognized experts, able to testify in court, in each of the major organized crime areas that are of concern to the unit—narcotics, gambling, fraud, etc. The complement should also include personnel with the necessary technical skills needed by the unit, including photography and, where lawful, electronic surveillance. Finally, to the extent possible, the investigators should be from diverse ethnic and religious groups, of different sexes, ages and sizes, and able to speak the lan-

guages common to the jurisdiction. More than issues of equality are involved here. Effective law enforcement is made possible when the unit has access to resources flexible enough to take advantage of all types of investigative opportunities as they arise.

1.6 Intelligence Analyst

An organized crime control unit should have assigned to it one or more investigators who are trained and competent intelligence analysts. The intelligence analysts should be specifically and wholly assigned to the compilation, indexing, analysis and dissemination of intelligence relating to organized crime within the units' jurisdiction.

Commentary

If an organized crime control unit is to develop an appreciation of the problem it faces and to be in a position to evaluate the attainment of goals, it must establish some systematic method of regularizing the now largely unsystematic approach to gathering, indexing, analyzing, and disseminating intelligence relating to organized crime. At least lip service is given to this fact now in most organized crime units.

Most failures in the use of this approach, however, have been caused by the assignment of an investigator to the "intelligence role" only on a periodic basis, relieving him of those duties, when exigencies required his presence "in the field." Such exigent circumstances, however, tend to occur all too frequently in an organized crime control unit, and the analyst role, therefore, tends to be forgotten. Experience demonstrates that a successful analyst must be full time; his commitment to this specific task must be insured. One practical solution to the temptation to use the analyst in other roles "temporarily" is to choose an individual for the job who is capable, yet, for one or another reason, can no longer be assigned normal investigative duties in the field. An obvious example would be an investigator who, because of injury, now cannot qualify for field duty.

No matter how good the indexing system used by the analyst, or how standardized the system, inevitably much of the intelligence file's usefulness will result from the analyst's personal familiarity with the material it contains and how to use it for maximum benefit. As a result, care should be taken in choosing an individual who would be expected to remain in that capacity for a substantial period of time. Consequently, an investigator who is nearing retirement age should be avoided.

On the other hand, the ability to analyze, evaluate and relate raw intelligence requires sophisticated knowledge of criminal activity. Someone without practical investigative experience or one who is new to the job will probably be largely ineffective. Consequently, a proper balance between youth and age must be achieved. Understandably, therefore, finding a qualified individual may be difficult.

Once the analyst is chosen, he should take advantage of one of a number of excellent training courses available,[6] and he should be encouraged to meet other persons with similar positions. Other members of the unit should also be reminded regularly to channel intelligence through the analyst and to avoid the tendency to horde information. In addition, procedures should be developed to insure that raw intelligence is returned to the unit's staff in usable form on a regular basis through intelligence briefings.

It might well be a good idea, too, to secure the services of competent intelligence analysts prior to the establishment of the unit so that they could assist in surveying all available intelligence to determine the extent of the organized crime problem in the particular jurisdiction.[7]

Finally, one additional comment is in order. Attorney General Bruce E. Babbitt notes:

> [This standard] does not adequately address the relation of intelligence to the investigative and prosecutive functions. The notion, implied in the standard, that one investigator can build and maintain a proper intelligence file is naive. The real question is how to access, coordinate and utilize the vast amounts of intelligence collected every day in all large police agencies.

The Attorney General is, or course, correct. The standard however, only focuses on the prosecutor's office in the context of the organized crime unit. Obviously, the general need for adequate intelligence demands more than one officer. Yet it is re-

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[6] *See, e.g.;* Western Regional Training Institute; State of California; Department of Justice; Dade County (Florida) Institute on Organized Crime; Dade County Public Safety Department; Miami, Florida.

[7] The organization and operation of a police intelligence unit is discussed in *Basic Elements of Intelligence* (LEAA 1976 Rev. Ed.); *Organized Crime* pp. 121-35.

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markable how few organized crime units have even one for their needs.

1.7 Investigative Accountant

An organized crime control unit should have assigned to it one or more accountants experienced in criminal investigations for the examination of books and records.

Commentary

Specialization is the hallmark of an organized crime control unit. One of the most significant areas of specialization is in the "paper chase." Organized crime figures and corrupt public officials have become far more covert and sophisticated in their operations. Today, it is often necessary to trace payoffs and other profit trails through a number of books and records to get back to their source or to follow them to their recipients. Only accountants experienced in criminal investigations can master the "paper chase." Such accountants are essential, too, in drafting comprehensive subpoenas and presenting complicated financial transactions to juries.

1.8 Training

Attorneys and investigators assigned to an organized crime control unit should, in addition to formal in-house training, take advantage of outside training programs specifically designed for organized crime control work.

Commentary

All too often training in organized crime control work, both for attorneys and investigators, consists of little more than an informal introductory briefing and a somewhat longer, but still too brief period of apprenticeship. More formal efforts must be made to create in-house training capabilities, particularly for attorneys, whose period of service is relatively short compared to investigators.

In-house training, moreover, cannot do the entire job. A number of excellent opportunities now exist to secure training specifically designed for organized crime control work for both attorneys[8] and investigators. Every effort should be made to take full advantage of these opportunities.

[8] See, e.g., National Association of Attorneys General, Committee on the Office of the Attorney General, Raleigh, N.C.; National College of District Attorneys, College of Law, University of Houston, Texas; the Cornell Institute on Organized Crime, Cornell Law School, Ithaca, N.Y.

Finally, it must be emphasized that training should not be narrowly limited to investigative techniques or law. It should be broadly conceived. The organized crime attorney or investigator must know something about organized crime itself—its social, economic, and political aspects. Management, too, must be included in the subject matter studied. Organized crime investigation and prosecution is more than a policeman or lawyer's craft; it also involves issues of personal relations, budgeting, resource allocation; planning for the achievement of public policy goals, etc. Given the high turnover of personnel in prosecutive units, it is all the more important that some effort be made to acquire such skills through formal training, since so little time will be available for on-the-job learning through experience.[9]

1.9 Clerical and Secretarial

An organized crime control unit should have assigned to it a sufficient number of clerical and secretarial personnel so that attorneys and investigators are not required to engage in word processing, reproducing, filing, or similar tasks.

Commentary

No organized crime control unit—or, for that matter, other parts of a prosecutive office, can be called efficient, when its attorneys and investigators do tasks that should be performed by persons paid one-half or one-third their salary. Nevertheless, it is not uncommon for attorneys to type, reproduce, and collate legal papers and for investigators to spend innumerable hours typing investigative reports or transcribing recorded conversations. For a unit to operate at maximum productivity, it must have an adequate complement of clerical support personnel.

Similarly, where routine recordkeeping or record checking is required, clerical workers should be assigned to perform the task. There is obvious room, too, for the imaginative use of para-legals in organized crime control units.

Care should be taken, however, that the use of auxiliary personnel does not result in the loss of investigatory leads or advantages. Sending a clerk to examine a record may result in only specific infor-

[9] Training for the organized crime prosecutor is considered in Organized Crime, § 9.6, p. 196.

mation being brought back, where a knowledgeable investigator would have recognized other relevant information. Obviously, a question of careful balance is at stake.

1.10 Physical Equipment and Space

An organized crime control unit should have available to it adequate physical equipment and space. Office space sufficient for private work, interviews, interrogations, debriefings, and conferences should be available.

Commentary

Any professional office ought to be adequately equipped and housed. Nevertheless, it is too often not the case. Adequate office equipment should include such items as typewriters, dictating and transcribing machines, all of which are dependable and in good condition. It is doubtful, however, that sophisticated electronic communications equipment is all that necessary. In some units, there seems to be a penchant for James Bond-type gadgetry, facilitated perhaps by the availability of Federal funding; it should be avoided.

Too little thought, moreover, seems to be given to the question of attorney productivity. Housing several laywers in the same room guarantees endless talk, sometimes about work, but often, too, over current affairs, and perhaps other less worthy subjects. A measure of privacy is required for the preparation of legal documents or for study.

There should also be adequate space for conducting interviews in private. Room must be allotted for storage, for the analysis of subpoenaed books and records, and for listening to recorded conversations. Here, too, it is helpful if room is available for defense counsel to examine exhibits and listen to tapes, without disturbing the routine of the office. If electronic surveillance is lawful and the securing of leased lines is possible, a room for monitoring and recording conversations is ideal. It is helpful also to have a special line not listed to the unit from which cooperating witnesses may make telephone calls that can be recorded. Finally, the investigators assigned to the unit must have adequate room for the intelligence files, electronic and photographic equipment, etc., and their own special work needs.

1.11 Security Requirements

All personnel assigned to the organized crime unit should be subjected to a rigorous background check. They should be required to make full disclosure of potential conflicts of interest. The housing for the unit should be physically secure, have methods of entrance and exit that permit informants or witnesses to enter, remain, and leave without unauthorized observation.

Commentary

Security in organized crime control work is a double-edged sword. A failure to attain it carries well known consequences; informants and witnesses can get killed. Nevertheless, it is helpful to underline at the outset of a discussion of security that just as often such considerations have been wrongfully used as an excuse for failure to cooperate with other law enforcement agencies or to exclude able people from particular investigations, where they could have made valuable contributions. The result has been duplication, lost leads, and the general failure to achieve important results. Loose tongues, of course, must be avoided, but security must not be made a fetish; in noting the need for security, this standard should not be used to justify the continuation of harmful and outmoded security practices.

Turning to personnel security, certain basic precautions are important. Organized crime control unit personnel should be given a vigorous background check. Few things are more compromising than the disclosure of embarrassing information about a staff member's past. Similarly, to avoid the appearance of impropriety, all personnel should disclose any potential conflicts of interest, including those which might result from previous employment, relatives, friends, or associates.

Certain other basic precautions would be in order. Papers containing sensitive information should not be left lying around on desks for anyone to see. Attorneys and investigators alike should have a sufficient number of locking file cabinets and drawers; they should develop the habit of using them. An unattended building should be alarmed; phones and conference rooms should be checked periodically for unlawful surveillance devices. Where feasible, dedicated phone cables should be obtained. When a record of persons entering and leaving a building is kept, code names should be used for witnesses and informants.

Since a substantial portion of a unit's work involves the interviewing of confidential witnesses, the debriefing of informants and the grand jury examination of persons not publicly identified, a private entrance to the offices should exist. Where this is impossible, interviews should be conducted outside the office in an alternative location. Even if the unit believes that there is no substantial risk of the identification of informants and witnesses, those persons who seek to hide the fact of their cooperation will more readily appear in a location they believe is secure. A building having an underground parking lot leading to an elevator is, of course, useful; it would also be ideal if the building could be completely taken over by the office.

SECTION II. ORGANIZING AN ORGANIZED CRIME CONTROL UNIT

2.1 Organization of Attorney Workload

An organized crime control unit should organize its attorney work load so that responsibility for achieving the goals of the Mission Paper is fixed and those responsible can be held accountable. Factors to consider in adopting an organizational framework include when the unit was established, its jurisdiction, and its resources. Any organizational framework adopted should be sufficiently flexible to meet unanticipated situations. It should also guarantee close supervision by experienced personnel of less experienced staff members, easy communication within the unit, and coordination of efforts through comprehensive planning. When necessary, attorney overspecialization should be avoided by utilizing a Task Force approach.

Commentary

Ultimately, the internal organizational framework of an organized crime control unit will depend more upon the personalities and capacities of the head and the staff than any formal organizational chart. Nevertheless, it is important to attempt to channel these dynamic relationships and direct them in a rational fashion toward articulated goals. The form of organization that is adopted, too, will depend on a variety of factors—the age of the unit, its jurisdiction (statewide or county), the scope of its operational mandate (organized crime, organized crime and political corruption, etc.), its size and the size of the office of which it is a part, the source and conditions limiting its funding, etc. Obviously, organizational issues will have to be resolved in a fashion unique to each unit, but generalizations are possible.

The unit's Mission Paper will, of course, set out certain targeted goals. The accomplishment of these goals requires that the unit establish priorities, develop information, efficiently investigate, and competently prosecute. Unless staff members are assigned subject matter or geographical areas of responsibility, those goals are not likely to be achieved. Each assistant will pursue what interests him or what is convenient. He will spend as much time on a project as he believes is necessary without regard to the unit's needs. Cases will be investigated and prosecuted one-by-one, perhaps with a great deal of skill and success. With limited manpower and other resources, however, this is impractical. Each goal must be the responsibility of an individual or group of individuals who must either produce or be required to explain why not. Responsibility must be assigned and there must be accountability.

How that responsibility is assigned is, as noted above, dependent on a number of factors. Alternative possibilities follow:

Ad hoc assignment by unit head: Potential investigations, from whatever source, are routed through the unit head, who determines whether the matter should be pursued. Once he has decided that the case is appropriate for the unit, he assigns it to an assistant. The unit head then coordinates all investigations, determines whether there are areas not being explored, and makes additional assignments when necessary. He must judge the proficiency of the assistant, and he must supervise the allocation of adequate time to each matter. The system is unwieldy, but useful where there is an experienced and administratively capable unit head, and inexperienced and unsophisticated assistants; it is also probably possible only in small offices. While it is also probably the most common form of organization, it is also most likely the form which contributes least to the achievement of specific goals.

Team approach: Where a number of unit members are sufficiently skilled, the ad hoc system can be refined by creating teams composed of a junior and senior attorney. Supervision of inexperienced staff will be increased and training facilitated. The teams can either be fixed (having the advantages of stability and continuity) or float (an exchange of partners exposed to new techniques and outlooks). As the junior member becomes more able, he can be given primary responsibility in cases of graduated degrees of difficulty. This approach has the added advantage of providing increased manpower

when needed to meeet deadlines, protection against unavailability due to illness or trial responsibilities, and continuity when an assistant leaves the office.

Module approach: In situations where there are few experienced attorneys and teams are not feasible, one senior person can supervise a module of three to five less experienced lawyers. The supervisor then becomes "back-up" for each of his assistants, fulfilling the partner role in the team approach. This system is particularly effective in situations where the unit has major areas of responsibility to which each module can be assigned—for example, one module to narcotics, one to official corruption, and one to labor corruption. In effect, the modules become sub-units, whose activities are coordinated by the unit head. The modules need not, however, be given special areas; each can be assigned matters as they are developed on the ad hoc basis. Obviously, if the problems are sufficiently diverse and the manpower is adequate, specialization is the better approach.

Specialization: This is the most sophisticated approach; it is only practical in large bureaus (ten to fifteen attorneys) that are faced with a variety of organized crime problems.

It is premised on the theory that the illicit enterprises controlled by syndicated crime are of sufficient complexity that without detailed knowledge of their operations and structure, even of persons involved, a coherent strategy designed to have a long-term impact on their activity cannot be developed or executed. Expertise is required and must be obtained at the expense of variety. The attorneys and investigators with whom they work must be as acquainted with the illegal businesses or the illegal aspects of the legitimate businesses, as those who operate them. (It is as if the businesses were a foreign language: the ideal is that they must be able to think in that language without translation.) Clearly specialization is enhanced if built on natural talents and affinities. Only after they have developed that degree of proficiency can they expect to conduct investigations on a level designed to affect the targeted activity and the underworld figures who direct it. Specialization combined with the team approach, therefore, allows attorneys to have the time to develop expertise, utilize it, and pass it on.

Two final aspects of organization need to be highlighted: communication and flexibility. Any organizational form adopted must guarantee that there will be a maximum degree of communication within the unit. The need to make a concentrated effort to maintain the requisite level of personal interchange varies directly with the size of the unit and its degree of specialization. Too often communication take place only haphazardly—at lunch, on social occasions, or in other places. To facilitate rational planning and to minimize duplication of effort, each member of the unit should know, at least in general outline and with only rare exceptions, the work and *the problems* of other members. Membership in an organized crime unit develops unique skills. Seldom can a member of a unit obtain help outside of his unit, and little in his life will have prepared him for his job. It is crucial to the success of each person's efforts that an active process of legal cross-pollination be cultivated. Periodic meetings should be held to brainstorm common problems, analyze the implications of legal rulings or proposed statutes, and to face together other matters of mutual concern.

Next, the obvious needs to be underlined. Organization is a means to an end; it is not an end in itself. When unusual occasions arise, those responsible for the unit must be prepared to let organization slide and get the job done. Organization must, therefore, be kept flexible, but a word of caution is in order: lawyers tend to know little about organization and care less; everything in their professional makeup makes them case-oriented. Flexibility may be a virtue in an organization, but where the organization is staffed by lawyers, it will more likely be a vice.

Finally, another word of caution is in order. As Attorney General William F. Hyland notes, "[A]lthough specialization is the primary benefit to be derived from establishing an organized crime unit, such a course of action presents obvious risks." Specialization may result in insulation, even within the prosecutor's office. Where necessary, therefore, a task force should be adopted in dealing with certain problems. Members of other sections in the prosecutor's office may be assigned, as Attorney General Hyland notes, "to assist in an organized crime investigation or prosecution." "Trial and appellate attorneys," he suggests, "may offer a fresh perspective," when they are not regular members of the organized crime control unit. Outsiders may also be of assistance in the formulation

of "Feasibility Studies" (3.4) and "Investigative Plan" (3.5).[10]

2.2 Relationship of Attorneys to Investigators

An organized crime control unit should have a clearly defined relationship between the attorneys and the investigators with whom they work. The relationship may take a number of forms, but the form chosen should give due regard to each person's professional standing, and it should, if feasible, place ultimate decision-making authority and responsibility in a single individual.

Commentary

An organized crime control unit can derive its greatest strength from capitalizing on the symbiotic relationship of attorneys and investigators that can be created at every stage of its work. A poor relationship, or one that is dysfunctional, will usually be a guarantor of failure. Few greater issues face a unit, therefore, than the establishment of an institutional structure that insures the mutually advantageous use of each other's necessary talents.[11]

In situations where the investigators are police officers, who are not hired by the prosecutor, the crucial problem in developing a workable relationship is line authority. No responsible organizational head can afford to allow subordinates, for whose actions he is ultimately accountable, to be wholly supervised by a person whom he cannot control. This is eminently reasonable. Nevertheless, an organized crime control unit engaged in a sophisticated investigation of a dynamic organized crime enterprise, communications must often be accomplished quickly (with no time to report to in-line superiors) and investigative determinations made in the absence of a conference setting. Thus, for purely pragmatic reasons, a single person should be given the authority by the prosecutor and head of the investigators to make operational decisions.

That individual may be the attorney in charge (normally designated unit head), a supervising investigator, or a coordinator, who is both an investigator and attorney. While there are advantages and disadvantages for each alternative, crucial factors are the personalities involved, the number of prosecuting or police agencies concerned, and the legal restrictions in the delegation of responsibility. But a decision should be made and adhered to. The person responsible should consult with those who put him in charge whenever necessary and possible, and he should only interfere with normal line authority when circumstances dictate. Finally, he must, of course, be held accountable for his actions. What is important is that the buck stop somewhere near to the scene of the action, at least for operational purposes.

A more difficult problem arises when the unit works with an outside investigative or other prosecutorial agency on an ad hoc basis. Clearly, line authority will be more rigidly adhered to under these circumstances, and while certain understandings regarding the decision-making process may be entered into, it is unlikely that a single individual will be granted authority to direct the activities of all agencies. These cases are distinguishable, however, from the formation of the unit, since the relationships are transitory, and they will not envision sustained activity in the usual situation.

Obviously, attorneys and investigators engaged in a common effort should be encouraged to deal freely and frankly with one another. To the extent possible, this means that investigators should be able to discuss the case with an attorney when the need arises without previous clearance from his supervisor, while the attorney should be able to speak to an investigator without necessarily going through his superior. In each case, of course, nothing should be hidden from the supervisors, who should routinely be the first to be briefed. In short, the relationships should be unencumbered, but should be carefully structured so as not to result in embarrassment.[12]

2.3 External Relationships

An organized crime control unit should establish relationships with individuals and institutions capa-

[10] For a discussion of general management issues in the prosecution of white collar crime, *see Prosecution of Economic Crime* (LEAA 1976).

[11] One common, but minor source of misunderstanding is ignorance of the structure and policies of differing agencies. Brief orientation lectures would seem to be in order for new people.

[12] For a study of how to set up a multi-agency narcotics unit at the police level, see *Multi-Agency Narcotics Unit Manual* (LEAA 1976). Setting up a fencing unit is discussed in *Strategies for Combatting the Criminal Receiver of Stolen Goods* (LEAA 1976). General issues concerned with managing criminal investigation are discussed in *Managing Criminal Investigations* (LEAA 1975).

ble of assisting in the unit's work. Included in such relationships should be other law enforcement agencies, civil enforcement units, the judiciary, federal and state sources of financing, public utilities, repositories of information, investigative reporters, and business and civic groups.

Commentary

Those responsible for the management of organized crime control units know and understand that the unit has to deal with people on the outside to get certain things done. Unfortunately, these contacts are frequently made on an ad hoc basis; they are often also conducted on an arm's length basis until personal relationships are developed. If these relationships are severed because of personnel turnover, the process must begin again. Obviously, a more sensible method of achieving the necessary cooperation is to indentify the people and institutions with which the unit must or could profitably associate and establish working relationships with them.

Law enforcement agencies, both criminal and civil, are a prime example. When information or assistance is required by one agency from another, the reaction, in the absence of previous positive experience, is likely to be proper, but curt. And why not? Few agencies can be expected to expend their time and manpower for another without something in return. They cannot always know to what use their aid is going to be put. Where, however, the request is made on the basis of a personal relationship or where an institutional policy in favor of cooperation exists, the reaction is quite different. The phenomenon is well known, and the lesson is clear. Prior to the need for assistance, a relationship should be developed. Some units have succeeded in this area by choosing personnel, who have had personal experience or good contacts in a variety of agencies. The suggestion of sponsoring a meeting between representatives of various agencies is likely to produce a positive result. Attendance at professional-social conferences is a common and effective method. Establishing a policy by which requests by other agencies made to a unit are handled quickly, politely, and helpfully is also advantageous. Finally, the general reputation of a unit in the law enforcement community is a factor worthy of consideration here; if it can be kept high, cooperation can be assured.

Attorneys in an organized crime control unit have a unique role to play with members of the judiciary. As representatives of one side of an *adversarial* process, they must avoid even the appearance of unfairness and resist establishing special relationships to judges. Yet, as investigators requiring ex parte court approval and supervision for certain legal processes, (*e.g.,* wiretap orders), as counsel to a grand jury impaneled by the court, and as officers of the court responsible to the court for their behavior in litigation that frequently comes before the court, they must, at least to some degree, engage in conduct that may have the appearance of establishing those very relationships.

Subject to a careful effort to avoid even the appearance of impropriety, the head of the unit should see that every attorney is introduced to those judges with whom he will have to deal on a day-to-day basis. The unit head should also arrange with the appropriate judge or court personnel *before the occasion arises* the procedures to be followed in such matters as ex parte applications for search warrants or wiretap orders, civil and criminal contempt hearings, motions to quash grand jury subpoenas, and the regulation of the court calendar. Where the unit adopts a policy of vigorously representing the public interest at the time of sentencing, the manner of the presentation of information and argument should be worked out in advance. Policy memoranda on these issues can be profitably shared with the judiciary and also made available to counsel as the occasion arises.

Funding for special projects can come from a number of sources. Usually legislative bodies will be involved but the fine art of Federal and state grantsmanship has aided many units finding money to support their programs. Likewise, organized crime control units which have failed to make their legitimate needs known to the relevant parties have found themselves in financial trouble. One staff member under the direction of the unit leader should, therefore, be assigned to investigate the availability of funds and to prepare applications for grants. The individual should also be prepared to insure compliance with terms of the grants by drafting required progress reports, extensions, applications, and filling out the other seemingly endless forms. Here is one area where the services of a paralegal might be profitably used.

Investigators know that public utilities, particularly the phone company, have information and records that can legally expedite certain investigative procedures, but that at the whim of a clerk can be

unavailable when needed. Fortunately, many detectives are facile at developing contacts in these kinds of companies who then provide required services speedily and efficiently. Nevertheless, there are policymakers who can affect broad areas of discretion, who have to be dealt with on an institutional level. The unit head should insure that the legitimate needs of the unit are made known to these individuals and should maintain appropriate relationships with them for that purpose. Particularly where the law dealing with law enforcement access to third party records is in transition, every effort should be made to work out with the legal counsel of the company prior to the occasion the procedure to be followed.

The function of an investigative reporter (publicity) may at times be opposed to that of the organized crime control unit (grand jury secrecy). Each should, therefore, respectfully treat each other at arms length. Nevertheless, there are times when they can work together. The reporter can provide leads and even witnesses to the unit and the unit can, by legitimately publicizing a case, give the reporter a good story. Since the local press and media generally assign the same reporters to cover crime stories, the unit and reporters have no trouble meeting each other. What this standard draws attention to, therefore, is the need to think through and control this relationship, so that it does not work to the disadvantage of the unit.

Nevertheless, an emphatic word of caution is in order. As one who commented on the study observed:

> I would only caution [about] the danger of leaks to newspaper reporters and the harm that prejudicial publicity could do not only to investigations but to the credibility of the organized crime unit as a whole. It might be best to . . . have the prosecutors avoid reporters except in dealings concerning a story. . . .

Business and civic groups are also a potential, but much neglected source of aid to organized crime control units. They can, on one side, channel complaints of terrified citizens and identify business trends demonstrating criminal involvement. They can, on the other side, supply "buy" or "show" money, "stolen" goods, jobs for witnesses and informants, and "cover stories." Attorneys or investigators in the unit, particularly those who are assigned the responsibility of investigating and prosecuting extortionist activities in commercial settings, should, therefore, communicate with appropriate groups and advise them of the unit's concern, interest, and availability. Whenever possible, the unit should provide speakers to such groups to promote such relationships.

A word of caution, however, is in order. As Attorney General Bruce Babbitt notes, "There are a lot of dangers [in supplying money, etc.] and the suggestion [must carry] . . . red flags on it." Such outside help should always be carefully reviewed at the highest level in any office and every effort made to avoid any impropriety.

2.4 Policy Manuals

An organized crime control unit should, insofar as it is practicable, reduce its general policies to written form. These policies should be periodically updated.

Commentary

Policy decisions, especially in an organized crime control unit, should be carefuly thought out; they should be the result of the meticulous weighing of conflicting values. As much of the commentary in this study suggests, these decisions will be subjected to second-guessing, and they are guaranteed to be the subject of criticism by those who are not benefited by them, particularly public officials and their friends and allies caught in a web of corruption. Nevertheless, policy will withstand such attack, so long as it is reasonable on its face and evenly applied. But any deviation from such policy will be difficult to sustain, especially where the deviation results not from reason, but from ignorance of the policy itself.

Policy manuals are particularly important in areas where action is lawful, but there is a wide scope to the exercise of legitimate discretion. Attorney General William F. Hyland, for example, notes:

> I would suggest that guidelines concerning the granting of immunity . . . be prepared. Many states have enacted statutes dealing with immunity. From my experience, such immunity laws have greatly enhanced our fight against public corruption and organized crime. Nevertheless, indiscriminate grants of immunity must be avoided. The testimony of those seeking to curry favor with the state in order to avoid prosecution should be carefully scrutinized.

Other apt areas for policy guidelines would include plea bargaining, as noted in 3.11 (*Sentencing and Plea Bargaining*) and wiretapping.

The point must be underlined: when policy is merely lore, to the extent that there are personnel changes in the bureau, there will be ignorance. Investigative procedures are so complex, sound policy considerations so multi-faceted, and ad hoc agreements so informal, that without clear, precisely written guidelines, young attorneys and investigators cannot be relied upon to maintain unit standards. Moreover, any assistant or investigator wanting to deviate from policy will feel free to do so, in the absence of written memoranda for which he is held accountable. A paralegal, working as an administrative aide to the unit head, might be the ideal person to draft the initial versions of the manuals.

To avoid the common phenomenon, however, of having written rules regulate the office policy for no other reason than that they are written, periodic evaluation of the rules should be undertaken. Where changes in circumstances allow for modification, appropriate adjustments should be made.

Attorney General Hyland also suggests:

> . . . the development of a form book. . . . Indictment, search warrants, affidavits, immunity applications and other documents should be included. Likewise, the unit may wish to maintain a brief bank and develop other methods of information retrieval. A digest consisting of memoranda concerning recent judicial decisions should also be prepared and maintained.[13]

One last caution is in order. Just as these general standards are meant to be implemented in concrete situations, policy manuals and various guidelines for office procedure must be applied in individual cases. Care must be exercised so that there is, as District Attorney Carl A. Vergari notes, no "infringement on the freedom of the prosecutor to exercise his discretionary power to change existing policy or to make exceptions to them." Consequently, it might be a good idea to include appropriate language ("except as otherwise provided" . . . "for good reason") that would always leave room for exceptions and preclude criticism for the exercise of good judgment in concrete cases.

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[13] The adoption of police guidelines is recommended by the American Bar Association. *The Prosecution Function and the Defense Function,* § 2.5 A.B.A. Project on Standards for Criminal Justice (1971).

Section III. OPERATING AN ORGANIZED CRIME CONTROL UNIT

3.1 Strategy

An organized crime control unit should develop a strategy to implement the goals of its Mission Paper. Such a strategy should be based on an analysis of its organized crime problem, its social, political, and economic implications, an assessment of available manpower and other resources, and an estimate of the probable reaction of the various other components of the criminal justice system. Access to outside sources of expertise in the development of such a strategy, including its analytical assumptions, would be helpful.

Commentary

The single greatest deficiency in virtually every organized crime control unit in the United States on the state and local level has been the conspicuous failure to develop comprehensive strategies to address identifiable promblems in the organized crime area. Without the formulation and execution of a coherent strategy, impact on targeted criminal activity can be only haphazard. At best, the incarceration of an underworld figure disrupts an individual enterprise until new leadership is established, but the disruption is often only minimal, and the effect on the general problem negligible.[1]

To be effective, a general strategy, hoping to impact on more than individuals or individual enterprises, must necessarily take into account the long-range implications of daily operational tactics. Ultimate success, if it can be achieved at all, will be the result of years of eroding the foundations of the targeted criminal activity, rather than a number of spectacular investigations ending primarily in headlines for public consumption. It takes foresight and a strong commitment to adopt such an approach, and it may be an approach that only established units can successfully utilize, since relatively new programs must show immediate successes to demonstrate their "effectiveness." It is, however, seriously worth considering.

Essentially, the technique requires that there be an analysis of the targeted activity, an assessment of the available resources, and an evaluation of the probable effects of differing tactical approaches. The example that follows may or may not be applicable to a particular unit—it seeks only to demonstrate the concept:

Assume an organized crime control unit is in a jurisdiction with substantial bookmaking activity. It is decided that one goal of the unit will be to reduce the profits that flow from that unlawful business to organized crime. (Note, this is *not* necessarily identical to the goal of reducing the total amount of bookmaking activity). A sophisticated economic analysis of the available data, a study of the bookmakers currently in business, and review of the history of enforcement, demonstrate that there exists a large number of independent operations, which, aside from the cost of financing, operate on a 2% profit margin. By and large the bookmakers in the area, in short, earn a good living, but do not accumulate capital. The fact that they do not balance their books on each contest (popular belief here, as elsewhere, to the contrary) means that they win certain weeks and lose others. When they lose heavily, they borrow from organized crime loan sharks at 2%–3% per week. The conclusion reached (simplified for purposes of this example) is that major syndicate figures receive their profits *indirectly* from bookmaking within the jurisdiction, that the true source of income, though dependent on the existence of bookmakers, is *financing* at usurious rates of interest. Moreover, the loan sharks also lend to losing bettors at 2%–5% per week, providing additional income to the loan sharks.

A unit in this jurisdiction that seeks to attach the syndicate implications of bookmaking by conduct-

[1] This is obviously true where the targeted activity is a widespread phenomenon, and it is the product of a number of enterprises and ventures (*e.g.* gambling in New York, narcotics in Arizona, theft and fencing in Colorado). Where, however, a single criminal enterprise constitutes the targeted activity (*e.g. the* major bookmaking operation in Colorado), a single investigation and successful prosecution can effect the desired result. This, however, is rare.

ing investigations based on leads, establishing probable cause for a search warrant, executing the warrant and seizing evidence, and indicting the clerks, who are thereafter fined or given minor sentences, will miss its mark. (Note that this is the standard approach taken with variations such as the utilization of electronics surveillance, etc.) To be sure, the raids will, in fact, hurt bookmaking operations. Operations will be hurt economically—bad claims will be submitted by bettors, fines will have to be paid, a day's business will be lost, attorneys fees may be substantial. The result, however, will be that the individual bookmaker will suffer, and he will have less capital to buffer losses: indeed, he will be more likely to require mob money to survive—hence, the headline "20M BET RING SMASHED" may well signify a net gain to organized crime.

Based on this analysis, a strategy designed to produce the goals set forth in the Mission Paper would have to aim at the loan shark, not the bookmaker. While it is beyond the scope of this commentary to produce a comprehensive strategy in this area, certainly the following thoughts might be considered:

1) Investigations into bookmaking operations should be directed at operators who are potential informants and witnesses in ways designed to obtain cooperation;

2) Seized records should be analyzed to identify consistently losing bettors who can be interviewed to determine if they are loan shark victims;

3) Undercover officers should attempt to lose money as bettors and agree to be introduced to loan sharks; and

4) Attempts to put individual bookmaking operations out of business should be reserved primarily for those deeply in debt, forcing organized crime to lose its investment.[2]

It is quite clear that such an analysis and the development of a comprehensive strategy based on a multitude of variables requires a substantial commitment by trained individuals. Larger offices and units should devote the necessary resources on a continuing basis. Where this is not possible, because of budgetary or manpower considerations, the services of outside consultants should be secured.

3.2 Allocation of Investigative and Prosecutive Resources

The head of an organized crime control unit should be given the authority to decline to investigate or otherwise transfer out of the unit matters that are of low priority, potentially unproductive, outside the scope of the Mission Paper, or are, for other reasons, unacceptable. Unless unusual circumstances are present, an organized crime control unit should not commit a disproportionate share of its resources to a single matter. Where such circumstances exist, the unit should be able to obtain additional resources on an ad hoc basis so that its operation does not lose balance.

Commentary

This standard addresses the difficult issue of the allocation of resources. It goes to the heart of the meaning of the Mission Paper. Its conclusion is something that few would argue with in the abstract. But abstractions do not exist in the real world. Prosecutors and heads of organized crime control units must face these issues realistically. The success of their unit will depend on proper resolution. Inevitably, the "test case" will arise, and the classic mistake will be made; it is the assignment to the organized crime control unit of an investigation that, because of its importance, complexity, or other unique characteristic absorbs too much of the unit's manpower and resources. The arguments against such an assignment are so compelling that this standard and commentary ought not be necessary, yet this mistake occurs with such frequency that some attention should be paid to it.

The establishment of an organized crime control unit constitutes a recognition that the existence of sophisticated criminal conduct requires a sophisticated response by law enforcement. Specialization, and therefore expertise, is the hallmark of that sophistication. That expertise is concentrated in a number of areas. First, awareness is acquired of organized crime in general and of its operations in such fields as narcotics, professional gambling, theft and fencing, etc. Mastery is then acquired of the substantive law applicable to these activities. Next, and most important in this context, a mastery will be acquired of the techniques available to law enforcement in the investigation and prosecution of

[2] For another strategy analysis *see Strategies for Combatting the Criminal Receiver of Stolen Goods*, (LEAA 1976). The legal issues in anti-fencing work are surveyed in G. Blakey and M. Goldsmith, "Criminal Redistribution of Stolen Property: The Need for Law Reform," 74 *Mich. Law Rev.* 1512 (1976).

complex and important cases. Ironically, it is this last area of skill acquisition that is the unit's undoing. For whenever an important and complex matter arises, there is a tendency to assign it to the organized crime control unit. What happens then is that the unit is transformed into a special investigative and prosecutive unit. Day-to-day crises will command its attention. Long-term goals, like the control of organized crime, will be put off only "temporarily," but "temporarily" never ends.

The solution is not complex. A separate unit (or sub-unit) to handle special matters not involving organized crime should be established. Indeed, establishing it might be more important than establishing the organized crime control unit. As was noted at the outset, the rackets bureau concept was itself the outgrowth of a special investigation to deal with a specific problem. The formation of an organized crime control unit does not obviate the need for a unit to undertake special investigations into other areas (*i.e.* white collar crime or political corruption) or to aid those investigative agencies that require legal assistance. The existence of a general criminal investigation unit and, where required, other specialized units will, therefore, insure a competent handling of a complicated matter without the interruption of specified strategies designed to have impact on specialized areas.

Where the burdensome case is a legitimate rackets investigation, however, it is important that the organized crime control unit be given additional manpower on an ad hoc basis so as to be able to continue to function in a rational manner. The additional manpower could come from the criminal investigations unit, or perhaps from another section of the office; it is obvious, too, that the organized crime control unit could lend some of its personnel elsewhere on occasion.

The existence of a general investigations unit has other substantial benefits as well. Investigations that are otherwise not appropriate for the organized crime control unit can be referred there. Citizen complaints involving general conspiratorial activity can be handled. Collateral matters emanating from the organized crime control unit or other specialized units' investigations can be pursued. Moreover, cases that are not at first viewed as suitable for rackets work may be developed by the criminal investigations unit and adopted by the organized crime control unit after maturation.

A special word of caution is in order about "political" cases. Investigative tools that have proven effective against organized crime, because they are directed at divulging the existence of conspiratorial activity, have come under attack when they have been used against those who clothe themselves, legitimately or illegitimately, in the cloak of political or religious dissent. Thus, investigative grand juries, eavesdropping, informants, and conspiracy laws, which can be positively viewed when applied in the organized crime field (or, for that matter, against political corruption or white collar conspiracies), take on a different pall under other circumstances. Consequently, the more closely anti-organized crime techniques and efforts are associated with the investigation and prosecution of those who commit "political crimes," the less confidence and less support they will have from the public. Where rackets bureaus have been used to prosecute a Black Panther Party, prison rioters, the Weathermen, a Jewish Defense League, etc., they have become correspondingly less effective against organized crime activity. Apart from the merits of such prosecutions, either generally or in special cases, the tendency to use the organized crime unit or its attorneys to prosecute individuals who engage in illegal activities for the purpose of political ideology or religious dissent, therefore, ought to be firmly resisted.

A special word of caution is also in order about political corruption cases. Organized crime work inevitably involves political corruption. Where such political corruption is brought about by organized crime, those investigations and prosecutions belong in an organized crime unit. No one rightly suggests that the investigation and prosecution of any kind of political corruption, however, is not of prime importance; indeed, it is more likely than not *more* important than the prosecution of organized crime matters. Nevertheless, the head of the organized crime control unit ought to resist the temptation to be drawn into political corruption investigations, particularly where they will commit a disproportionate share of his resources to matters that may be outside his jurisdiction. In individual cases specialized task forces should be set up or if the generalized and sophisticated character of the political corruption warrants it, a specialized unit should be established.

The new organized crime control unit head, moreover, ought to be frankly warned that often,

contrary to popular misconception, political corruption investigations and prosecutions are not all glory. They are often "no win" propositions. If a prominent public figure is not investigated, a "cover up" will be charged. If he is investigated, but not indicted, he will claim "witch hunt," and his enemies will say "white wash." If he is indicted and not convicted, he and his friends will remember who brought the prosecution. His enemies, too, will remember who failed "through incompetency" to do what needed to be done. If he is indicted and convicted, his friends will remember who engineered the "frame up" or used "unfair" tactics to secure his conviction.[3] These observations, of course, do not suggest that anyone ought to avoid an investigation into political corruption, but only that they ought to go into them with a full understanding of the consequences, and they ought not be drawn into them out of a false sense that that is where the glory lies. District Attorney Carl A. Vergari rightly wrote of an earlier version of this commentary:

> I am concerned and very uncomfortable with the rather negative and hyper-cautious attitude toward official corruption cases which the standards and commentary convey. Our statement here should be positive in tone, clearly defining official corruption as a matter of highest priority. It is perhaps appropriate that the commentary point out the pitfalls involved in the prosecution of corruption cases. If so, it should also be made clear that there are risks which the prosecutor must be prepared to take. The commentary should explain that such risks can be minimized by establishing and adhering to policies which reflect absolutely impartial, fair, and evenhanded treatment of all such matters.

[3] The point here was well put by Judge Herbert Stern, when he was the United States Attorney for New Jersey:

> There's very little in [the investigation of political corruption] for a prosecutor. When you indict [leading political figures] . . . you are risking as a prosecutor almost as much as they are as defendants. You won't go to jail if you lose, but you may ruin your career, destroy your credibility. You'll be regarded as a fool, an incompetent, a headline hunter. And if you win, you won't have many friends. No man can be a really good prosecutor if he's worried about his personal future. The only way to do this type of a job [in the political corruption area] is to pretend that it's the only job . . . [you will] ever . . . have. Friends—you'll have few. Enemies—you'll have many.——Quoted in P. Hoffman, *Tiger in the Court* p. 17 (1973).

It takes a prosecutor's office with a substantial foundation of support to withstand the political attack sometimes associated with these investigations. That support can, in short, be developed through a consistently professional record of competence. Disgruntled and vengeful politicians will find difficulty, too, in developing support in their opposition against an office widely perceived to be successful in combating organized crime. Ultimately, therefore, keeping the focus of an organized crime control unit on organized crime may well be a good way of fighting political corruption.

3.3 Political Investigations

An organized crime control unit should undertake no investigation for the purpose of affecting partisan politics. Where political corruption investigations and prosecutions are undertaken, care should be exercised that the investigation and prosecutions do not unfairly affect the political processes.

Commentary

This standard addresses a delicate matter. Indeed, Attorney General Bruce E. Babbitt termed it "a little too scary." A decision to divorce the work of the administration of justice from partisan politics is, of course, necessary. Few quarrel with it as an abstract proposition. Unfortunately, not enough follow it as a working precept. The implementation of that decision, however, may have both affirmative and negative implications.

In the opinion of some, it may, for example, involve a careful weighing of the right of the public to make an informed judgment of the integrity of candidates for public office and a duty to avoid unfair and unanswerable innuendoes resulting from official actions undertaken as part of the administration of justice. Others argue that such a weighing process would be improper. On the one view, therefore, it may involve the postponement of official acts or the public recording of established facts.

Unfortunately, as with so much that has been discussed in these standards, clear guidelines are not always available to indicate the proper method of proceeding in an individual case. Judgment and conscience ultimately are the determining factors. Below are set out examples of how one office, noted for its professional and nonpartisan character, handled two problems, each of which could have had far-reaching political implications. The

propriety of these actions may be argued both ways.

1) In 1962, a hotly contested election for governor was to be determined in large measure by the reputation of the incumbent. Prior to the election, a local district attorney had cause to call the chairman of the State Liquor Authority before a grand jury investigating corruption in that agency. By doing so, the district attorney, who was of a different political party than the Governor, could have caused the Governor great embarrassment, putting him in the untenable position of either supporting a potentially corrupt official, or disavowing his appointee, without any resolution of the issue possible before the election. Instead, the natural tempo of the investigation was slowed, and the issuance of subpoenas was delayed until the day following the election. While its natural tempo was altered, the investigation was not abandoned, and it ultimately resulted in a number of important convictions, including the state chairman of the political party of the Governor.

2) In 1943 the same district attorney, pursuant to court order, intercepted a conversation between a newly designated candidate for a judgeship and a notorious underworld figure, in which the candidate pledged "his undying loyalty" to the mob chieftain. In this situation, the district attorney lawfully arranged to release the tape and transcript, allowing the candidate to rebut its existence or its implications prior to the election. Despite the wiretap, the candidate was elected.

In fact, as noted above, in each of these cases good arguments could be made for handling the matter in an alternative fashion. The significance of this standard is that the problem is real, and it must be thought through. Ultimately, the standard rests on the generally accepted principle that decisions in this area ought to recognize that the criminal process should not unfairly impact on free elections. On the one hand, the integrity of the investigation must be maintained. On the other, the election should be left free. If possible, an effort ought to be made, therefore, to prevent unresolvable charges from being unfairly levelled against candidates. The criminal process, to the degree practicable, must be operated to preserve First Amendment freedoms. Too often in the heat of battle, politicians want the political ammunition; newspapers, usually champions of the First Amendment, want the story. Investigators and prosecutors must have the courage to stay out of politics.

No standard proposed by this study occasioned, however, as sharp a disagreement as this one when it got down to specific cases. Judge Herbert Stern, for example, wrote:

> The prosecutor should vigorously investigate *any* credible indication of wrongdoing by any public servant *regardless* of the person, the party or the presence or absence of a political campaign. The prosecutor has no business "weighing" the public right to know against the candidate's right to run unfettered by an investigation. The assertion that such a judgment is desirable is incredible. there simply is no weighing to be done. (Emphasis in the original).

Judge Stern's position—full steam ahead, let the chips fall where they may—has much to recommend it. Nevertheless, it may overstate the issue. Investigations must, of course, be pursued—whatever the consequences. But the real issue is how and when. Judge Stern is not correct, moreover, when he states that there is no weighing to be done. His real point must be that the duty to investigate so far outweighs the need for free elections that the duty to investigate always tips the scale. Put in such absolute terms, he is, of course, correct. But the standard ought not be so read.

As noted above, the issue is not whether—but how or when—where there are choices available. (Where the integrity of the investigation requires that it go forward, and if it goes forward, it will unavoidably result in publicity, there is no choice.) But where the investigation will not be hindered by delay, or where there is an alternative method of going forward that avoids publicity (and publicity may well be unanswerable and unfair), it is the judgment of some that the prosecutor may well have a paramount duty to leave the electoral process alone. Postponing the issuance of the subpoena in the liquor investigation, therefore, was a proper course of action.

Having presented both specific perspectives on this issue, it should, of course, be added that neither so clearly commands adherence that the other may be said to be wrong. Once again, the purpose of the standard is to cause thoughtful analysis; agreement is not its objective, certainly not on its concrete implementation.

Finally, all concur that where the investigation must go forward, the prosecutor has a duty to counter unfair publicity; he should never contribute to it. As Attorney General Babbitt notes, if a witness must be called before a grand jury, unfair publicity may be counteracted "by reminding the press of the nature of the procceeding and cautioning that in many cases a witness may be called to *assist* in developing the case." Judge Stern adds:

> When I was United States Attorney, I regularly announced indictments and I invariably reminded the press (including the electronic media), that the indictment I was announcing was *only* an accusation and that the individual was presumed to be innocent of the charge. This may be viewed by some as good advocacy. It is in any event good law and good morals, and the two need not and do not diverge.

Indeed, the duty to avoid publicity is part of a prosecutor's professional responsibility.[4]

3.4 Feasibility Studies

An organized crime control unit should develop a feasibility study procedure for evaluating matters for investigation in light of the strategy designed to implement the Mission Paper.

Commentary

This standard is a necessary corollary to 3.2., (*Allocation of Investigative and Prosecutive Resources*) *supra.* Assuming a matter does not fall outside of the Mission Paper it does not follow that it ought to be handled. Given severely limited resources, a strategy can only be made to work by undertaking those matters which offer a legitimate potential of yielding specifically desired results. Since one by-product of most investigations is the development of leads in reference to other matters, a unit that is operating in a problem area will usually be in a position to choose from among many possible new matters, and it must develop the ability to isolate the most promising course of action.

One method of making this choice is a feasibility study: an examination of the proposed investigation by considering the probable consequences of alternative methods of investigation. If the investigative methods available are not feasible, or the probable consequences not productive, the proposal should be abandoned, or at least shelved until there is a favorable change of circumstances. For example, a study might be undertaken to determine if for purposes of the bookmaking-loan sharking illustration, *supra* 3.1 (*Strategy*), an undercover officer could attempt to borrow money by pretending to be a handbook at a local bar. Backgrounds of bar owners or bartenders could be examined for the purpose of selecting one who would be likely to cooperate. Surveillance in several locations could be instituted and attempts to execute search warrants made to obtain and to analyze records disclosing the size of wagers accepted by handbooks in the area. The results might well demonstrate that a suitable location could not be found or that a local handbook could not convincingly claim to have lost enough money to require a large loan. In either case, the plan would not be likely to succeed, and an alternative proposal should be considered.

Clearly, such an elaborate feasibility study need not be undertaken for every proposal. Most can be evaluated by skillful and "street-wise" attorneys and investigators. Appropriate recommendations can then be made. Nevertheless, the feasibility study concept is a valuable method of conserving resources on what might otherwise be an unprofitable, purely speculative venture.

There are occasions when the organized crime control unit might well consider undertaking investigations that would not tend to advance a specific strategy. Newer units might well decide to "make cases" that are likely to receive substantial publicity to demonstrate their "effectiveness" and to provide a basis for refunding. Certain matters, too, may have an important symbolic value, and they should be considered for that purpose. Indeed, one strategy to be employed might well be symbolic impact, particularly where current and likely resources preclude any realistic hope of having a real impact. Still another reason for undertaking a nonessential matter might be to cooperate with an agency to provide a basis for future mutual aid.

The existence of a criminal investigations unit, *see supra* 3.2 (*Allocation of Investigative and Prosecutive Resources*) would be of value in allowing the organized crime control unit to concentrate its efforts in pursuing its more specific interests. Collateral matters, not directly relevant to rackets work, would be transferred from the organized crime

[4] *The Prosecution Function and the Defense Function,* § 1.3 A.B.A. Project on Standards for Criminal Justice (1971).

control unit to the investigations unit (*e.g.*, perjury committed by a non-target, a minor fencing operation discovered in the course of a narcotics investigation, etc.). Thus, the tendency of organized crime control unit assistants to personalize cases, to seek to propsecute an individual because he "deserves it" and not because it would further the unit's work, could be overcome. Justice could still be done, but *the specific areas of responsibility kept* in perspective.[5]

3.5 Investigative Plan

An organized crime control unit should not proceed with the investigation of a matter in the absence of a formal investigative plan jointly developed by the attorneys and investigators assigned to the matter. The plan should propose alternative modes of investigation, evaluate their relative merits, and identify and resolve potential legal and other problems associated with them.

Commentary

Previous standards have noted the need to develop and pursue a comprehensive strategy, undertaking only selected matters that would advance that strategy. Similarly, an investigative plan should be formulated to direct an appropriate investigation so that it provides results consistent with that strategy.

Most potential investigations are, at the beginning, amorphous, offering several possible approaches and a variety of possible outcomes. Unless there is, at the inception, a general, but realistic idea of what the investigation should produce, the initial steps taken may well preclude desirable and otherwise attainable goals. Moreover, without a written plan as a constant reminder of the objectives, the tendency to pursue tangential leads of short-range interest will not be held in check, and it will result in a dilution of effort and resources that should be directed toward accomplishing the primary goal.

Assume, as in 3.1 (*Strategy*) and 3.4 (*Feasibility Studies*), that it was practical to use an undercover police officer posing as a handbook in a bar to borrow money from a loan shark. A purposeful default on a small loan by the undercover agent to determine if the loan shark would use threats of injury would preclude him from proposing the loan of a much larger sum to meet the loan shark's "money man." Similarly, if the undercover officer noticed that liquor from the bar was being diverted to an "afterhours club," an investigation into alcoholic beverage control violations would drain needed manpower and result in a less successful loan sharking case. It would be better to leave the "spin-off" matter for another day or refer it to another agency for investigation. If, however, the spin-off investigation involved corruption in the state agency regulating the liquor industry, the decision to pursue that matter at the expense of the loan sharking case would probably be in order.

The investigative plan need not be inflexible. Changes should be made in it, in conformity with the overall strategy, as increased knowledge of the matter presents new opportunities. Neither should the plan be too specific. It is enough if it notes the potential targets, alternative modes of conducting the investigation, the consequences and relative merits of each, and an analysis of legal and other difficulties that could be expected to be encountered.

The development of an investigative plan is especially important in situations where electronic surveillance is a potential source of evidence. The requirements that all conventional means of investigation be considered before electronic surveillance be employed [18 U.S.C. § 2518(3)(c)] and that surveillance not be authorized for a period of time longer than that necessary "to achieve the objective" of the investigation [18 U.S.C. § 2518(5)] clearly envision the careful and critical evaluation of alternative methods of investigations and the formulation of an investigative "objective," even if they do not require the preparation of a written investigative plan. A properly prepared investigative plan, therefore, can serve as the basis for identifying the objectives of the investigation and its subjects and for demonstrating the need to use such an extraordinary means of evidence gathering for whatever length of time is necessary.

Concern was expressed by some of the evaluators and those who commented on the study that the discovery of an investigative plan by a criminal defense attorney might, in Jeremiah McKenna's words, "provide grist . . . for cross-examination." Judge Stern observed: "The existence of the plan, if discoverable may give rise to unjustifiable infer-

[5] For an example of a study of a general criminal justice problem that would come close to being the beginnings of a paper that would lead to the drawing up of feasibility study, *see Combatting Cigarette Smuggling* (LEAA 1976).

248-593 O—78——5

ences; that there has been a deviation from the norm for some nefarious purpose." These concerns seem unreal. Whether or not the "plan" is written or carefully thought out, it will have to be formulated; testimony can always be taken from the lawyers and investigators who conducted the investigation. No one suggests that they not tell the truth. If anything, the written plan will establish the motivation that guided the investigation by a contemporaneous document; it will not be necessary to reconstruct it from possible faulty memory. The honest prosecutor, therefore, has nothing to hide; he should not unreasonably fear criminal discovery here anymore than elsewhere.

3.6 Implementing the Investigative Plan

In the operation of an organized crime control unit, primary responsibility for the implementation of an investigative plan should be assigned to investigators. At every stage in the implementation of the plan, attorneys in the unit should be in a position to assess the legal implications resulting from a choice of tactics and to influence the investigative decision-making process on that basis.

Commentary

To say the "cops investigate and the lawyers practice law" does little to resolve the problems inherent in the complex decision-making process required to implement an agreed-upon investigative plan. At the extremes, that maxim is probably true. The number of cars to be used in a surveillance is essentially a matter that a trained investigator is more competent to decide and a question to which a lawyer has little to offer. On the other hand, whether there is sufficient probable cause to support an application for a search warrant is generally a decision for a lawyer to make. Yet, even in those examples, situations can be envisioned in which a joint analysis would be beneficial to the ultimate investigation.

All questions, however, do not admit of ready solution. Does it make more sense for a lawyer or investigator to choose the proper time to confront a potential witness in an organized crime case? Who decides how he should be confronted? Who decides what he should be told? These questions are without theoretical answers, and it helps little to classify such issues as legal or investigative to reach a correct conclusion. Each is a tactical decision *with legal and investigative aspects,* and they exist in a form unsuited to abstract analysis.

This problem is not unique to police-prosecutor relationships. Two investigators working together may disagree on tactics and two attorneys on the same case certainly would disagree. But the problem in exacerbated in this situation because of the different training, objectives, areas of competence, and particular viewpoints associated with these two professions. Police traditionally wish to solve crimes and make arrests; prosecutors seek the greatest amount of legally competent evidence available and convictions. Police deal with a substantially greater case load than prosecutors, and they have to adjust to doing the minimally acceptable amount of work on each in order to do something on all. Prosecutors who read suppression ruling after suppression ruling tend to be cautious and conservative, adopting an "it can't be done unless it's been done before" attitude. Additionally, unless each "speaks the other's language" and learns to ask the right questions, a failure to communicate in a meaningful fashion results.

The standard here adopted suggests the minimum degree of cooperation necessary. It talks in terms of "influencing the decision-making process." In fact, that is probably the most that can be hoped for in most situations, especially if the investigators are not the employees of a common head. What is required then is a healthy respect for each other's abilities and points of view and a commitment to accommodate each other's professional needs.

3.7 Utilization of Methods of Investigation

In the operation of an organized crime control unit, the investigators should be prepared to utilize all lawful and practical methods of investigation. Procedures should be established to insure the availability of the necessary manpower and other resources. A manual addressing the technical and other problems inherent in each method and setting forth standard operating procedure should be developed and periodically updated.

Commentary

The great advantage of the organized crime control unit is its ability to have attorneys and investigators interact in appropriate circumstances, utilize all legally sanctioned investigative techniques immediately and surely, while methodically, yet expe-

ditiously, carrying out a thoughtfully conceived investigative plan. To do this, it is essential that the unit have experts in every field of criminal activity that it plans to pursue. Where this is not the case, important leads will be lost because of the inability of the unit to recognize significant bits of information and to capitalize on investigative situations.

The units should, for example, be prepared to have agents assume undercover roles on short notice. That means that all officers cannot be 6 feet, 190 pounds, with short dark hair. It also means that officers suitable for undercover work (often single, with back-up stories, etc.) should be segregated from normal police activity such as search and seizure, arrest, testifying, etc. where their names and faces may become known. Of course, having their previous exploits and pictures appear in local newspapers or other media outlets should be avoided.

All too often the advantages of an organized crime control unit are not realized, not because of the concept itself, but because of errors in implementation. Jurisdictions that are the loudest in citing the need for court-ordered electronic surveillance and consensual recording often fail to realize their full potential because of shoddy, outdated, overworn, and ill-repaired equipment which, for all intents and purposes, is unusable. The results are often broken or inaudible tapes that cast doubt on the integrity of the recording process, instead of giving incontrovertible proof of the crimes under investigation.

While this commentary cannot be an investigator's handbook relating the techniques that ought to be employed, the unit should have for its own use clearly written guidelines dealing with its own internal procedures, as noted above in 2.4 (*Policy Manuals*). This is especially true in situations that, because of their very nature, are likely to be scrutinized in the future. Informant control and the periodic or special payment of money for information is one example. Inventory of property and chain of custody of evidence are still other examples. Any procedure that may become the subject of court hearings—wiretaps, immunity grants, etc. should be routinized with standard operating procedure memoranda written, distributed, read, and referred to by those who are charged with its implementation.

3.8 Prudential Limitations on Methods of Investigation

In the operation of an organized crime control unit, no investigative tactic should be used, notwithstanding its lawfulness, if the consequences would gravely damage the unit's reputation and seriously impair its ability to operate, or probably result in the enactment of undesirable law.

Commentary

This standard is a necessary corrollary to 3.7 (*Utilization of Methods of Investigation*). To be sure, an organized crime control unit should use all lawful methods of investigation. No legal quarter ought to be given to organized crime. Nevertheless, everything that is constitutional or lawful is not wise. One of the finest aspects of the art of the management of appellate litigation is the ability to choose to present an issue to an apellate body only where it will be seen in the context of compelling factual circumstances. Similarly, it is wise to avoid pressing a legally sound position in an appellate or a legislative context, where the appellate court or legislature might well view it as an attack, not on organized crime or political corruption, but on the prerogatives of the court or legislature itself.

Two issues come to mind to illustrate the point: the simulated case as a technique for investigating corruption, and one-party consent recording. Apart from the merits of legitimate controversy over the propriety of the use of these two techniques of investigation, it has been suggested, not without some ring of plausibility, that their use against judicial and legislative corruption has been a factor in some of the judicial criticism and restrictive legislation that has resulted.[6] The merits of these two issues are not what is in point here. The purpose of the standard is to draw the attention of those in organized crime control work to the need for prudence. Consequently, where it can be reasonably foreseen that the use of a lawful technique will

[6] *See United States* v. *Archer*, 486 F 2d 670 (2nd Cir. 1974); *Nigrone v. Murtagh*, 46 A.D. 2d 343, 362 N.Y.S. 2d 513 (2nd Div. 1974). (The issue is considered in *Organized Crime* § 1.10, pp. 52–53); testimony of J. Thompson before the National Commission for the Review of Federal and State Laws Relating to Wiretapping and Electronic Surveillance, 2 *Comm'n. Hearings* pp. 965, 966–68 (1976). (Ill. General Assembly passed restrictive legislation after members placed under surveillance and indicted); testimony of W. Phillips, *id.* at 973–74, 982 (1976). (Legislature passed restrictive legislation after special corruption prosecutor was appointed.)

injure the unit more than it advances the investigation, it ought to be avoided, or not pressed to the limits of its rationale at least in that instance.

Having argued that there might well be prudential limitations on the use of lawful tactics, an additional word is in order. To the degree that this limitation stems from public misconception, the organized crime unit ought to do its part in helping to educate the public. Relationships should, for other reasons, (*see supra* 2.3, *External Relationships*) be established with business and other civic groups. Speeches at dinner and other meetings could well be used to make clear the circumstances when certain techniques are lawful and when they are not, so that a technique will not be unthinkingly condemned in a blanket fashion.

3.9 Uses of the Products of Investigations

An organized crime control unit should, consistent with legal constraints, make all practical use of the information it obtains in the course of investigations. Where appropriate, such information should be made available to grand juries for grand jury reports, legislative bodies for hearings and legislative proposals, and to researchers for research and public education. Civil use should also be made of the information, either by the unit or others within the prosecutors office, or other agencies with the appropriate civil jurisdiction.

Commentary

While an organized crime control unit is essentially an arm of a prosecuting agency, which should be primarily concerned with criminal prosecutions, there are a number of important and legitimate roles that it can play outside of the grand jury or courtroom. Grand jury reports, where lawful, can be, for example, a significant device to draw public attention to crime conditions existing in the community, maladministration in public agencies, and defects in legislation. Legislative bodies, too, have need of the specialized information and expertise of organized crime units in setting policy and otherwise enacting legislation. Finally, unless that specialized information and expertise is to remain the exclusive property of public agencies, there is a need subject to carefully framed privacy and other restraints, to make it available for research by competent social scientists operating in the context of colleges and universities.

It would be a mistake, too, if the organized crime unit failed to make use itself of all available civil remedies applicable to organized crime control.[7] Organized crime control units that are in an attorney general's office with civil jurisdiction should be, for example, singularly able to utilize civil remedies that might facilitate the enforcement of particular rulings against designated offenders. They generally can enforce regulatory statutes, instigate license revocation proceedings, enjoin the operation of illegal businesses, etc. Moreover, given their jurisdiction, and the power to operate criminally or civilly, any strategy that they employ can be designed to take advantage of this ability. In units solely having criminal jurisdiction, information that is developed that would aid agencies in pursuing civil enforcement techniques should, of course, be routinely made available to the appropriate bodies.

3.10 Trial Assignments

An organized crime control unit should, where investigating attorneys try their own cases, make trial assignments to insure the capable prosecution of the case and its related hearings, while minimizing the impact of court proceeding on ongoing investigations. Where such attorneys do not try their own cases, provision should be made for the investigating attorney to influence the trial decision-making process. The trial of routine matters should not be permitted to interfere with the work of the unit.

Commentary

One of the most vexing problems involved in the management of an organized crime control unit is the administration of the indictments that result from its investigations. The basic dilemma occurs because the work of the unit is ongoing, and the expenditure of the time necessary to prosecute a case properly requires a corresponding reduction in the allocation of resources to investigations then in progress. Many of those who evaluated or commented on this study termed it: "irresolvable."

The advantage of having the investigating attorney prosecute is, however, great. He is in the best position to evaluate evidence and witnesses, recognize potential problems with either, minimize the impact of surprises and changing tactics by the defense, and with his command and knowledge of the

[7] *See* Appendix C.

facts of the case, to cross-examine adverse witnesses in the best possible fashion. Moreover, because it is "his case" he is more likely to devote that "added effort," which a trial assistant cannot do for every trial.

Nevertheless, these advantages must be weighed in the balance with other considerations. The investigating attorney may be a potential witness in either the trial or pretrial hearings: he could thereby be disqualified. He may, moreover, have become so involved in the case that although not a witness, his credibility is necessarily in issue. His knowledge of the case may also make him blind to problems with the presentation of the direct case and less than objective in the handling of the entire prosecution. As noted before, he is probably also involved in other investigations, which will suffer if he devotes the necessary time to preparation, motions, hearings, and trial of another matter. Here, too, there are no easy solutions or no "right ways." On the other hand, some system must be developed for allowing investigating attorneys to try at least some cases, for their development as attorneys. The ability of a lawyer to evaluate evidence for use at trial is dependent in important ways on having had experience in presenting evidence at trial.

Part I of this prescriptive package shows that different approaches have been tried to resolve this issue:

1) assistants try cases they "make"

2) the organized crime control unit is divided into investigating and prosecuting sections, and

3) cases made in the unit are transferred into a trial unit. Subject to the caveat that investigating attorneys must have and keep up-to-date a measure of trial experience, nothing in the experience of existing units indicates that any one of these methods is markedly superior. Consequently, the choice made in the particular unit should depend on other factors including the unit's internal structure, the available manpower, the caseload, and the existence of other individuals in trial units in the office competent to handle indictments involving organized crime.

As a general rule, the unit should retain and try, when this option is open to it, only those cases in which it has a special interest, either because of the legal theory, the particular defendant, or the complexity of the evidence. Other, more routine matters, to the extent possible, should be given to trial units to be handled as normal indictments, so as to limit the loss of manpower for routine unit work.

Where the internal structure of the unit is arranged in terms of teams or modules [*see 2.1. (Organization of Attorney Workload), supra*] then those matters retained by the unit for trial can be handled by a knowledgeable, yet not intimately involved assistant, who can be backed up in his investigatory duties.

One final caveat must be made. It is possible to separate the investigative and prosecutive function within one office. The difficulties that are engendered by the separation can be overcome, mainly because one office can have a common head and esprit de corps. Nothing that is said here should be understood as approving the practice of separating the investigative and trial functions between different offices. While it can and has been accomplished, the difficulties it poses are generally not worth whatever advantages might be gained by that kind of specialization. The unique promise of the organized crime control unit is that it integrates functions. Efforts to separate them, therefore, should be resisted. Only where constitutional or legal restraints exist *that cannot be overcome* should such separation be tolerated; it certainly should not be pointed to with pride.

3.11 Sentencing and Plea Bargaining

An organized crime control unit should make an effort to secure appropriate penal dispositions in prosecutions that it brings. Use should be made of all special sentencing procedures applicable to organized crime control work. Strict plea bargaining guidelines should also be adopted and adhered to.

Commentary

Next to lack of strategy, the most common single failure in organized crime control units is a failure to pursue sentence as vigorously as it pursues evidence.[8] Ironically, the rackets bureau concept originated because of the recognition that there was a need to create a legal outreach capacity within the process of investigation to secure evidence; yet organized crime units have been singu-

[8] On the role of the prosecutor at sentencing, compare *The Prosecution Function and the Defense Function* § 6.1 A.B.A. Project on Minimum Standards for Criminal Justice (1971) (severity not general index of effectiveness), with, *Organized Crime* pp. 163–80 (major organized crime offenders to maximum sanctions).

...y unimaginative in creating a similar outreach capacity in securing appropriate penal dispositions in prosecutions where they achieve convictions. Because of the importance of this issue, Appendix B, *infra,* contains a detailed legal memorandum covering the general legal principles applicable to sentencing. It shows that there is considerable room for the organized crime control unit lawfully to bring to the attention of the sentencing court those considerations that might result in longer terms of imprisonment, higher fines, or the imposition of other appropriate conditions of probation that might have a positive effect on organized crime control.

Sentencing also raises the question of plea bargaining.[9] Advancement of the unit's general strategy will be of paramount concern in the determination of guidelines for the disposition of indictments. In addition, the number of indictments and ability to try cases must be considered. Thus, the decision to indict may well depend upon the policy established by the unit regarding the decision to engage in plea bargaining and what general policy guidelines the unit should follow.

At best, plea bargaining issues are difficult to resolve. The general controversy in the literature was reflected in the comments of the evaluators. Judge Herbert Stern, for example, was generally opposed to it, while District Attorney Carl A. Vergari and Attorney General Bruce Babbitt had less rigid views. Nevertheless, some generalizations can be offered. Newly formed units, for example, should probably agree to more liberal pleas than a well-established unit. The new unit can ill afford to spend a disproportionate amount of time on trial. Assistants will probably be relatively inexperienced: there will be a great deal of novel motion practice; and because of the media interest, failures or acquittals will be magnified. Here, as elsewhere, there is more than one school of thought.
Attorney General Babbitt observes:

> I . . . disagree with the notion that newer units should do more plea bargaining. The reverse is probably true. New units need credibility with the criminal defense bar and they get it by going to the wall and winning. Better advice would be, "New units should be especially careful to prepare cases that are winners."

On the other hand, as a unit gains in experience and viability, it will be in a position to strengthen its position and insist on a particular plea in the absence of cooperation by the defendant. By maintaining a consistent plea policy, the unit will be viewed as a totally professional operation that usually secures convictions when indictments are returned. In that sense, the plea policy is self-effectuating when a defense bar understands that a plea to the court required is the rule, not the exception. In order for this type of program to work, however, the decision to abide by the guidelines must be firm, and hence, the decision to require a specific plea must be made prior to the indictment. If extenuating circumstances are present—circumstances that would warrant a plea to a lesser count—then that decision should be made before formal charges are laid. Thus, a formal indictment memo should be prepared in all cases, analyzing the charges, legal and factual problems, and trial issues. Where serious questions as to ultimate success exist, consideration should be given to a negotiated settlement before indictment.

Where, however, the indictment is of importance, and because of public scrutiny and potential impact on the public's faith in the system, a plea to a lesser count should not be offered, the unit must be prepared to litigate and lose a case. This may also be true in situations where an otherwise indicated plea would do nothing to advance the unit's strategy, while a conviction of a serious crime might.

3.12 Parole

An organized crime control unit should establish a system for determining the dates that a convicted defendant is to be interviewed for parole and should routinely prepare carefully documented position papers on parole that detail the defendant's history, his role in the commission of the crime for which he was convicted, and his relationship to the organized crime problem.

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[9] *See generally, Task Force: The Courts,* President's Commission on Law Enforcement and Administration of Justice, pp. 10–11 (1976); *Pleas of Guilty,* § 3.1(a), A.B.A. Project on Minimum Standards for Criminal Justice (1968) Particularly useful, too, is the comprehensive and sensitive discussion of the plea policy followed by the *Watergate Special Prosecution Force: Report* pp. 41–49 (1975). Not all authorities agree that plea negotiations are wise. *See National Advisory Commission on Criminal Justice Standards and Goals: Courts* § 3.1 (1973) (abolish by 1978).

Commentary

Just as it is important that proper sentences be imposed in organized crime cases, it is important that they be carried out. Just as courts can find organized crime control unit input helpful at time of sentence, parole bodies can find such input helpful at time of parole. This, too, has been an area where units have generally not followed through on investigative and trial work. It need not continue.

3.13 Outside Evaluation

An organized crime control unit should undergo not only internal evaluation on a continuous basis, but also periodic outside evaluation.

Commentary

Evaluation of organized crime control work is at best difficult.[10] Objective measures of impact do not exist in the criminal justice system generally. It is difficult if not impossible to attribute any changes in patterns of criminal behavior to modifications of parts of the criminal justice system. Too many other factors potentially play too significant roles. Nevertheless, it is possible to assess the efficiency of individual criminal justice units; if impact cannot be measured, at least the relation between input to output can be determined. Some practices are obviously counter-productive, and they should be discontinued. Modest goals can be set for parts of the system, and efforts can be made to assess how well the unit is working to achieve such goals. Organized crime control units, therefore, should be continuously under review internally. Mission Papers should be reconsidered. Strategies should be reformulated. The overall operation of the unit should also be evaluated periodically by knowledgeable outsiders; those in charge of the unit should not be placed in the position of having to be a judge in their own cause.

How often that process ought to be undergone, however, is not clear. Everything cannot always be held in suspension. Sometimes things must be tried long enough to see if they will work. A constant rearranging of programs bespeaks of lack of planning and courage. An outside review that takes place every two years, but takes into consideration long-term projects and goals would seem to be in order.

The recommendation that an outside review be undertaken also has its difficulties. Jeremiah McKenna writes:

> [I]t raises real questions about access to confidential data and to whom is the evaluation report rendered. The question is even more pertinent where the prosecutor is an elected official answerable only to the electorate. There is a delicate balance to be struck between confidentiality and the right to privacy of the subjects of an investigation versus the need for an appraisal of the prosecutor's execution of his responsibilities.

District Attorney Carl A. Vergari adds:

> No standard for outside evaluation should be adopted without also establishing very strict standards with respect to what individuals or agencies conduct them. The bare statement . . . without limitation . . . would make it most difficult for prosecutors, with credibility, to resist attempts to "evaluate" . . . by [the] inimical and politically motivated . . . seeking to get some improper handle on the prosecutor's office. The commentary might cite as an example of a suitable evaluating agency the National District Attorneys Association, which does provide "technical assistance teams" composed of qualified prosecutors.

There is no ultimately satisfying way to resolve these difficulties. Nevertheless, their recognition is the first step, and in concrete cases, some appropriate compromises can be worked out.

[10] In recognition of this difficulty, the National Advisory Committee on Criminal Justice Standards and Goals recommended a series of annual public reports by prosecutions in the organized crime area. *Organized Crime* § 2.5, p. 71.

PART 3
METHODOLOGY AND
SITE VISIT REPORTS

Site Visit Studies. Part III of this study contains analytical descriptions of the operation of each of 12 investigative and prosecutive units centered in the offices of local district attorneys or state attorneys general.

The local units surveyed were as follows: [1]

1) Kings County, New York, *infra* p. 59 (6/76)
2) Nassau County, New York, *infra* p. 63 (12/76)
3) New York County, New York *infra* p. 67 (1/76)
4) Suffolk County, Massachusetts, *infra* p. 71 (10/75)
5) Westchester County, New York, *infra* p. 75 (1/76)

The state units surveyed were:

1) Arizona Attorney General's Office, *infra* p. 79 (6/76)
2) Colorado Attorney General's Office, *infra* p. 81 (6/76)
3) Statewide Prosecutive efforts in Florida, *infra* p. 85 (4/76)
4) Louisiana Attorney General's Office, *infra* p. 88 (4/76)
5) Michigan Attorney General's Office, *infra* p. 92 (6/76)
6) New Jersey Attorney General's Office, *infra* p. 95 (6/76)
7) Wisconsin Attorney General's Office, *infra* p. 99 (6/76)

Material, Methods and Time. The site visit descriptions that follow were drafted at the conclusion of an investigation of each unit that entailed on-site visits and both structured and informal interviews. It was recognized at the outset that most offices tended to view their organized crime and official corruption units with a certain amount of pride and understandably they would not likely admit to problems, defects, or lack of specific strategies in the handling of their assigned tasks. With this in mind, there was a conscious effort made to verify claims made by office personnel by speaking with knowledgeable sources within the particular jurisdiction. Such sources included newspapermen, members of the defense bar, police department officials and ex-members of the unit.

Each site visit was conducted over at least a two- to three-day period. Detailed outlines were employed to gather basic material and to insure uniformity, but specific efforts were made to view the workings of the office from multiple perspectives. To that end, there were discussions held with administrative, supervisory, and line prosecutors, as well as investigative personnel. Where appropriate, analyses of completed investigations were undertaken to identify the techniques used by the lawyers in meeting and solving the problems inherent in their work. Finally, drafts of the studies were given to individual offices [2] for comments and corrections.

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[1] The dates in parentheses note the month the draft study was written.

[2] The Florida study is an exception since it did not concentrate on a particular unit, but rather the statewide effort in the absence of a unit.

I. THE KINGS COUNTY (BROOKLYN) DISTRICT ATTORNEY'S RACKETS BUREAU

A. General Information and Jurisdiction

Brooklynites like to consider their home the fourth largest city in America. In fact, Brooklyn was an independent city until the end of the 19th century. Today, however, Kings County (Brooklyn) is one of the five counties that make up the City of New York, and as such has an independent, elected District Attorney.

Clubs in each of Brooklyn's State Assembly districts have been the traditional centers of the borough's political activity. Prior to 1969, aspiring young attorneys joined one of these clubs, and when a vacancy occurred in the District Attorney's Office, were placed there by a district leader. While there have been—and currently are—lawyers of real ability in the D.A.'s office, placement and promotion were more often functions of political connections than of ability. This situation was not unique to Brooklyn; until recently, all the city's D.A.'s offices, save Manhattan's, operated according the same political traditions.

The present D.A., a former criminal defense attorney and Brooklyn native, is bent on changing these traditions. He has stopped clubhouse hiring, prohibited assistants from endorsing political candidates, and proscribed outside employment.

The office employs two hundred and seventy assistants, distributed among 12 bureaus, each headed by a chief and deputy chief. (Here, as elsewhere, the titles of several bureaus suggest the influence that the availability of Federal grants has had on the organization of urban district attorneys' offices.) The Rackets Bureau is considered a "senior" bureau, of particular interest to the D.A., and prestige attaches to assignment there. Formerly, rackets assistants were given premium pay, but that policy has been abandoned.

A.D.A.'s are recruited mostly from each year's graduating law school class. Before admission to the New York Bar, they serve as criminal law interns. After admission, they become A.D.A.'s, with a starting salary of $13,000 per year. (An increase in starting salary—to $15,725—is pending.)[1]

The D.A.'s squad's intelligence unit does not have a structured program of intelligence interchange with other law enforcement agencies, state or Federal, although it does have telephone access to the Organized Crime Control Bureau of the New York Police Department, which maintains a large intelligence collection program. The D.A. states that he has good relations with local FBI agents.

B. Structure of the Rackets Bureau

Although the D.A.'s office includes chief, executive, and first assistants, the chief of the Rackets Bureau reports directly to the D.A. (and is, in fact in almost daily contact with him). The bureau employs sixteen assistants.[2] Six of these are assigned to the trial section, the others handle investigations. The bureau also includes a supervising assistant. The chief describes the supervising assistant as "chief of operations," but admits that he (the bureau chief) is not really comfortable delegating authority to anyone.[3] The bureau chief makes all investigative assignments.

The six trial section attorneys try most of the cases resulting from Rackets Bureau investigations. (Brooklyn has three courtrooms reserved for rackets cases—in New York parlance, three "rackets parts.") Occasionally an investigating assistant may try a case which he has developed.

New A.D.A.'s make a commitment to stay in the office three years. They generally advance to rackets only after experience in a "junior" bureau. The usual apprenticeship is about two years, but attrition due to salary constraints has reduced this time. The most senior rackets assistant has less than four years' service in the bureau. The bureau chief earns $34,000, the deputy chief $30,000, and the supervising assistant $24,000.[4] These salaries are more than

[1] As of September 1976, the salary was $15,725.

[2] As of September 1976, the figure was nineteen.

[3] As of December 1976, a new bureau chief was in place; he does not feel that discomfort.

[4] As of September 1976, $37,000, $33,000, and $29,000, respectively.

competitive with comparable positions in other prosecutorial agencies.

Rackets can recruit assistants from any unit in the office. Selection is essentially a decision of the chief, whose good relationship with the D.A. results in the approval of nearly all personnel requests. The chief does not require previous trial experience, and current rackets assistants have had experience in diverse junior bureaus.

The Bureau is the only anti-racketeering unit studied which employs female attorneys full time. Male assistants speak highly of the two women attorneys' work and the women say that they receive the same treatment as male assistants.

When attorneys are recruited, they fill out long background questionnaires. Since several rackets assistants did not know whether they had been objects of security investigations, such investigations must be either nonexistent or exceptionally discreet. The civilian security officer who supposedly controls entrance to the floor was observed only twice in a three day visit to the bureau. The bureau's expressed concern about security seems more rhetorical than real.[5]

Unlike the Manhattan Rackets Bureau, the bureau has no manual of procedure. Even more surprising is the fact that it uses no written policy statements at all. A few memoranda on technical matters are distributed, but on the whole, new assistants learn their trade from senior personnel.[6] (The investigating assistants are assigned to teams, each composed of a senior assistant and a less experienced attorney.) All training for rackets assistants is essentially "on the job."

The office formerly employed a group of civilian investigators. Only two remain; when they leave or retire, their positions will not be filled.

The D.A.'s squad, composed of officers detailed to the office by the New York Police Department, provides the bureau with investigative manpower. The squad commander (an inspector), a lieutenant, and five sergeants lead a squad of sixty-two patrol officers. The commander selects the squad's recruits; the bureau chief approves them *pro forma*.[7] Because, apparently, of the history of corruption within the plainclothes and narcotics units of NYPD, the squad recruits from those units only with care. Some of the investigators are holdovers from previous administrations; those interviewed appeared street wise. No formal training for investigators exists; their training, too, is "O.J.T.".

The squad includes a seven-person Criminal Intelligence Unit which purports to provide up-to-date organized crime intelligence. It does not. There are no fixed collection requirements and intelligence gathering is sporadic. Agents do case investigations as well as intelligence. The unit employs no trained intelligence analyst. Intelligence files are primitive.[8] (The unit's office is decorated with photographs of alleged "Mafia" figures in the style which swept the profession after the McClellan hearings of the 1960's.)

One police officer is responsible for the office electronic equipment, most of which is quite modern.

C. Methods of Investigation

An unusual tactic favored by the bureau is covert entry into mob controlled businesses. The unit has become involved in private cartage (garbage collection), electrical contracting, plumbing, fencing, and other businesses.

Consensual electronic surveillance has been used most notably in the investigation of police corruption, which has long flourished in Brooklyn. One joint bureau-police department investigation using the technique of obtaining the cooperation of a corrupt officer and having him wear a recorder or transmitter, to gather evidence, resulted in the indictment of twenty-four police officers, the conviction of twenty-two and destruction of a substantial "pad."

According to the National Wiretap Commission, the Rackets Bureau's use of nonconsensual electronic surveillance has been dominated by gambling as the subject criminal activity. (1973: 52/72, 1974: 48/57, 1975: 10/19) "which reflects the office's present [12/74] conviction that gambling activity is a major source of organized crime's resources . . ." The Commission's report suggested that, given the propensity of New York judges to impose fines rather than jail sentences in gambling cases, and the length of time the taps were permitted to run, there were questions "regarding the ef-

[5] As of December 1976, security had been tightened.

[6] An effort is now (December 1976) being made to get assistants in various training programs.

[7] As of December 1976, this practice no longer obtained.

[8] Since December 1976, an effort has been made to up-grade them.

ficient use of manpower in gambling investigation . . . [and] the propriety of using a simple gambling tap as a means of gathering strategic criminal intelligence." As a result of staff interviews the Commission found that, "In the case of the Rackets Bureau, most initial tap applications are generated from investigations carried on by law enforcement units of the NYPD which are outside the D.A.'s office."

Among the bureau's uses of the grand jury has been the use of its presentment authority to make recommendations for improving the performance of the city's Department of Consumer Affairs in regulating the private cartage industry. It has also made creative use of existing statutes which prohibit restraint of trade. As a result of one private cartage investigation, fifty-six defendants pleaded guilty to restraint of trade charges.

The D.A. admits that he has assidously cultivated the New York press, and he receives substantial—and generally favorable—coverage. This cultivation is part of his strategy to change the political image of the office and to extend its credibility. The D.A. issues press releases; only he may hold formal press conferences. Rackets assistants may, however, provide limited explanatory information when indictments are issued. The bureau has sometimes allowed substantial press coverage of even its "sensitive" cases, even prior to indictments.

The bureau conducts no speakers' program, but it will provide speakers if requested.

D. Strategy and Goals

The D.A. encourages the strategy of picking a target—an organized crime group—and putting pressure on it with the hope of diminishing its economic strength. The "business acquisition" tactic mentioned earlier is a means of doing this, one which the bureau chief considers productive. The bureau also selects geographical areas where intelligence indicates substantial mob influence, and concentrates efforts there. As a result, the bureau entered the amusement business in the Coney Island area in a effort to combat both organized crime and public curruption.

The lack of a coherent intelligence gathering process and the failure of the unit to define specific goals for itself, however, has resulted in a random and essentially uncoordinated attempt to deal with a substantial organized crime problem in Brooklyn.

While the bureau has adopted techniques of infiltrating corrupt industries and certain geographic areas, these forays have been based on specific complaints and for the most part not instituted as a part of a continuing strategy designed to effect a significant impact on the subject activity. (An apparent exception is the private cartage investigation.)

The bureau conceives organized crime in Brooklyn as primarily the province of Italian American "Mafia" families. Assistants acknowledge the presence of Black and Hispanic groups involved in gambling and narcotics; the bureau knows little about them except that more needs to be known.

Assistants consistently said that at least half their investigative work load involved gambling cases initiated by outside police units. The rationale for this is that these cases lead up the organized crime management ladder to more important crimes (an apparent change in emphasis from the economic impact motive suggested in the Wiretap Commission's Report). Yet one bureau member stated that seventy-five to eighty-five percent of these cases start and end as low level gambling cases. As noted by the Commission, electronic eavesdropping is the primary tool in these investigations.

Bureau members disagree about the division of the unit's investigative resources between reactive and proactive work. One person estimates the bureau's work to be ninety percent reactive; another believes it to be only fifty percent reactive.

One reason for the dispute may be that the D.A. often assigns to the bureau matters of "great sensitivity" that might otherwise fall to other bureaus, like Homicide, thus diverting manpower from other rackets work. Another may be that, according to the D.A., "Our sworn obligation as a public prosecutor mandates that we follow . . . leads . . . of criminal activity that is reported to us by other law enforcement agencies," and, hence, it is difficult for priorities to be established and discretion exercised in selecting or rejecting suitable investigations. This does not account for the lack of a coherent overall strategy, however.

The bureau chief admits to a highly informal management style. He believes, however, that his control over the bureau's work, especially over investigations is effective. Assignments may be recorded in memoranda, but most subsequent communication is oral and meetings between the chief and his assistants ad hoc. While the D.A. has

"found that close informed supervision of highly motivated competent workers is generally far more productive than a stratified structure requiring numerous written, often self-serving, reports" some administrative changes would be desirable. One assistant considers it hard to know who among the three supervisors is really responsible for what. Another lamented the lack of a development program, of systematic progression in the kinds and difficulty of cases assigned. Sources outside the office have commented that some Rackets Bureau work has been marked by technical mistakes caused by inexperience or lack of supervision.

The bureau uses some imaginative tactics in investigating organized-crime-controlled business activities and has enthusiastically pursued certain public corruption cases. On the whole, though, the program has been without form. There appears, moreover, to be little systematic thinking about the problem of organized crime or encouragement of creativity among assistants

It is important to note, however, that the reputations of the office, and of the Rackets Bureau, are better than under prior administrations, and that assistants are proud of the public's increased confidence in their organization. Sophisticated planning, and its systematic implementation, remain to be achieved.

II. NASSAU COUNTY

A. General Information and Jurisdiction

Nassau County is a Long Island suburb of Metropolitan New York bounded on the east by Brooklyn and Queens. It and neighboring Suffolk County, to the west, contain almost 1.5 million people. Nassau's population is young (median age 31.5), mostly white (95%) and financially well-off (median family income $14,500). Many workers commute to New York; the average wage of commuters ($17,400) is more than double that of non-commuters ($6,700). The county contains 2 cities, 3 towns, 26 incorporated villages, and unincorporated areas.

The District Attorney, elected for a term of three years, is the county's chief law enforcement official, answerable only to his constituents and to the Governor. The county executive, however, controls the office's budget. The D.A. exercises only criminal jurisdiction.

The incumbent D.A. assumed his position Jan. 1, 1975 and since that time the office has undergone considerable reorganization.[1] It now employs one hundred assistant district attorneys (A.D.A.'s) divided into about ten bureaus. The executive assistant D.A. oversees the investigative bureaus—(Rackets, Commercial Frauds, and Official Corruption) and the chief assistant oversees the rest—(County Court, Appeals, etc.). All A.D.A.'s are full-time employees; the D.A. allows neither outside work (except writing or teaching) nor any political activity.

The office has a past history of political partisanship in hiring. The incumbent, however, has an expressed policy of forbidding political consideration in hiring or promotions. The office selects assistants—most applicants are about to graduate from law school; a few have practiced law—through a competitive application process. Assistants must commit themselves to at least three years' service.

Those dissatisfied with the previous administration had alleged that official corruption plagued the county. In response, the new D.A. established an official corruption bureau to which he assigned the office's ten civilian investigators, mostly ex-New York City detectives and ex-FBI agents. The D.A. assigned the investigators' former duties, working with the Rackets Bureau and handling rackets' files and intelligence, to a new police command, the Organized Crime Unit (Rackets Squad) or OCU. The head of the OCU, a Nassau County Police captain, acts as a liaison between the office and the Police Department, and—by agreement between the D.A. and the Police Commissioner—hand-picks detectives to work with him. Few of these have worked with the office previously; most detectives with experience in rackets cases have been reassigned.

Police units within Nassau County in addition to the Nassau County Police Department include two city departments and twenty-four village departments. All operate independently; no central office controls them. The State and Parkway Police also have limited jurisdiction within the county. Obviously it is not easy for the Rackets Bureau to coordinate its activities with so many agencies. Moreover, the Federal Strike Force for the Eastern District of New York (formerly headed by Nassau's present D.A.), the U.S. Attorney's Office for the Eastern District, the New York State Organized Crime Task Force and the State Attorney General's Office all have varying degrees of jurisdiction over organized crime in Nassau County.

No formal arrangements for exchange of intelligence between agencies exist; whatever exchanges take place result from personal relationships among members of various agencies. These are extensive in Nassau; the D.A. and the executive assistant D.A. formerly headed Federal Strike Forces and the Rackets Bureau Chief served in the NY-SOCTF.

[1] Indeed, since this report was written (12/76), the bureau's personnel has undergone a complete turnover, including the chief of the bureau. In addition, virtually all of the Rackets Squad's detectives, including the commanding officer and the head of the organized crime unit, have changed.

B. Rackets Bureau Structure

The Rackets Bureau handles cases involving organized crime. The bureau chief generally decides what "other investigations" to accept, using these criteria:

1. prosecutive leads likely to be uncovered;
2. importance of witnesses;
3. "historical indicia" of organized crime;
4. required expertise to properly conduct the investigation.

Thus, for example, on the days the interview was conducted, the bureau was engaged in the seizure and prosecution of an allegedly pornographic film. (Criteria 1 and 2.)

Assignment to the Rackets Bureau is voluntary; A.D.A.'s may leave it if they so choose. Both the head of the bureau and his deputy have eight years' experience and have handled numerous non-jury and jury trials. Each earns more than $30,000 per year. Their three assistants have less than three years' experience each. None has tried rackets cases, but each has some trial experience in misdemeanor and felony cases. Each earns more than $19,000 per year.

The bureau has few security problems. Where it is able to, it runs background checks on people with access to sensitive information. This is not always possible, so that there are attempts to minimize such access. (The bureau frowns on the process by which the Administrative Judges' law department reviews applications for wiretaps. The bureau fears not corruption in the department, but the increased possibility of inadvertent leaks as the number of people handling applications increases.) The building housing the D.A.'s office has back doors which aid concealment of witnesses and informants comings and goings. The bureau considers the danger of its telephones being tapped slight. The bureau's extremely limited office space makes interviewing witnesses and drafting legal documents exceedingly difficult.

In the previous administration, trial bureaus prosecuted those cases investigated by rackets; now each investigating A.D.A. tries his own case. Each carries five to seven indictments assigned for trial, plus ten to twenty investigations, though only two or three are active at a given time. Obviously, when the A.D.A. is on trial, his investigations suffer. Manpower shortages eliminate the possibility of a "floating team" approach to solving this problem, so the bureau chief must make decisions on cases when an assistant is unavailable because of a trial.

C. Methods of Investigation

Both the Rackets Bureau and the OCU initiate organized crime cases, generally in response to complaints, tips from informants, results of physical surveillance, leads from ongoing investigations, etc. Circulation of a "lead sheet" aims at keeping each investigative bureau in touch with the investigations of others. As cases develop, the bureaus routinely report to the executive assistant who is responsible for coordinating the work of all investigative bureaus. Obviously, the effectiveness of coordination is directly proportional to the quality of the reports he receives.

Officers of the OCU are responsible to the head of the unit, who is responsible in turn to the D.A. No clear guidelines regulate the relationship of the officers to A.D.A.'s. Members of the OCU report to their superior officers, who consult with the A.D.A.'s and thus arrive at investigative decisions. Disagreements are resolved by the head of the OCU and the chief of the Rackets Bureau.

The Rackets Bureau regards the use of undercover police officers highly. Most officers have litte training in this work; mistakes have spoiled some of their initial efforts. However, they learn quickly, their work becomes increasingly popular, and the bureau expects valuable results in the areas of labor racketeering, infiltration of businesses, gambling, loan sharking, and narcotics.

The bureau regularly uses search warrants. Warrant procedure—drafting by an A.D.A., approval of the bureau chief, processing in the judge's law department, final consideration by the judge—requires from a minimum of four or five hours to as long as two days. The police feel that this is attributable to lack of experience and confidence on the part of the A.D.A.'s; the A.D.A.'s say this is inherent in the complicated nature of the process.

Obtaining eavesdropping warrants likewise takes too much time—a minimum of two days. (The bureau's personnel note that federal applications take weeks!) The same steps as in search warrant procedure, with the additional approval by the executive assistant, are required. Police personnel attribute much of the delay to younger A.D.A.'s unfamiliarity with the complexity of the criminal activity involved; the A.D.A.'s again say that this is inherent in the nature of the process. According to police,

A.D.A.'s do not recognize the importance of much of what is presented as probable cause, and require detailed explanations to understand the relevancy. Since electronic surveillance is an "investigative last resort" for combating sophisticated criminal enterprises, timing is often crucial. Thus the police recommend that A.D.A.'s develop areas of special competence. The OCU has adopted this approach, but the executive staff prefers that each assistant D.A. be "well-rounded."

Pen registers (without concomitant use of electronic eavesdropping) are rarely used; in the ten months of the current administration, no successful use has occurred. The Vice Squad uses bumper beepers, but sparingly, since the D.A.'s office and the Nassau County judiciary have yet to determine whether warrants are necessary or probable cause required.

Consensual recordings are used, but generally not by A.D.A.'s, who do, however, instruct informants wearing recording devices on how to conduct themselves. The bureau admits to only fair success with this technique.

The office is now developing a potentially very successful informant program. The main reason for the anticipated success is money; money from the budgets of the D.A.'s office and the NCPD. Thus, the office can offer a potential informant—instead of (or in addition to) a favorable plea in a pending case, nonbinding recommendation to the judge or an effort to effect correctional assignment—anywhere from $200 to $1,000 for a particular piece of information. The office makes it clear that it gives informants neither the license to commit crimes nor promises that future violations will not be prosecuted.

A written declaration by an A.D.A. that a person is an informant serves to register him with the office. No common pool or master index of D.A.'s office and Police Department informers exists. A member of the OCU is, however, almost always assigned to an informant of the D.A. so that A.D.A.'s do not deal directly with him. The main use of informants is in intelligence gathering. When appropriate, the office makes—and keeps—promises not to disclose an informant's identity to other agencies or to the public.

Another method which is used by the District Attorney's office to obtain information is the investigative grand jury even though, generally speaking, grand juries are not impaneled and used solely for intelligence purposes. They are, on occasion, used to obtain contempt or perjury indictments against witnesses when it is expected that there is, in effect, no chance of obtaining a substantive indictment. As a result of office policy, summary contempt is avoided in favor of criminal contempt indictments. There is admittedly a lack of experience with and knowledge of the use of summary contempt, the effectiveness of which the office intends to explore.

Manpower shortages severely limit physical surveillance for intelligence purposes. The police and the D.A.'s office disagree about the use of saturation surveillance. They agree that lack of manpower necessitates that selective surveillance aim at high-level, but hopefully fairly young and active targets.

The office uses no civil remedies. It does turn over pertinent information to appropriate agencies.

Although the office deems public awareness important enough that it has set up a speakers bureau for business, civic, and other organizations, the present D.A. has held no press conferences. In the first place, there have been no major arrests or other results warranting a conference. In the second place, the D.A. campaigned on the charge that his predecessor released information prejudicial to defendants' rights and used the press as a means of self-aggrandizement.

Defendants may plead to a count one degree less than the top count charged; to plead lower, a defendant must give something—information or testimony—in exchange. The same principle holds with recommendations of leniency. Since no questions of parole recommendation have arisen under the new regime, no guidelines for it exist. Generally individual A.D.A.'s decide what information and corroboration to give to the probation department, because the central administration of the office exercises only loose control in this area.

D. Strategy and Goals

The relatively new administration's executive staff frankly expresses confusion as to how much organized criminal activity exists in Nassau County; it admits to little knowledge about the nature and extent of racketeering within its jurisdiction.[2]

Indeed, persons within the D.A.'s office believe that organized crime may not be a serious problem in Nassau County, because organized crime tradi-

[2] When the new administration arrived there was little up to date intelligence; things have been getting better since.

248-593 O—78——6

tionally does not flourish in wealthy, suburban areas without major ghettos. The D.A., seeking intelligence information, feels his experience in and contacts with the Federal Strike Force have been of value even though most of its work involved investigations into visible activity in Brooklyn and Queens. He *cites this as a reason for his opposition to* a superseding statewide agency with jurisdiction over organized crime—a statewide unit would focus on areas where the problem is most serious and leave counties like Nassau without effective enforcement units.

Knowledgeable sources outside (and inside) the D.A.'s office do not share the belief that serious organized crime problems stop at the county line. They believe there is much gambling, loan sharking and labor racketeering activity, as well as much infiltration of legitimate business. These sources consider the D.A.'s Office at an intelligence disadvantage because of the abrupt change of personnel which has occurred under the new administration, causing the loss of informants and contacts with police units and newsmen.

One result of insufficient knowledge of the nature and extent of organized criminal activity in the jurisdiction is the lack of a comprehensive strategy for combating it. The one expressed principle—the work of the latter philosophy—is to concentrate on the top men in the criminal hierarchy. In the case of bookmaking, the decision was to grant clerks immunity in return for testimony against their bosses, especially to determine if there "existed corrupt relationships between the bosses and political figures." Unfortunately, problems connected with untruthful testimony, lack of legally required corroboration, etc. were inadequately explored. Nor did the Office adequately consider other possibilities—imprisoning clerks in the hope that bosses would man the wirerooms, hurting the operations economically by repeated searches and seizures of records, use of undercover officers, use of electronic eavesdropping and so forth.

The current lack of coherent strategy is also in part, attributable to the unwillingness of the new D.A. to continue a predecessor's unsuccessful methods. These methods, mostly subpoenaing organized crime figures and questioning them before grand juries in the hope of obtaining contempt or perjury indictments, had been unproductive and almost universally condemned. Indictments were flimsy and poorly drafted, often factually and legally insufficient. Many were dismissed, lost at trial, or reversed on appeal. Since New York law requires that witnesses compelled to testify before a grand jury be given transactional immunity, the result was often that an organized crime figure received an "immunity bath." Consequently, the new D.A. has had to start from the beginning and work out a new approach; it will take time to work out a successful new strategy.

Most members of the District Attorney's office who are engaged in organized crime prosecution believe that it is, in fact, possible to reduce the level of organized crime activity and to help a certain number of individuals. Beyond that, however, they see very little else their efforts can achieve. There is no possibility of containing organized crime to a particular area within Nassau County. They do not believe that they can prevent other ethnic groups from developing structured crime confederations. In general, they feel that although there may be some exceptions, persons who are involved in organized crime will not cease their illegal activities through the process of infiltration of legitimate businesses and the operation of those businesses in a legitimate fashion.

To date, the convictions and indictments appear to bear out the problems that the office has had in developing a strategy and in pursuing their work in the organized crime area. There have been only a few major investigations to date.[3] Indictments that have been returned have charged single individuals. The crimes, which range from perjury to arson, untaxed cigarettes, burglary, loan sharking and gambling, are undoubtedly important and serious violations of law, but are generally of a minor character in the framework of organized crime activity. It should be noted, however, that at the present time, there are a number of undercover and grand jury investigations underway.[4] If those prove successful, the Rackets Bureau will have succeeded in indicting persons engaged in conspiratorial activity as opposed to organized crime figures who have engaged in individual, illegal acts.

[3] An exception is the multi-million dollar gambling ring involving an alleged organized crime figure, Fred DeGregorio, that was raided on January 18, 1976.

[4] Here investigations and indictments involving the Agro-Cataldo-Messina gambling ring $50 million estimate based on seized records), the Hempstead Police corruption matter, and the alleged corruption selling of paroles by a legislative aide must be noted. Each is an example of the changes the Nassau Office is undergoing.

III. THE NEW YORK COUNTY DISTRICT ATTORNEY'S RACKETS BUREAU

A. General Information and Jurisdiction

Most American cities are located within counties; New York City contains five counties and as a result has five independent D.A.'s. Among these, and nationally as well, the New York County (Manhattan) D.A. has traditionally been a leader. Like other D.A.'s in the state, he is an elected, constitutional officer, responsible only to his constituents and the Governor.

His office employs about two hundred assistant district attorneys who serve in a trial division, appeals unit, and three investigative bureaus. Narcotics prosecutions are handled by the Special Citywide Narcotics Prosecutor. Specialized programs exist from time to time in response, not surprisingly, to the ever-changing menu of LEAA grants.

New York County D.A.'s have historically been commanding figures; consider Thomas E. Dewey and Frank Hogan. Hogan set standards not only for his own successors, but to a large extent for offices across the country. Several features have distinguished the Manhattan D.A.'s office. It insists on nonpolitical criteria for hiring and promotion. A.D.A.'s may not engage in politics (except campaigning on their own time for candidates of their choice, where such campaigning is essentially behind the scenes and not public in character) or in outside law practice or other business (except teaching or writing, again on their own time). The public has traditionally considered the office honest, efficient and dedicated.

The current D.A., Robert Morgenthau, is a former U.S. Attorney for the Southern District of New York, which includes Manhattan. Morgenthau, who regards anti-racketeering efforts as critically important, is the first D.A. in years who is not a product of the office itself.

A gathering of all agencies which deal with organized crime and official corruption in the city would make a considerable crowd. The four other D.A.'s, the U.S. Attorneys for the Southern and Eastern Districts, the Federal Strike Forces in each district, the New York State Organized Crime Task Force, the Special Citywide Anti-Narcotics Prosecutor, the Special Prosecutor for Criminal Justice System Corruption in New York City—all these conduct activities similar to those of Morgenthau's office. Although there is more than enough business to go around, coordination is difficult, and interagency jealousy hardly unknown.

The office has no strict definition of organized crime, although it refers frequently to concentration of economic power and conspiratorial activity.

B. Structure and Staff of the Rackets Bureau

Considering the strong supervisory role of the Rackets Bureau chief, it can be fairly said that organized crime is present when he and one of his assistants see it the same way. The bureau chief has complete discretion to accept, reject, or refer to other bureaus or outside agencies any investigation.

Under the former chief, A.D.A.'s developed specialities; the waterfront, gambling and loan sharking, securities, airline ticket and credit card operations, infiltration of businesses (including bars, hotels, private garbage collection services); hijacking, fencing, and the garment center. Each assistant was charged with gathering information from appropriate agencies, developing resource files, and filling speaking engagements about his speciality. The current chief uses this system less extensively.

The bureau chief has ten years' experience in the office; his deputy five. In contrast to the situation in the Hogan-era, eight of the bureau's nine other assistants have less than five years' experience; three have only six months.

The chief makes $32,000 per year; his deputy $25,000. A.D.A.'s hired right from law school make $11,500 before admission to the bar, $13,000 after.[1] Those with relevant prior experience start at somewhat higher salaries. Considering that large New York law firms offer high-ranking law school

[1] As of September 1976, the salary was $15,725.

graduates $25,000, office salaries are far from competitive. Yet such is the prestige of the office that it receives more than a thousand applications—many from first-rate graduates of first-rate schools—each year. On the other hand, the financial sacrifice, and the tiny likelihood of significant raises from a financially strapped city, lowers morale considerably.

The bureau chief believes that his assistants should have prior trial experience, so he and nearly all rackets assistants have had experience in one of the "junior" bureaus, though not the long apprenticeships of the Hogan years. (The belief is not universally held. Some argue that most misdemeanor trial work—because of the volume of cases—does not lead to the development of the unique skills and habits essential for complex rackets trial work.) Advancement to the bureau is informal. When bureau members notice a promising A.D.A., the chief interviews him and consults his superiors. Final decisions rest with Morgenthau.

When an A.D.A. with little trial experience joins the bureau, his main training consists of work with an experienced prosecutor on a major felony trial. There is little formal in-house training aside from the mandatory reading of the Rackets Bureau Manual. The manual, informative, concise, and well written, emphasizes the necessary balance between aggressive investigation and concern about overreaching. Assistants who know it thoroughly avoid many serious mistakes.

Each of the city's D.A.'s has a police unit drawn from the New York City Police Department. Morgenthau's squad, commanded by a deputy inspector, has sixty-five officers, including a lieutenant and five sergeants; the rest are detectives or plainclothes officers. The squad commander, who has eighteen years' police experience and is a graduate of the Senior Command Course at the British Police College, Bramshill, selects—subject to the Police Commissioner's approval—squad members. Politics seems to play no part in the selection.

Detectives need not fill out financial forms or submit to routine polygraph examinations. All employees do, however, fill out complete employment questionnaires. The squad conducts thorough background checks, including local and FBI name and fingerprint searches, of new personnel.

The squad is formally available to all bureaus; in practice, it works mainly with the Rackets and Frauds Bureaus. The squad commander and his colleagues are shrewd, tough professionals with all the qualities of the best of New York's "First Grades": street "smarts"; a wide streak of skepticism of humanity; a willingness to work long, often boring hours; and, a somewhat messianic zeal about putting "bad guys" away.

The squad commander reports to the D.A. and to the chief of detectives, unlike commanders in the other D.A.'s squads who report to their respective borough detective commanders.

The office has no funds for training detectives. They do, however, participate in some of the Police Department's programs.

In addition to the police officers assigned to the District Attorney, there is a group of civilian agents known as D.A.'s investigators. According to office legend this unit was primarily responsible for investigations of police corruption. Because of the establishment of a special prosecutor in New York, the retirement of the chief investigator and as a result of a stagnating rigidity in the unit, the bureau was broken up and members of this group were assigned to each of the office's bureau chiefs. The man assigned to the Rackets Bureau maintained wiretap or other electronic surveillance orders and tapes. In addition, he served as a liaison with outside investigative agencies and police units, and aided in the coordination of the bureau's work. He was also charged with maintaining the bureau's intelligence files, and served as an intelligence analyst. (A position which surprisingly had never existed in the past). Within the last year, however, Morgenthau has attempted to revitalize the investigators as a bureau by recruiting a former Alcohol, Tobacco, Firearms Agent as a new supervisor for this group. What, if any, impact this move will have is unknown, but presently the Rackets Bureau rarely relies upon these agents for investigative work.

C. Methods of Investigation

The bureau uses undercover officers—frequently equipped with concealed recorders or transmitters—to infiltrate certain criminal groups and to carry out physical surveillance of selected targets of investigation. Manpower shortages preclude routine, or even intermittent, physical surveillance of known criminal figures for general intelligence.

Consensual surveillance is especially important in view of New York law's legal requirement of corroboration of accomplice testimony. The bureau chief claims that, "The major case, especially in the area of official corruption is often made by infor-

mants [who are willing to testify] wearing concealed recorders."

The bureau relies greatly on electronic surveillance, as the considerable space the manual devotes to it suggests. New York was among the first states to authorize court-ordered surveillance. The manual treats in great detail application and custody procedures and other matters.

Much of the bureau's electronic equipment is obsolete. The Hogan tradition required avoidance of entangling alliances, hence a relutance to seek Federal funds. Since Morgenthau has no such reluctance, the bureau will soon use LEAA funds to bring its electronic equipment up to date. The detective squad contains officers trained in its use, and in photographic work.

Morgenthau himself brought to the office a group of informants developed during his time as U.S. Attorney. According to the bureau chief, who has another group developed by the Bureau, these often provide valuable information. The D.A. also brought from his Federal work—where no corroboration of accomplice testimony was required—a relaxed attitude toward "dirty" witnesses, a departure from the Hogan tradition.

Nevertheless, the bureau is greatly concerned about informant control. The chief prefers to give informants a specific assignment rather than to use them as general information collectors. Where disclosure requirements do not mandate otherwise, they are equipped with recorders, which produce permanent records of conversations and inhibit the tendency to embellish them.

The bureau has a reputation, which it strives to protect, for protecting its sources of information. The manual warns, under the heading "Investigative Rules," of the dangers of discussing investigations with non-bureau people and of leaving warrants in unsecured places. That no informant or witness be interviewed by an aissistant alone is a bureau rule; an investigator (normally the detective working on the particular case) must be present.

Very likely, no anti-racketeering unit—Federal, state, or local—uses investigative grand juries better than the Manhattan Rackets Bureau does. New York law provides for both regular and extraordinary investigative grand juries. The law now provides only for transactional immunity; attempts to obtain a use immunity statute have failed, but the years ahead will bring new efforts. The law of contempt—civil and criminal—and of perjury is well developed. The bureau has been a pioneer in the use of evasive contempt.

Bureau members read the law to require that a review of grand jury minutes—always likely to be requested by defense counsel—disclose, from the beginning, an arguable criminal basis for the investigation. Assistants must always keep in mind the prospect of such review.

D. Strategy and Goals

No one really knows how to measure the effectiveness of anti-racketeering work. The standard measure, conviction and imprisonment of organized crime figures, appears inadequate. The bureau chief (who employs several financial analysts) suggests focusing on illegal concentrations of economic power, yet no one knows how to assess objectively the results of investigations and prosecutions on such concentrations. Lack of resources is one reason; no prosecutor has the resources to do even most of what he would like. Inertia is another reason; lawyers are not notorious for innovation. Even so obvious a technique as determining the best allocation of resources by cost-effectiveness studies has not been used.

While the bureau has been of necessity generally reactive, it has made some proactive efforts, like its extensive probes of labor racketeering. Under the previous chief it undertook studies of the evolution of black and Chinese organized crime groups.

The major strategy used by the bureau in investigating organized criminal activity is exemplified by the *Fraulein* investigation reported by the National Wiretap Commission. Put most simply, the strategy involves the identification of an individual, known as a "mover," who, while partially insulated, must operate to some degree in the open. The "mover" is generally the individual trusted by the bosses to act in their behalf, to enter into pacts and hold negotiations, and to supervise the execution of the criminal venture. Since he is not the person carrying the contraband, hijacking the truck, or sporting the big name, he is often overlooked as the potential target of surveillance. Yet by keying on him and subjecting him to physical and electronic surveillance, where authorized, it is frequently possible to piece together the nature and scope of the entire operation. Apparently ambiguous evidence obtained with respect to the bosses, when analyzed in conjunction with the comprehensive information gleaned from investigating the "mover," is often

sufficiently meaningful and unambiguous to secure convictions of those top men.

The bureau chief speaks with enthusiasm about a reformulation of the prevailing conceptual approach to organized crime and public corruption prosecution, but acknowledges that his program continues to be essentially a matter of targeting upon individuals suspected of illegal conduct. He disputes, and labels as fallacious, proceeding on a hypothesis grounded upon some rigid "Mob" structure. Rather, he suggests, resources should be focused and committed upon situations where economic analysis indicate illegal concentrations of power; such as the entertainment field, liquor industry, etc. The theory is excellent, but in the absence of any internal, economic analytical expertise or substantial outside work in this area, strategic guides of this type will apparently remain on the prosecutorial "wish list."

The bureau has no systematic intelligence-gathering program and no trained intelligence analysts. Matters of potential interest come from several sources: the D.A. directly, other bureaus, Federal agencies, "walk-ins" or letters (people contacting the bureau directly), and outside police units. The bureau assigns such a matter to an A.D.A. as a "potential inquiry." The assistant explores it and reports his findings within two weeks to the bureau chief who decides whether to proceed further. A matter the chief wishes investigated further is called a "preliminary investigation" and given a code name. An investigative report form summarizes the information available and gives the investigative plan, devised by the assigned A.D.A., the investigative supervisor, or both. Thereafter case reports are filed monthly until indictments are obtained or the case dropped as unproductive. Rackets assistants on occasion, but rarely, handle their own appellate matters.

The D.A. receives monthly reports on all "major investigations." These are investigations which (1) are likely to be long and active, (2) involve high ranking or important public officials, (3) involve notable crime figures, (4) involve labor racketeering, or (5) involve police corruption.

In spite of the intriguing discussion of reconsidering approaches to organized crime, "the steady kid on the block," as one assistant called the office, plays the game essentially as it always has, with dedication and competence, but only rarely with innovation. It seeks to react swiftly and skillfully and to hang as many scalps from the lodgepole as possible.

IV. THE SUFFOLK COUNTY INVESTIGATION AND PROSECUTION PROJECT

A. General Information and Jurisdiction

Suffolk County, Massachusetts, contains 750,000 people distributed among the cities of Boston, Chelsea, Winthrop and Revere. The county's chief law enforcement officer is the District Attorney, elected for a four year term. He has no civil jurisdiction per se. The current D.A., Garrett Byrne, is in his twenty-first year in that office, after twenty years as an assistant D.A. He is the state's only full time D.A.; however, a recent statute will require that by 1979 all D.A.'s and their assistants will be full-time officials. Byrne was a member of the President's Commission on Law Enforcement and Administration of Justice and now serves on the Advisory Task Force on Organized Crime Standards and Goals, created by the LEAA.

Byrne may be motivated less by political considerations than any other Massachusetts D.A., yet he is nonetheless a political figure and makes some politically motivated appointments to his staff. The Organized Crime Unit is an apparent exception. It is also an exception to the rule that all A.D.A.'s, because of low pay, must maintain private law practices. Moreover, its members have no official or unofficial political duties.

Each of Suffolk's four cities has a separate police department. The Metropolitan District Commission, a limited regional governing body, has a police department, the "Mets," which patrols certain highways and investigates crimes in areas such as waterways, reservoir properties and parks. The Massachusetts State Police, a fully empowered law enforcement agency, patrols the Boston airport and portions of the Massachusetts Turnpike within Suffolk. The State Police also have limited intelligence duties within the county, but by tradition—absent direction from the Governor or a request from the Attorney General—do not do general investigative work within it.

The Attorney General has a complement of State Police officers who carry out investigative activities. He also has within his Criminal Division an Organized Crime Section staffed only with investigators; attorneys are assigned to it only for grand jury presentations or trials. The Massachusetts Organized Crime Control Council, chaired by the Attorney General, has seven members appointed by the Governor. It has no operational responsibilities; its mission is policy guidance on statewide anti-organized crime efforts and use of LEAA funds.

The Organized Crime Unit is suspicious of many of its brethren in the Massachusetts law enforcement establishment. That fact, and the state's strong tradition of interagency jealousy about "credit" for cases, make the intelligence unit cautious about exchange of intelligence or leads with outside agencies. Federal agencies are deemed more trustworthy. The unit's director has a strong personal relationship with the Chief of the Federal Strike Force, who controls some of SCIPP's Federal funds. The Strike Force also receives a flow of organized crime intelligence from various Federal agencies, which partially offset SCIPP's intelligence deficiencies. SCIPP investigators also work very closely with Drug Enforcement Administration agents.

B. Structure and Staff of SCIPP

SCIPP ("Skip"), less than 2 years old, operates almost entirely on LEAA funds. Skip grew out of a major bookmaking case which turned up a "payoff list" of fifty-eight police officers, including some high in the Boston Police Department. The present Skip director assisted one of the D.A.'s senior trial assistants on that case, and developed an interest in establishing a unit to focus on organized crime and political corruption. He discussed the plan with LEAA (among others) which at that time favored broader objectives—major crime investigations. The first year's activity, paid for by a LEAA grant, was mostly directed at investigating fraud in Boston's Department of Veterans' Services, which was paying benefits to various ineligible people, including relatives of organized crime figures. Thirty-eight indictments—many of them

public officials—and a two million dollar savings resulted.

Skip has shifted to a more traditional organized crime approach, although it retains some "major investigations" capability, which it will continue to direct at targets of opportunity. The unit believes doing so will enhance public confidence in Skip.

Skip's attorney-director and two of his assistant attorneys are paid from Federal funds. The former makes $24,000 a year; the latter $17,000 a year. A third lawyer is paid $10,900 a year from the D.A.'s budget. With the exception of the director, the attorneys have little trial and practically no investigative experience. We have noted that among A.D.A.'s only the Skip staff works full time; thus many experienced A.D.A.'s are unwilling to give up established practices to join Skip. Even the director does not have "heavy" trial experience, although members of the defense bar consider him a strong opponent.

Use of three financial investigators, paid from $14,000 to $16,500 a year from Federal funds, is novel in Massachusetts. These men—two are former IRS agents—are not entirely accepted by the unit's six police investigators. Said one, "They have yet to recognize that a guy with a pencil can open jail doors." Thus, the financial investigators usually work alone and report directly to the unit director.

Skip also employs three research assistants, investigative clerks with no peace officer authority, who handle documents, man the communications base in the unit's office, maintain files, etc. Two are former law enforcement officers; the third is a student from Northeastern University's Criminal Justice Education Program. They are underused, mostly (again) because of lack of acceptance by police officers. One called his role that of "gopher."

Skip's police investigators submit "General Information Reports"—intelligence reports—but only when they feel they have learned something significant; there are not routine reports on designated people or on particular activities. Reports are put in a central file, but no regular reading file is available to all agents. The unit stresses its close-knit character and relies on informal exchange of information. When pressed, agents acknowledge that intelligence does sometimes fall between the cracks. As noted earlier, Skip gets much information from the Federal Strike Force and is cautious about exchanges with local law enforcement agencies. Typically, agents exchange information informally with trustworthy people from other agencies, although Skip will—when a "need to know" is demonstrated and the integrity of persons requesting information known—respond to formal inquiries. Many joint investigations are conducted with Federal agencies and with the Boston Police Department's Organized Crime Unit, so communication with them is frequent and critical. No leaks from the unit have been discovered.

Skip conducts no formal background checks on its personnel; agents recruited so far have been known personally to the unit's senior investigators. The unit seems to make casual inquiries about clerical personnel, who also have usually been known to the agents.

The unit has an informal tradition—not an inflexible requirement—that investigators have at least ten years' investigative experience.

The unit is planning a formal training program for A.D.A.'s (none exists now) which will involve lower court trial work, trials of misdemeanors in Superior Court, and then felony work. Moreover, the unit will assign attorneys to investigations as they begin, rather than at the prosecution stage. The director presently handles most grand jury presentations.

C. Methods of Investigation

Skip conducts no undercover activities. State law authorizes any judge of a court of record to issue search warrants, but for security reasons, Skip deals only with the Chief Justice of the Superior Court, or another judge of that court should he be absent. Within seven days of issuance, return must be made to the issuing judge; affidavits, warrants and inventories are lodged with him. The documents are public records available, upon request, to anybody.

The same application procedure applies to orders for non-consensual electronic surveillance. Conversations are taped and a log maintained. At the end of surveillance, the original tape and the log are returned to the court. No more than ninety days after termination of surveillance, defendants (or potential defendants) who can be identified must be notified that they were overheard. They may then have access to the recordings, the affidavit, and the order. Skip assumes that the statute does not require notification of *all* persons overheard, al-

though it sometimes notifies them in the hope that they will come forward with information.

The necessary equipment is owned by the Massachusetts Joint Organized Crime Strike Force (also called Boston Joint Strike Force and modeled on an earlier program in the Southern District of New York), which controls a $400,000 pool of LEAA money for cooperative work among the Attorney General, the State Police, the Boston Police and the Massachusetts D.A.'s (although no other D.A. besides Byrne has ever received any money from it).

State law seems to require a warrant for consensual recording of conversations except where police officers are involved, so informants are rarely "wired." The unit has not used "bugs," as opposed to wiretaps; it intends to start. Police agents handle technical work on wiretaps. Skip uses pen registers and bumper beepers, which do not require court authorization.

Skip has a $10,000 informant fund. Information is purchased on an ad hoc basis; purchases are approved by the chief investigator and detailed reports—real identity, assumed names, receipts signed by informers and the Skip agents who control (or "run") them—kept. Skip has no salaried informants. Seldom does it permit debriefing by other agencies. Indeed, Skip agents rarely reveal informants' identity to fellow agents. Skip also has a $5,000 witness relocation fund from its Federal grant.

Only the Attorney General may impanel an investigative grand jury, so Skip uses regular Suffolk County grand juries which convene every six months. The D.A.'s office is uncertain about grand juries' legal authority to issue reports; certainly it is not customary for reports to be issued—nobody in the office remembers one having been. In appropriate circumstances, Skip seeks perjury indictments and citations for contempt of a grant jury.

State law allows only transactional immunity. Efforts to provide for use immunity are underway, but prospects are dim. Contempt proceedings as a consequence of a refusal to testify under grant of immunity are complex, involving a single justice of the Supreme Judicial Court and an Assignment Judge of the State Superior Court. This complexity, and substantial guarantees of due process inherent in the proceeding, work to the advantage of recalcitrant witnesses.

Individual agents, based on their own knowledge, usually select people upon whom to concentrate physical surveillance. If surveillance—or other methods—turns up evidence of possible criminal violations, the agent confers with the chief investigator. Together they decide whether the importance of the case warrants further concentration. If the agent's case "heats up" and specific criminal acts seem likely to occur very soon, the unit assigns other agents to assist. One or all may undertake physical or electronic surveillance or any other needed work. During this period, the chief investigator briefs the director daily. Final decisions rest with them. Attorneys usually become involved just prior to arrests, except that they do assist in warrant applications.

Although the D.A. has no civil jurisdiction, his office disseminates information regarding tax fraud, liquor license matters, etc. to appropriate agencies. The director contemplates his own tax fraud investigations in the future, however, since state income tax statutes provide criminal penalties.

Skip personnel do not seek speaking engagements and respond only reluctantly to requests for speakers. The unit does discreetly seek to highlight its performance in the press, partly through background briefings for selected reporters. It believes that such publicity encourages informants to step forward.

Skip lawyers try all cases developed by the unit, plus others from the general trial flow which have organized crime implications. Skip has thus far refused to plea bargain; it has not yet lost a case tried by its attorneys. Skip prosecutors make sentencing recommendations to the courts. The director intends to seek legislation to create broader "special offender" categories which will mandate substantial minimum terms and eliminate parole for certain offenders. Pre-sentence reporting procedure is now so inadequate that no attempt is made to use these reports to inform judges of defendants' organized crime involvement.

D. Strategy and Goals

The D.A. and Skip personnel have no illusions about eliminating organized crime in Suffolk County. Their goal is to retard its growth and to restore public confidence in government—at least in its prosecutorial functions.

The basic strategy is "headhunting," that is, identification through a "consensus of informed speculation" by agents of important people currently active in organized crime followed by successful

prosecution. Agents are convinced that "taking off" (convicting) important organized crime figures is the most effective use of scarce resources.

Skip does recognize the value of other approaches, however, especially of attacking revenue sources. This approach was successfully used in a joint Skip-FBI investigation of football lottery cards in 1974, which disrupted the distribution network and caused an estimated revenue loss to organized crime of more than a million dollars. Still, the unit considers the essential measure of success the conviction of important "targets."

The unit often seeks to transfer investigations to Federal agencies with greater resources. It also seeks transfer when the evidence appears to support a potentially more successful prosecution at the Federal than at the state level. A final motive may be the belief that transfer may enhance future relationship with Federal agencies. The Massachusetts Joint Strike Force (The Boston Joint Strike Force), already mentioned, has encouraged joint Skip-Federal agency ventures and increased cooperation between Federal and local agents in Boston.

V. WESTCHESTER COUNTY

A. General Information and Jurisdiction

Immediately north of New York lies suburban Westchester County. Westchester's 894,000 people, of whom 80,000 (roughly ¼ of the work force) commute daily to New York, are affluent; mean family income is $17,500 and only 4.5% of all families live below the poverty level. The population, 10% of which is black, is densest in the areas nearest New York.

Westchester's chief law enforcement officer is an elected District Attorney (D.A.) charged with initiation and conduct of criminal prosecutions. He has only limited civil jurisdiction, and even that, pursuant to agreement, is handled by the county Civil Attorney.

As a state constitutional officer, the D.A. is responsible only to the Governor and people of the State of New York. The budget of his office, however, is controlled by the county executive and legislature. Despite the difference in political parties of the executive and the D.A., there has been no political controversy between them, and the D.A. has received adequate budgets.

In the past, politics has counted in the D.A.'s hiring and promotion policies. The present D.A., however, is an alumnus of the Hogan office in Manhattan and, in the Hogan tradition, runs an entirely nonpolitical office. No assistant may hold any party position, or participate in any political campaign, other than the campaign for D.A., and this is done, if at all, only on a volunteer basis and on his own time. Assistants can do no outside legal work. Teaching, lecturing, or writing assignments may be accepted with the express permission of the D.A.

The office generally hires recent law school graduates as A.D.A.'s, although it occasionally receives and accepts applications from practicing attorneys. Assistants must commit themselves to staying in the office for three years.

B. Structure and Staff of the Rackets Bureau

An organizational chart of the office discloses that the D.A. has given his chief assistant responsibility for the day-to-day supervision of all but the investigative units. Thus, the D.A. directly supervises the Rackets and Frauds Bureaus which are composed of sixteen of the office's eight-five A.D.A.'s. The head of the Rackets Bureau has fourteen years prosecutorial experience and his principal aides five years each.

The bureau investigates and prosecutes cases involving organized crime and corruption in the criminal justice system. It also has jurisdiction over homicide and narcotics investigations and over all matters requiring wiretaps and search warrants. The Bureau defines organized crime as any "family" activity or, more ponderously, as any other "continuing, smoothly functioning, loosely organized criminal conspiracy designed to avoid detection in part by corrupting law enforcement." The bureau chief believes that once a local criminal organization becomes profitable, resident New York families take it over or demand tribute from it.

Recently the number of trial parts (judges available to try pending indictments) in Westchester County more than doubled (from four to nine) compelling the reassignment of A.D.A.'s with trial experience from investigative bureaus to trial bureaus. Their replacement with inexperienced attorneys prompted an administrative reorganization within the Rackets Bureau. Each of the two senior assistants is in charge of a module of two younger and inexperienced assistants; one module primarily concentrates on organized crime matters and the other on special investigations (narcotics, homicide, and assisting local police departments). The assignments are flexible, however, and shift as needs dictate.

The inexperienced assistant helps with the drafting of affadavits for search and eavesdropping warrants, presents routine narcotics cases to the grand

jury, and ultimately conducts investigations under the supervision of a senior assistant. Eventually, as noted above, he is needed in the trial division and hence is reassigned. After having manned a part or number of parts, and gained trial experience over a period of time, he may if he desires and if the chief agrees, return to the Rackets Bureau as a senior assistant; the D.A. generally gives the bureau chief priority in selection of assistants.

Formal in-service training deals mostly with policy matters and trial techniques. Assistant D.A.'s must develop the specialized skills required in Rackets Bureau work by working closely with experienced assistants. There is no bureau manual of procedure, but D.A.'s receive clearly written "SOP" memoranda on eavesdropping, grand juries, and informants.

The bureau attributes much of whatever success it has had to the twenty-two investigators in the D.A.'s office, led by a retired chief of the State Police Bureau of Criminal Investigations (BCI). Each investigator must have either five years' law enforcement experience or a college degree and one year's experience.

Since the investigators provide manpower for all bureaus, on a given day fewer than fifteen will be free to work with the Rackets Bureau. Three or four of these will be qualified to use and maintain the electronic equipment necessary for consent recording and interception of conversations pursuant to court order. Two investigators are assigned to maintain intelligence files and dossiers on over one hundred organized crime figures who live or do business in Westchester. These officers also regularly maintain surveillance of organized crime figures. Demands on the investigators' time insure that the files cannot be maintained properly. For example, the intelligence cards generated by electronic surveillance are not integrated into a master file; it is therefore impossible to discover whether the conversations of a particular individual have ever been intercepted by the Westchester County D.A.'s office. Supervising investigators believe that six more investigators are required to maintain the files properly.

Investigators do not receive regular observation reports from local police. Investigators do attend as many gatherings of organized crime figures—parties, weddings, funerals and the like—as possible.

In the interest of security, investigators complete background checks on all persons who have access to sensitive information. In addition, Rackets Bureau telephones are periodically checked for illegal taps, as are telephone company frames.

Investigators' major efforts go into cases involving gambling, loan sharking, cartage and official corruption. Cases involving infiltration of legitimate businesses and loan sharking normally result from victims' complaints. The bureau does little work involving theft-fencing, since it seldom finds out from local police about thefts until arrests are made.

As with the Rackets Bureau the investigators see their success largely as a result of their cooperation with the attorneys at a very early stage of the investigation. While the investigators at times initiate their own surveillance as a result of leads they receive, very shortly after such surveillance begins or immediately upon the receipt of any additional leads from the surveillance, the District Attorney and the chief of the Rackets Bureau are consulted. A meeting is then usually held to determine whether or not the investigation ought to proceed and if so in what manner.

Forty different local police units patrol the county. The bureau must deal with all these plus the State Police, the Parkway Police and the Sheriff's Department. The sheriff, an elected constitutional officer, runs the only county-wide non-prosecutorial law enforcement agency. As far as organized crime is concerned, his office is active only in narcotics cases; it is also involved in some gambling investigations.

Because of the limited jurisdictions of most agencies and a history of corruption, political patronage or lack of skilled investigators in others, the bureau has an unstated policy of refusing to conduct joint investigations. This policy is not inflexible, however. A particular exception is the State Police, with whom the bureau routinely conducts joint investigations, especially into gambling and loan sharking activities.

The problems of working with so many police agencies is enormous. Since local units can refuse assistance from the D.A. and exclude outside agencies from their jurisdiction, dealing with them requires considerable diplomacy.

Problems commonly arise, for example, when a local police unit comes to the D.A. for help with a low level gambling case. Rackets, seeing the potential for a large scale investigation involving a major "bank" in *another* unit's jurisdiction, proceeds with

the case. To what extent should the bureau inform the original unit of developments outside its jurisdiction? Who has the right to know informers' identity, or even of their existence? How long can the local unit be told not to make arrests? Must the D.A. prosecute the subjects of the original complaint when—for reasons of strategy or resources—it does not prosecute others just as culpable? What kind of cooperation will the local unit give the D.A. in the future?

Confusion about the roles of the bureau and the State Organized Crime Task Force, an agency with concurrent jurisdiction, causes problems. No guidelines require particular police units to report to particular prosecutorial agencies. Duplication of effort, waste of resources, ineffective investigations and embarrassing situations for police units can result. Usually, subjective factors, particularly personal relationships, determine how various units work together.

C. Methods of Investigation

The bureau has found undercover investigators very useful. About twenty percent of its investigators are usually available for such work. These are kept away from local court appearances and contact with local police units. They engage primarily in gambling and loan sharking investigations, since undercover Sherriff's or State Police officers usually work in narcotics cases.

The bureau aids police units throughout the county in obtaining search warrants. Consequently, it has become adept at warrant procedure. Investigators and police officers draft their own statements of facts, which are then edited by an A.D.A.; significant redrafting is discouraged unless there is insufficient time for the officer to rewrite his own affidavit. From receipt of the affidavit, the process usually takes less than an hour, in part because "boiler plate" clauses are already placed on magnetized cards used by the typists. After issuance, warrants are filed, indexed solely by number, in the County Clerk's Office. Since only the D.A. knows the number, documents may be filed—to avoid charges of tampering—while security over the investigation is maintained.

Use of electronic surveillance is restricted to cases involving gambling, narcotics, criminal usury, extortion and homicide. As with search warrants, officers prepare their own affidavits, although they may be more extensively revised. Magnetized cards are again used for boiler plate language. Since assignment of police personnel to a particular investigation is not under the D.A.'s control, often times inexperienced officers are called upon to do very sophisticated work. The result is often improper execution of orders by the local police.

The D.A.'s office has made use of pen registers without concomitant use of electronic surveillance; in fact, it owns its own pen register equipment. Recently a city court in the county held use of pen registers without a warrant unconstitutional, so their future use depends on the results of an appeal. Similar recent decisions suggest that the use of the bumper beepers without warrant, in which the office has also engaged, may also be unconstitutional.

The office uses consensual recordings as well. An attorney's conversations, however, are seldom recorded, unless he is the subject of a criminal complaint or thought likely to commit perjury. Confusion about the present discovery statute restricts the use of recordings of conversations between informants and subjects for purposes of corroboration. Since it is not clear whether such conversations are subject to discovery, many are not recorded.

On the whole, the electronic equipment which the office owns and maintains is of excellent quality. The use of a filtering device which suppresses background noise has been especially successful. Recordings are usually retained by the D.A.'s office, unless the matter involved grew out of an investigation by the Sheriff or State Police, in which case these agencies retain the tapes.

The bureau uses informants extensively. If the bureau has developed an informant, an A.D.A. will initially be involved in his use, but will be replaced by an investigator or police officer who makes weekly reports to the A.D.A. The office's policy permits no promises to a defendant-informer concerning the disposition of a case except a promise to inform the judge of his cooperation. Informants who are not defendants receive either salaries or payments "for services rendered." No informant may commit acts of violence. An informant, however, in a gambling operation, for example, may continue his involvement while reporting to the D.A. Informants' identities are never disclosed to any other agency or to the public.

The Rackets Bureau makes extensive use of grand juries for investigative purposes. Before plac-

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1 OF 2

ing a target before the grand jury and granting him immunity, the bureau screens other agencies to insure that their investigations will not be compromised. No target is subpoenaed unless there is evidence to support a perjury indictment; the bureau takes care not to give any organized crime figure an immunity "bath." Recalcitrant witnesses are subject either to summary contempt or indictment.

Many of the cases made by rackets' A.D.A.'s are tried by the Trial Bureau. Narcotics cases, for example, go to the Narcotics Bureau. Cases involving wiretap evidence, on the other hand, usually are tried by the Rackets Bureau unless there is a former rackets assistant now in the Trial Bureau who is capable of handling the matter.

The bureau usually requires organized crime defendants who agree to plead guilty to plead to that count of the indictment that carries the highest penalty. This rule is flexible, however, depending upon the strength of the case, possibility of exposure of informant or undercover officer, etc.

Discretion about opening cases resides with the bureau chief; he and the A.D.A. assigned to each case decide on tactics to be followed. In addition to reporting weekly to the bureau chief, the A.D.A. keeps logs and activity sheets. The decision to drop an unproductive or insufficiently important case comes (on recommendation from the A.D.A.) from the bureau chief.

Each assistant D.A. usually handles only one case involving wiretaps. Investigations requiring much legal work may be assigned to as many as three A.D.A.'s. In such cases, assistants from other bureaus will participate, to avoid tying up the Rackets Bureau's manpower.

D. Strategy and Goals

The Rackets Bureau sees its function as reducing the effect of criminal conduct in the Westchester community by initiating and conducting investigations leading to the conviction of organized crime figures. They are convinced that such work will not eradicate organized crime in the county but will interrupt its operations, making it less harmful to the citizenry. The work of the Bureau is not susceptible to measurement aside from the number of convictions it produces. Nevertheless, the Rackets Bureau indicates that it has seen the effects of major investigations in the way organized crime figures have altered their methods of operation.

Such efforts would not succeed if there were not a standing bureau to deal with organized crime matters. The bureau provides a reservoir of expertise which would not be present if investigations were assigned on an ad hoc basis. The bureau provides direction and the ability to assess priorities in part because of the wealth of experience built up over time and is available to new assistants through contact with the bureau chief and the distributed "SOP's."

Investigations are both self-generating and reactive; they are reactive in the sense that the District Attorney's Office will respond to complaints they have received, newspaper reports, informant's tips and other leads which signal that an investigation is required or may prove to be successful. They are self-generating to the extent that the intelligence gathered by the investigators and compiled in the criminal dossiers may indicate that an organized crime figure is involved in certain criminal activities and should be chosen as a target.

The overall strategy of the bureau is based in large measure in the realization that Westchester County is "a bedroom of New York City." Thus, for example, large-scale fencing activity is likely to be found within New York City and not in Westchester. The city is just a better marketplace for illicit goods than its neighbor to the north.

Thus, investigations into organized criminal activity are pursued with the objective of making it less desirable for organized crime figures to conduct their illegal activities in Westchester County. The Rackets Bureau notes, for example, that after major gambling investigations numbers banks will move from Westchester to Rockland, the Bronx or even New Jersey. Hence the particular strategy used in gambling cases has involved searching the banks on a repeated basis and seizing records, for economic reasons, and thereafter seeking to convict upper echelon people by giving immunity to clerks.

VI. ARIZONA ATTORNEY GENERAL CRIMINAL DIVISION—SPECIAL PROSECUTIONS SECTION

A. General Information and Jurisdiction

The Special Prosecutions Section was created as a response to a demand by Arizona businessmen for effective enforcement of laws relating to business and land fraud. Often couched in terms of racketeering or organized crime, a recent number of well publicized cases indicated that Arizona was the center of a growing problem in the Southwest—a problem which arose from the abundance of land in a sparsely populated but developing leisure and retirement area.

This is not to say that more traditional types of organized criminal activity are not present. There is a large narcotics problem, some gambling, a great deal of theft—auto and burglary, pornography, union corruption, etc. It is maintained, however, that Arizona's proximity to Mexico and Las Vegas greatly influence the manner in which such activity is carried on, and that the controlling organization if one exists, may be quite different from what is required and found in other locations.

Arizona's population is concentrated in two counties; Maricopa (Phoenix) with fifty-five percent of the population, and Pima (Tucson) with twenty-five percent. Each has a county attorney responsible for investigating and prosecuting criminal activity within his jurisdiction. There has been dissatisfaction with the manner in which the Maricopa County Attorney has handled whatever rackets cases there were, prompting a civic association—the "Phoenix 40"—to ask the Board of Supervisors to appoint a special prosecutor for organized crime. At the same time, this group lobbied for legislation authorizing a statewide grand jury with the Attorney General as legal advisor. There was no real opposition to the proposed bill by the County Attorneys, and in fact, it was supported by most including the C.A.'s of Maricopa and Pima Counties.

Under Arizona law the Attorney General clearly has jurisdiction to investigate and prosecute matters where the local C.A. requests aid, or the Governor so orders. In other cases, it is unclear. The statewide grand jury is limited by statute to certain crimes, mainly concentrated in the areas of business and fraud, and multi-county gambling, narcotics, prostitution, etc. The legislation unfortunately does not authorize the A.G. to investigate crimes such as extortion and murder, which are commonly associated with organized criminal activity.

B. Structure of the SPS

The Special Prosecutions Section was established by the A.G. and the chief assistant A.G. under the Criminal Division, to coordinate investigations, and present matters to the grand jury. According to the director of that unit, the focus is on white collar crime—"If organized crime exists in this state, it exists in terms of financial crime"—with emphasis on land, securities, tax and insurance frauds, and, potentially, official corruption.

The project director is a former Federal prosecutor with experience in several U.S. Attorney's Offices and Strike Forces. He admittedly favors the non-Strike Force approach, where investigators investigate and bring the fruits of their investigation to the prosecutor to prosecute. Should the prosecutor, after receiving the case file, determine that additional investigation is required, the investigators are instructed to complete that phase. Similarly, complaints directed to the A.G.'s Office are referred to an investigation agency (or the A.G.'s civilian investigators) for an initial workup and given to the prosecutors when the case is "made." It is the project director's opinion that the unit ought to "focus on a case that is, and strengthen it," rather than select targets and develop evidence against them. The former, he argues, leads to prosecutable cases, the latter to intelligence gathering.

The SPS relies on its own twelve civilian investigators, the Department of Public Safety (the State Police Agency), local police departments, and agency investigators. There is no police unit specifically assigned to the A.G.'s Office to work with the Criminal Division or Special Prosecutions Section. Relations with the Phoenix Police Depart-

ment, while workable, are not as good as they could be.

Aside from these police units, the SPS has no independent intelligence capabilities at the present time. In fact, because so little work was done in the past, little is known about the nature and structure of organized crime in Arizona by the A.G.'s office. It is believed that repeated inquiries into land and securities frauds will develop this type of information.

The degree to which the work of the SPS is concentrated on paper cases in the specific areas mentioned above, is exemplified by the decision which was reached regarding the investigation of the well-publicized Bolles murder case. Although the murder of the newspaper reporter is alleged to be mob-connected, the prosecutor chosen to handle the case is the head of the Criminal Division, not the SPS. This was done for several reasons, including a lack of expertise in the unit, and the manpower requirements of the four month grand jury now in session.

The SPS is apolitical. Assistants are chosen from state certification lists which contain the names of numerous applicants, all of whom are interviewed by the project director before selection is made. Most new assistants have little trial experience, so the director has established an ambitious training program (conducted on Saturdays) in which assistants study selected trial records, deliver openings and summations, conduct direct and cross-examinations, and discuss trial theory.

According to the SPS director, aside from narcotics (which "everybody in law enforcement is working on"), "land and securities fraud is the key vehicle of criminal activity in Arizona." The reason given for this phenomenon is the "lure of Arizona land," the lack of any previous enforcement, and the inability of local C.A.'s to deal with the problem. According to the project director, the sale of land by misrepresentation, and the fraudulent sale of securities representing interests in land amount to in excess of $50,000,000 a year.

Although the white collar crimes against which SPS concentrates its efforts are complex, it has generally been able to make paper cases by subpoenaing and seizing records of target companies. These companies have been able to operate so freely, with so little fear, in the past, that their internal controls are very loose. When cases are made, the section hopes that employees of the target companies will turn, implicating their bosses and perhaps corrupt public officials, especially those serving in state regulatory agencies.

C. Methods of Investigation

As was noted above, the initial workup of a case is done by investigating agencies. Thereafter the matter is brought to the attention of the unit director who assigns it to one of his assistants. The attorney is charged with analyzing the file and, if appropriate, directing follow-up investigative work. Thereafter, he drafts proposed indictments and a prosecution memorandum outlining:

a. the background of the defendant;

b. an analysis of the relevant statutes and jurisdictional bases;

c. a statement of the fact;

d. an analysis of the evidence;

e. legal problems and suggested resolution.

If approval is granted by the project director and the A.G., the assistant is permitted to proceed to the grand jury.

D. Strategy and Goals

The SPS is in fact not an organized crime unit in the traditional sense. It uses neither traditional methods of investigation nor common strategies. It is a white collar crime unit—but it hopes that careful, dogged, and professional pursuit of those crimes will uncover organized criminal leaders and official corruption. It aims for deterrence of land fraud through successful prosecution and incarceration. It was established in the main to combat a particular evil that infests Arizona.

VII. THE COLORADO ORGANIZED CRIME STRIKE FORCE

A. General Information, Jurisdiction, and Structure

A Denver defense attorney has told the National Wiretap Commission that, "There is no real organized crime here in Denver." Many local law enforcement officials agree, although they admit the existence of small, independent, organized criminal groups. The Attorney General's Organized Crime Strike Force (OCSF), on the other hand, believes that, "Organized crime has existed and been tolerated in Colorado for more than 20 years."

The controversy does not stop there. OCSF, partly because of its unique structure, has remarkably good relations with local police, but remarkably bad relations with Colorado's District Attorneys, some of whom, unlike their counterparts in more populous states, have prosecutorial jurisdiction over several counties. The Strike Force considers many D.A.'s and their assistants to be lazy, politically motivated, and sometimes corrupt. Their conviction rates are low: two have recently been indicted.

The D.A.'s, for their part, traditionally fear abuse of statewide power and suspect the A.G. of planning a power grab. They also claim, with justification, that the Organized Crime Advisory Council, appointed by the Governor and formally occupying in the chain of command a place between OCSF below and the Attorney General above, exercises little supervision over the Strike Force. The A.G. has political and personal rivals who wish to take control of the unit away from him, and the unit's detractors have accused its members of various kinds of misconduct. A unanimously adopted resolution of the Colorado District Attorneys Association calls for transfer of OCSF's funds and function to the Colorado Bureau of Investigation (CBI).

A recent State Supreme Court case[1] has severely limited the jurisdiction of the OCSF by holding that indictments obtained by the Strike Force which resulted from submission of matters to a statutorily authorized statewide grand jury must be referred to local D.A.'s for prosecution. The impact of that ruling is potentially more damaging to the OCSF than any of the allegations or resolutions of the District Attorneys.

The OCSF staff includes a project director (who is a lawyer), two other attorneys, a financial officer, and fifteen police investigators. (Next year the unit will add two civilian investigators appointed by the A.G.)

Politics plays no part in selection of personnel, who may hold no political position. The investigative supervisor, in fact, prohibits his subordinates from even making political contributions. No unit member may hold outside employment.

The OCSF derives its uniqueness from the composition and recruitment of its investigative staff. Each police investigator, while temporarily assigned to the OCSF, is still a member of a local Colorado police department that has agreed to that temporary assignment as a way of coordinating and advancing its organized crime investigative capabilities. The director, investigative supervisor, (a Denver Police Department sergeant) and his men, decide which units ought to be asked to participate in the program. They then compile a list of officers they know, respect, and trust from that department. Should the unit agree to participate and to reassign one of the designated individuals to the OCSF, it still maintains ultimate control over that officer, and the officer is bound to obey his own unit's particular rules and regulations. Investigators are sworn in as state officials so that they have peace officer status in any geographical area in which they may work. Each is assigned to one of four teams which concentrates in a particular area of criminal activity.

The Strike Force encourages investigators to exchange information with their parent units. Regular intelligence reports, moreover, circulate among participating departments. The participation of local police, and OCSF efforts "to avoid acting as a prima donna," contribute to its good relations

[1] *People ex rel. Tooley* v. *District Court*,—Colo—549 P2d 774 (1976).

248-593 O—78—7

with local police agencies, which in turn contribute to the quality of its intelligence network. Nor does such cooperation stop at the state line; the unit works regularly with police agencies in neighboring states. In fact, it has shared information from its excellent intelligence files with two hundred and twenty agencies around the country. Its relations with Federal investigative agencies especially in the Colorado-Kansas areas have been professional and productive.

The OCSF has prepared a manual of procedure that contains a statement of its project goals, methods, and resources. This "mission paper" is thoughtful and realistic, providing a series of guidelines which define the type of investigations the unit should undertake.

While the project director ultimately controls the day-to-day operations of the Strike Force, investigative decision making is delegated to the investigative supervisor. Responsibility for case management appears to shift to the attorneys only after the matter is at the grand jury stage. There is no formal division of cases among attorneys; each is familiar with every investigation.

B. Methods of Investigation

The unit uses undercover officers often, in all types of cases. It generally uses its own investigators, but occasionally turns to other agencies; police units from Wyoming and Arizona have provided undercover officers on occasion. The Strike Force has found that it is able to use, with apparent safety, the same undercover officers again and again.

Many investigators prepare their own search warrant affidavits; any unit attorney can supervise drafting and approve applications, the entire process taking only a few hours. When security requires, all documents pertaining to search warrants can be sealed.

Ironically, the current Attorney General, in his former role as state Public Defender, was opposed to the use of electronic surveillance. He has since changed his position and OCSF has made limited, but valuable use of this technique.

OCSF does not use pen registers apart from wiretaps. Nor has it used bumper beepers; should it do so in the future, it will attempt to seek court approval in response to what its lawyers see as a trend in developing case law. Here as elsewhere, OCSF is thoughtful about the procedures it employs, recognizing that bad law made by one unit in one jurisdiction ultimately effects the entire law enforcement community.

OCSF uses consensual recording extensively, except where doing so presents discovery problems. It never records conversations with attorneys, however, without notification. Ordinarily, it records debriefing of turned defendants after initial negotiations are complete. Before a case is closed, the case agent is responsible for custody of the tapes. Tapes are kept in a sealed room. Departing from its usual care, the unit has neglected to issue official guidelines for custody of tapes and to insure that they are prenumbered.

The unit's street-wise investigators have a good informant network. The unit keeps no salaried informants, but pays instead for specific information; perhaps one percent of investigative funds goes to informants. (There is money available for relocation as well.) Each investigator keeps a record of his own informants; the investigative supervisor keeps a master list. Informants may sign receipts for payment with any name which the unit can trace and verify. OCSF attorneys seldom deal with informants; usually referring turned defendants to investigators.

The unit has not allowed informants to commit crimes. In fact, OCSF people seem to have given such a thing little thought. When the idea was brought to his attention, one staff member called this a "really tricky" area, but suggested that minor, nonviolent offenses such as gambling might be allowed, when that was necessary to obtain evidence.

OCSF offers several inducements to a turned defendant: a plea to a reduced count, perhaps a decision not to indict at all, a favorable sentencing recommendation, immunity for grand jury testimony. (Colorado law requires that immunity be granted only by grand jury vote. Thus OCSF can only *recommend* immunity, a fact of which it makes prospective informants aware.) The unit will not reveal an informant's identity unless a court so orders. OCSF makes informants aware of this possibility as well.

According to the project director, "The commitment of the staff is to employ every legitimate technique available to prevent and reduce organized criminal activity within Colorado." He does not consider legitimate the use of grand juries to obtain contempt or perjury indictments against de-

fendants whom the unit has insufficient evidence to convict of substantive crimes. Colorado law, moreover, provides only for transactional immunity, and OCSF is wary of giving any underworld figure an immunity bath. Thus, the Strike Force has not made use of the grand jury to punish organized criminals for refusal to truthfully testify about their activities.

The project director also considers harassment (questioning of family and the like) an illegitimate technique. Moreover, he considers such activity unproductive, and his colleagues agree. Agreement about its illegitimacy in not unanimous, however; some investigators say they might be willing to use harassment if they thought it was productive.

There is no formal program of routine physical surveillance, but investigators following leads use it. They attend funerals and other likely gatherings, using cameras and videotapes where appropriate.

OCSF, has access, through the Attorney General's Office, to a computer, which it has attempted to use in investigations of white collar crime. This innovative technique requires further development. According to a progress report, "Problems encountered in development of a computer program to identify the pattern of cash flow" were among the impediments to one investigation.

The unit values, but does not avidly seek, good press relations. It wants the public to be informed of the organized crime problem and will occasionally undertake an investigation largely because of its publicity value. The project director and investigative supervisor handle most press relations. No one may comment on a pending case.

C. Strategy and Goals

OCSF defines organized crime as any "family" activity, any criminal conspiracy of large (usually multi-county or multi-state) proportions, or as any group whose style of life and objectives are criminal. Such criteria are highly subjective, but the Strike Force believes that experienced investigators know how to apply them properly.

To accomplish the goals of its program, the Strike Force set itself seven task oriented projects:

Task 1:

To reduce the illegal professional gambling profit of organized crime through the investigation and prosecution of at least one major bookmaking operation.

Task 2:

To disrupt the organized criminal conspiracy of white collar crime in Colorado through prompt investigations using undercover agents to infiltrate the conspiracy.

Task 3:

To diminish the financial return of legitimate business takeovers by organized crime through identification of these legitimate business fronts and through enforcement of the tax laws, securities laws and regulations, and fair trade regulations.

Task 4:

Through efficient and effective use of limited personnel in the enforcement of this state's dangerous drug and narcotic laws, major distributors will be apprehended. Disruption of the interstate and international trafficking system will reduce the quantity of drugs available in the State of Colorado.

Task 5:

Monitoring organized criminal activity in other areas, especially theft and theft-receiving, and preparing at least one substantial case involving a major "fencing" operation.

Task 6:

To disrupt organized crime in areas outside the Denver metropolitan area through assistance to local law enforcement agencies and encouraging their requests for assistance.

Task 7:

To assist in grand jury probes, not necessarily defined under organized crime, by making available the legal staff and investigators to direct and assist these grand jury investigations.

Against more traditional criminal activities, (Tasks 1, 4, and 5) the Strike Force has done rather well, especially against bookmaking operations. For some time, Clarence "Chancy" Smaldone ran Denver's major bookmaking operation. Since he was seldom bothered much by the law, he ran things rather casually. He gave personal service, taking an occasional bet in a bar, speaking on the telephone with his colleagues. Electronic surveillance devastated his operation. Good, solid prosecutors and investigators (like those at OCSF) doing good, solid—but conventional—work (like that of OCSF) are very effective against overt, traditional organized criminal activity.

Much white collar crime (Tasks 2 and 3) is, in the words of a Strike Force progress report, "Hidden in a maze of corporate entities and sole proprietorships." Much of Colorado's crime is becoming more sophisticated; fighting this crime requires sophisticated law enforcement. OCSF ac-

knowledges this, and strives for "Increased imaginative use of the state and Federal tax laws, forfeiture provisions, licensing revocations, and cost of prosecution motions . . . ." The unit more than holds its own against unsophisticated crime. It is attempting through recruitment of investigators from "the East," training, and a willingness to use new and innovative investigative techniques to grapple with the sophisticated.

VIII. FLORIDA

Unlike the preceding studies, this one does not concern a unit whose purpose is combatting organized crime. It is, rather, a survey of recent statewide prosecutorial efforts in Florida.

A. The Committee

In 1968, the Florida Legislature's Select Committee to Investigate Organized Crime and Law Enforcement issued its final report. According to the committee, its investigative work and public hearings, "Uncovered . . . a closely knit family of underworld figures living, working and hiding in Florida." The interests of such a "family," it was further disclosed, was not limited to Florida, "but instead [wove] a network of crime throughout our country and around the world." In addition to organized crime's expected involvement in such crimes as gambling, prostitution, and narcotics, the committee reported a high incidence of corruption and massive infiltration of legitimate businesses. The committee explained:

> The mob likes to force its way into motel and hotel operations among other legitimate enterprises, because it gives them an outlet to put the money that they have made illegally from gambling, narcotics or loansharking.

As part of the legislative package, the committee recommended the enactment of laws authorizing electronic surveillance, certain mandatory sentences, stop-and-frisk, severe sentences for gambling and loan sharking and the equipment of the "Statewide crime fighting agency, the Florida Bureau of Law Enforcement with enough resources and manpower with which to effectively combat crime."

The committee chairman, now Attorney General, Robert L. Shevin concluded his report with the following:

> We know that organized crime is as big as U.S. Steel and has profits several times as large. We look forward to the day that we can mutually force organized crime into bankruptcy.

B. Legislative Responses

The legislature did, in fact, respond to the committee's findings and over a five-year period enacted legislation designed to strengthen the ability of law enforcement to deal with the problem of organized crime. Unfortunately, much of that legislation has not been effectively implemented.

In July 1969, the legislature, attempting to use a civil approach to combat mob infiltration of legitimate businesses, authorized the Attorney General to institute proceedings to forfeit corporate charters, revoke business permits, and enjoin business activity, of corporations and businesses whose management or owners were engaged in certain organized criminal activity. In *Aztec Motel, Inc.* v. *State ex rel. Faircloth,* the Florida Supreme Court held this enabling legislation unconstitutionally vague:

> The effort to correct a purported evil as recommended by a crime commission is commendable, but, when the means employed clash with our Constitution, this Court is compelled to follow organic law. The protective wall safeguarding the constitutional rights of all our citizens should not be pierced, or even cracked, by public opinion.[1]

Pursuant to Federal law, the Florida legislature also passed an electronic surveillance statute. Authorization to apply to a court of competent jurisdiction for an eavesdropping warrant has been given to the State's Attorney, Attorney General, and Governor. An analysis of the manner in which such eavesdropping authority has been used, and its effectiveness as of May 1975 was undertaken by the National Wiretaping Commission. The 1975 Report of the Administrative Office of the United States Supreme Court indicates that in the period January 1, 1975 to December 31, 1975, there were sixty-eight eavesdropping warrants issued in the State of Florida, eighty-five percent with gambling

[1] 257 So. 2d 849, 852 (1971).

as the designated offense, a figure which may be compared to a national rate of fifty-eight percent.

Finally, in 1973, the Statewide Grand Jury Act was passed to, "Strengthen the grand jury system and enhance the ability of the state to detect and eliminate organized criminal activity by improving the evidence-gathering process in matters which transpire or have significance in more than one county." In essence, the act authorized the Governor, "for good and sufficient reason," to petition the Supreme Court to empanel a twelve-month statewide grand jury. The statewide grand jury may return indictments and presentments irrespective of the county or judicial district where the offense is committed or triable. If an indictment is returned, it shall be certified and transferred for trial to the county where the offense was committed." The grand jury's legal advisor is a State's Attorney, selected by the Governor and approved by the court. The State's Attorney used his own staff to fulfill his additional functions. There is, however, no permanent statewide prosecutor to investigate organized criminal activity and present matters to a grand jury.

C. Governor's Special Counsel for Organized Crime

The Governor's Special Counsel for Organized Crime, in addition to advising the Governor, acts as a liaison with the legislature and state, Federal and local law enforcement officials, in the organized crime area. This rather unique and specialized position is relatively new, having been established in 1973 through a grant from the Law Enforcement Assistance Administration.

The Office of Special Counsel is not operational, i.e., the counsel is not intended to be a participant in ongoing investigations, giving direction to officers or making tactical decisions. The Governor has taken the position that it would be unwise for him to become embroiled in investigations which may involve corruption and have political consequences, since the effectiveness of the operation would be diminished by a certain attack on his motives. Thus, the Special Counsel, while coordinating the law enforcement efforts and analyzing the suitability of investigations for statewide grand jury action, has a severely limited role in "making cases." In fact, in order to limit the Governor's involvement in ongoing investigations, the Attorney General has in the past year assumed the position of the state government's applicant for eavesdropping warrants.

The Special Counsel, has, however, taken an active role in the determination by the Governor to petition the Court to empanel two statewide grand juries.

Grand Jury I, as it is known, was designed to demonstrate the utility of a grand jury on a statewide level. Immediately after the Statewide Grand Jury Act was passed, the Special Counsel conferred with officers from the Department of Criminal Law Enforcement (DCLE) to choose an investigation which would be suitable for this purpose. The only prospect with multi-county jurisdiction involved a joint investigation between the DCLE and the Drug Enforcement Agency (DEA), which ultimately resulted in a seizure of twenty-five tons of marijuana but which was expected to develop proof of cocaine dealing by known targets.

Upon the Governor's petition, a Grand Jury was impaneled and a state's attorney selected as its legal counsel. Unfortunately, the expected proof never materialized and the grand jury heard evidence which related only to marijuana, hardly an impressive beginning. Moreover, the actual presentation was drawn out, unwieldy and without structure. With the advantage of hindsight, the consensus was that that particular investigation was ultimately a poor choice for the following reasons:

1. the case was too amorphous and unmanageable;
2. it had not ripened to the point where a packaged presentation could be made;
3. there was no direct organized crime involvement;
4. expectations were unrealistically high;
5. the case was the only one available, and hence a critical evaluation was not undertaken.

Grand Jury II resulted from a different set of circumstances. The Dade County Public Safety Department and Federal Strike Force were engaged in a gambling investigation of multi-county dimensions. The Governor's Special Counsel, while briefed on developments, followed the "non-operational" policy described above, and referred the law enforcement officials to the Attorney General when electronic eavesdropping authority was requested. All strategic and tactical decisions were made by the Strike Force Attorneys and Dade County Police—no state prosecutors were involved.

While the electronic surveillance was continued (but at a time when arrests were imminent) the Governor was asked to petition for a grand jury; hence Grand Jury II. He thereafter appointed a State's Attorney as legal counsel and was no longer involved in the proceedings.

As in Grand Jury I, problems abounded, but of a different nature. The designated State's Attorney was accused of seeking publicity. There was interagency jealousy, and disagreements as to how the investigation ought to be run. Once indictments were returned, they were given to local prosecutors who had not been previously consulted, and who often considered the product they were handed as "garbage." There was, of course, neither oversight nor a standard plea policy. Finally, for the purpose of trial, the investigating police officers were forced to travel throughout the state.

D. Office of the Attorney General

Absent a possible common law power, and with the exception of handling appeals in criminal cases, the Attorney General has no criminal jurisdiction. Moreover, with only seventy attorneys and five investigators, it is unrealistic for him to commit a sufficient number of assistants to organized crime work for there to be an appreciable impact, according to his executive assistant.

Finally, the legislature has never enacted a law similar to the one struck down in *Aztec Motel Inc.,* which would meet constitutional standards, and which would permit the Attorney General to attack the infiltration of legitimate business in the civil courts.

E. Practical Results of the Current Prosecutorial Structure

It has been repeatedly asserted that local State's Attorneys in Florida suffer from a lack of funding, have established violent street crime as their number-one priority, and generally are not under public pressure to investigate organized crime. Some have been accused of ostrich-like blindness to a real problem and others of euphemistically running loose ships. At the present time, few have specialized prosecutorial units widely known for competent or innovative work in the field.

As a result, statewide police units like the Florida Department of Criminal Law Enforcement, who are interested in working in-depth investigations, tend to turn to the Federal attorneys. The effect is that the DCLE has become the local police arm of the Federal Strike Force working with Federal agencies to solve state cases. A second effect is that investigations are handled in a random manner, when one is finished, another begun, with no strategy being employed to deal with identified problems on a continuing or long-range basis.

With only six Federal prosecutors to investigate and prosecute cases from Miami to Memphis, this is not viewed as a workable solution by any informed observer. It was uniformly acknowledged that whatever political considerations or roadblocks lay in the way of the establishment of a statewide prosecutor with a staff capable of running investigation and submitting matters to the grand jury, such a unit was absolutely necessary for any sort of effective work in the organized crime area.

IX. THE LOUISIANA ORGANIZED CRIME AND RACKETEERING UNIT

A. General Information and Jurisdiction

The Organized Crime and Racketeering Unit of the State of Louisiana (OCRU) is a section of the Attorney General's Office financed by a grant from the LEAA. It began as a pilot project in 1971 and became fully operative in 1973.

Although OCRU has statewide jurisdiction as an investigative agency, it may not initiate criminal proceedings, impanel or present evidence to a grand jury, or prosecute indictments in state courts without an invitation from a local D.A., unless "cause is shown" for OCRU intervention. To date OCRU has not attempted to show cause, prosecuting only when a D.A. recuses himself, asks for assistance or agrees to a joint effort. Through the Attorney General's Office, OCRU has civil jurisdiction, which it has used on occasion to enjoin the use of certain houses of prostitution.

Because of OCRU's tenuous jurisdiction, its potential success depends largely upon the good will of other law enforcement agencies. One factor which has helped secure that good will is the prior experience of many of OCRU's investigators as officers in local police units. Investigators can thus use personal relationships to coordinate investigations, ask favors, and receive and disseminate information. These relationships depend on trust, so that the reputations of the investigators and their knowledge of local police are important assets. According to OCRU's chief, three other factors account for the unit's success in gaining cooperation from police: the unit has good relations with the press, which has emphasized and publicized its willingness to undertake investigations; investigators lecture regularly to police groups; and, although responsible for investigating police corruption, investigators are not viewed as "shooflies" or "headhunters" with whom local units hesitate to work.

In Louisiana, as elsewhere, many agencies are charged with law enforcement in the organized crime area. Among them are local D.A.'s and sheriffs (one each per parish), the Louisiana State Police (especially its intelligence unit), and the Metropolitan Organized Crime Strike Force (MOCSF), in addition to Federal agencies coordinated by the local Strike Force.

OCRU believes it cannot trust—and so avoids—some members of some units. Problems arise, too, from interagency jealousy. Moreover, new privacy laws and the alleged resistance of the Strike Force to using electronic surveillance sometimes strain Federal-state relationships.

Despite these problems, OCRU has fairly good relations with most police intelligence units. Local D.A.'s have not shut grand jury doors to OCRU, either (for reasons that vary from a conflict of interest, a genuine desire for help in complex cases, to fear that excluding OCRU will cause unfavorable publicity and might result in a "showing of cause").

The unit has a unique relationship with MOCSF (composed of A.D.A.'s and police from Orleans and Jefferson parishes), in part because the A.G. sits on the board which guides MOCSF. MOCSF was formed at a time when OCRU found that it was not succeeding in investigations into loan sharking and fencing on the docks. OCRU had only adequate relations with the harbor police but more helpful relations with custom officials, and the targeted crimes were particularly hard to uncover, in view of the consensual nature of the activity. The units decided that OCRU would, as the "first boy on the block," "oil the squeaking hinges" by going after highly visible organized criminal activity. MOCSF as the "second boy on the block," took what was left, concentrating on loan sharking, theft and fencing, and illegal activities on the waterfront.

OCRU defines organized crime as, "A continuing criminal conspiracy operating legally and illegally within society, with a profit motive, utilizing the tools of fear and corruption." This definition includes corruption in the criminal justice system; other corruption is generally handled by the corruption unit of the A.G.'s Criminal Division. OCRU will initiate or participate in investigations

of cases "fitting the definition of organized crime" when local units are unwilling or unable to successfully undertake them. Cases receiving public scrutiny or in which there is public pressure receive top priority.

B. Structure and Staff of OCRU

The unit is comprised of chief prosecutor with his staff of attorneys and a chief investigator with his staff of investigators, all supervised by the chief of OCRU, a former FBI Special Agent. Both the chief prosecutor and the chief of OCRU are assistant attorneys general. The unit also employs a financial analyst. Attorneys, commissioned as State Police Officers, have peace officer status and may carry weapons, although few do so regularly.

The unit hires attorneys on a nonpartisan basis (the administration is Democratic; the chief prosecutors have been Republican) after a series of interviews and a complete background check by the investigators. An attorney with less than five years' membership in the bar is a "staff prosecutor"; with more than five years, an "assistant attorney general." Outside noncriminal practice is allowed, with these restrictions: it must take place outside the hours of 8:30–5:00 Monday–Friday; court dates must be on compensatory time off or annual leave; names and backgrounds of all clients must be submitted to the unit to avoid any possible conflict of interest.

Since local D.A.'s prosecute ninety percent of the indictments resulting from OCRU's efforts, its attorneys have little or no trial experience. The chief prosecutor conducts almost all of the five or so trials which OCRU retains each year. His assistants take care of motion practice, subpoenaing records, and interviewing witnesses.

There is little in-house training for OCRU attorneys; the unit does send them to organized crime seminars elsewhere. OCRU has tried—with little success—to develop a program with the D.A.'s of Jefferson and Orleans Parishes, in which attorneys would try misdemeanor cases. The attorneys have received training from the National College of District Attorneys.

C. Methods of Investigation

OCRU uses it own investigators as undercover officers, primarily in vice, gambling, and narcotics work. Financial considerations have limited the duration, hence the depth of probes and all have been at street level. No investigator has yet been uncovered during an investigation. This success is attributable to the investigators' prior undercover experience, in-house training, attendance at the Dade County organized crime courses, and perhaps to the brevity and shallowness of investigations.

Investigators prepare search warrants, which are reviewed by an attorney—generally by the chief prosecutor. Since most warrants involve gambling, forms have become standard, and the entire process takes only two or three hours.

Louisiana has not authorized non-consensual electronic surveillance and in no cases brought to it by OCRU, has the Strike Force agreed to make application for such court-ordered eavesdropping. The lack of this tool has, in recent years left OCRU without an up-to-date understanding of the structure and activities of the resident Marcello family, according to the chief of the unit.

OCRU uses consensual surveillance occasionally for the safety of undercover officers and informants; almost never for evidentiary purposes. The unit's attorneys feel that use of recordings discourages investigators from using their memories and keeping adequate notes, reports, and records. They argue that recordings are of poor quality, contain extraneous material and require much time to transcribe. Moreover, some believe that "jurors view tapes with distrust." In short, "tapes are overrated."

The OCRU chief maintains a control file of informants to which only the intelligence analyst and the investigator or attorney responsible for a particular informant have access. An informant is paid a cash sum based on the value of his information according to LEAA guidelines—never a salary. Payment is made only after receipt and verification of information. OCRU will promise only to keep an informant's identity secret, to refrain from compelling his testimony, and to make his cooperation known to a sentencing judge with a recommendation for leniency.

As noted above, OCRU can use grand juries only in special circumstances. No statewide grand jury exists. Local grand juries are empanelled twice a year for six months' duration. No witness has yet been charged with contempt for refusal to answer and evasive contempt is unheard of.

OCRU's occasional use of injunctive relief has been noted. It also has transmitted information con-

cerning tax violations to the State Department of Revenue and information concerning liquor violations to ABC authorities.

D. Strategy and Goals

The unit's expressed goals are (1) to assist and coordinate the attack on organized crime, (2) to root out corruption, and (3) to suppress vice. In pursuit of these goals, the OCRU chief, borrowing from his FBI experience, has developed a variation of the "case agent" method. Since attorneys are police officers as well, the case agent may be either an attorney or an investigator. Often, as the case work changes from mostly investigative to mostly legal, an attorney may take over as case agent from an investigator. The case agent supervises all others working on the case and reports regularly to the OCRU chief who assigns the cases. Cases are often assigned to an investigator or attorney who has special knowledge of the background of the case, the criminal activity involved, or the subjects of the investigation. When documentary evidence is important, an attorney will more likely be assigned. Attorneys do not become potential witnesses in cases in which they might have to prosecute.

Investigators are assigned more cases than attorneys, perhaps thirty or thirty-five matters, which the chief reviews every thirty to ninety days.

According to the chief of the unit, the use of attorneys for field work gives him additional investigative manpower and hence greater flexibility, and gives the attorneys a greater appreciation of what field work involves: "A policeman should be more of a lawyer and a lawyer more of a policeman."

This description is probably more theoretical than actual. It appears that attorneys work almost independently of investigators, the former handling investigations into white collar crime and official corruption, the latter more traditional organized crime, especially illegal gambling. Investigators consider attorneys ineffective field operators. Moreover, the perception of the staff attorneys by the investigators as being young and inexperienced, results in the investigators seeking their advice only when compelled to do so. (An office rule requires that all search warrants be approved by an attorney, for example.) Even in those instances, the investigator will generally go to the chief prosecutor and avoid the staff attorneys. With few exceptions (and exceptions do exist) the prevailing view of the investigators is, rightly or wrongly, that "they know as much or more than the lawyers." The degree to which the staff attorneys are aware of the feeling is questionable. As one attorney stated (he is probably one of the exceptions), "The strongest thing in the office is the relationship between the attorneys and investigators."

With a minimal staff of investigators and attorneys, with no real independent authority to initiate grand jury proceedings, with no electronic surveillance capability, and with political funding problems, OCRU has had a difficult time in accomplishing its goals.

Essentially the OCRU has attempted to loom as an omnipresent force over the local D.A.'s, aiding, cajoling, threatening, and facilitating them to increase their efforts in combating overt manifestations of organized criminal activity. By building "a track record," the OCRU hopes to demonstrate that if the local authorities do not take action, they will be embarrassed, and that if organized crime continues to operate openly, they face, at the very least, interruption of their most lucrative enterprises.

OCRU has thus attempted to make cases quickly, and to let the public know of its accomplishments. To do this they have concentrated on essentially three types of investigations. The first is, in the words of the OCRU chief, "To kick them where they're susceptible." In substance, this has resulted in the plethora of gambling matters. The second approach is to join with other agencies in a task force, in which a target is selected, intelligence gathered and pooled, surveillance instituted, and hopefully criminal activity discovered and prosecuted. Finally, OCRU has attempted to work with investigative reporters in developing public corruption cases which result in convictions and demonstrate the unit's integrity and dedication.

An analysis of the productivity of these methods of investigation indicate that substantial prosecutions having a severe impact on organized criminal activity, either economically, personally, or organizationally has not resulted.

Gambling investigations are routinely carried out by the investigators. An informant provides a number of a horse room. A call is made to establish probable cause. Physical surveillance discloses the identities of the clerks. A search warrant is obtained. The clerks are arrested and evidence seized. The clerks plead guilty and are fined $100. The records are analyzed and hopefully numbers of other

bookmaking offices are obtained. The process repeats itself. At best, publicity results, local prosecutors are embarrassed, and the room is put out of business for a short time. There is no attempt to infiltrate the bookmaking fraternity, no method employed to make cases against bosses or to use the clerks as informants; in sum, no strategy to effectively fight what is admittedly a "tremendous gambling problem."

The task force approach was minimally productive. Targets were chosen who satisfied several criteria: 1) related to organized crime; 2) up and coming; 3) transacted business in the open; 4) operated in more than one county. After months of physical surveillance only two ventures resulted in arrests, one for a petty burglary, the second for a minor violation of the ABC regulations. Unfortunately, the Federal agencies withdrew from the task force because of problems they faced in revealing their intelligence files.

Finally, the attack at corruption by working with investigative reporters again proved to be only minimally productive. In one case after a lengthy grand jury probe, although political favoritism was uncovered, no criminal acts could be proved. The OCRU was prohibited by law from issuing a grand jury report calling for remedial legislation. Failure to charge evasive contempt meant "forgetful" witnesses were not punished. In another case, two attorneys, two accountants, and two investigators were assigned with the chief prosecutor to delve into a mountain of files. Finally it was determined that only the U.S. Attorney with a staff of sixteen auditors could handle the paperwork. The OCRU was left with following up relatively minor secondary allegations.

Despite OCRU's limitations as an investigative and prosecutive agency, and accepting the fact that its role as a watchdog is in most cases duplicated by the Federal Strike Force, the staff of the unit, including investigators and attorneys are convinced that its existence is important.[1] It is first argued that its "watchdog" and coordination functions are properly state functions and that it should not be left to the Federal government to "supervise" local district attorneys. Moreover, they believe that whatever their limitations, they, as a state agency, can more effectively work with the local authorities to develop meaningful cases. It is contended that there is a resentment by local law enforcement to Federal intervention in what is viewed as essentially a local problem. Thus, the OCRU's success to date in working with numerous agencies would be unattainable by the Strike Force.

Numerous letters of support for OCRU are powerful indications of the acceptability of a statewide prosecution unit dedicated to honest law enforcement by a whole range of state and local authorities. Those letters should not go unnoticed.

[1] After the preparation of this report, the Louisiana State Legislature fully funded OCRU, ending LEAA participation. LEAA, at the same time, cut back funding for MOSCF, and the Justice Department closed the New Orleans Strike Force. Consequently, OCRU is now the only viable agency in the state whose whole resources are devoted to organized crime control.

X. THE ORGANIZED CRIME DIVISION OF THE MICHIGAN DEPARTMENT OF THE ATTORNEY GENERAL

A. General Information and Jurisdiction

The Organized Crime Division (OCD) was formed in 1967, at the time the President's Commission on Law Enforcement and Administration of Justice was urging all states with organized crime problems to create state level units to combat those problems. The unit has had nearly ten years of continuous operation under one director. Michigan's elected Attorney General can thus claim to have the oldest anti-organized crime unit (in continuous existence) of America's fifty Attorneys General.

OCD is one of twenty-two line divisions in the A.G.'s Department. Unlike other divisions, however, it exists not by statutory authorization, but because of the A.G.'s personal interest in its activities. The director reports directly to the A.G.

OCD's main office, like those of the rest of the department, are located in Lansing, the State Capitol. Agents from this office cover multi-county territories in which they provide requested assistance to local police, develop intelligence through informants, take the lead in OCD investigations focusing on their territories, and provide liaison with other law enforcement agencies.

OCD also has a field office in Detroit. Agents there concentrate on organized crime in the metropolitan area, cooperating often with the Wayne County Organized Crime Task Force. Indeed, a great deal of the division's work is concentrated in the Detroit area. Many people including the director, believe that the main office should be in that city; the A.G. prefers to have the director close by and immediately available.

OCD seeks to encourage the formation of joint strike forces to attack specific targets. It originated and cooperated with the Detroit Police Department in a long probe of police corruption in that city, and has participated in other interagency teams involving State Police and various Sheriffs and Police Departments. The Division has willingly turned over information and informants to other agencies, including the FBI and the Wayne County [Detroit] Strike Force. Its relations with Federal agencies have been good.

B. Structure and Staff of OCD

The unit's director is a retired chief of detectives of the Detroit Police Department and unlike directors of similar agencies, a non-lawyer.

In fact, the division contains only a single attorney, who started his career in the Department of Highway Division, from which he requested a transfer to OCD. He came with (in his own words), "little knowledge of criminal law." By now he has certainly remedied that deficiency, since he has for 3 years single-handedly prosecuted a broad range of criminal cases, handled administrative proceedings against organized crime business interests, and provided legal advice to other division employees; all this with what may charitably be called a modest law library. He does have two law student assistants, one for the summer only, and one who will help part-time during the school year.

The director, his two agent supervisors (one for each office), his intelligence analyst, and two of his six agents, are former Detroit policemen. Most have had substantial service with that department's Intelligence Unit. The remaining agents have had little police experience, none with major urban departments. Each does have a college degree, however, and after a period of in-house training and field experience, does a creditable job. Agents earn from $9,300 to $16,000; supervisors from $12,400 to $19,000. The director finds that agents stay an average of three years before moving to better paying jobs in law enforcement; the small division offers little chance for vertical mobility.

All OCD personnel are full time state civil service employees. The unit prohibits all outside employment, including teaching or writing by its attorney. Public appearances must not present even the appearance of conflict of interest.

The attorney and his colleagues among the agents get along well. The former attends supervi-

sors' meetings and receives routine intelligence and investigation reports. The director, who believes in "front end" involvement by lawyers, encourages agents to confer with the attorney, of whose work they speak favorably. Moreover, investigative decisions appear to be influenced by legal considerations propounded by him.

C. Methods of Investigation

Few states whose A.G.'s have criminal jurisdiction are likely to have a legal climate less salutary for anti-organized crime efforts than does Michigan. Statutory law prohibits most electronic evidence gathering, and case law limits severely what is left—consensual recording or transmission of conversations. The unit interprets state law to require a warrant for use of bumper beepers, which it has not used.

Except in Wayne County, Michigan has no regularly constituted grand juries, so neither OCD nor local prosecutors make extensive use of grand juries to investigate organized crime and official corruption. State law provides only for transactional immunity.

The director has an extensive network of informants and expects agents to develop their own criminal and non-criminal informants. (A jail interview program is a regular part of each agent's duties.) The unit has no salaried informants, but pays for information ad hoc. A division fund provides payments up to $500 to an informant; the A.G. must personally approve larger payments. The unit insists on strict informant controls: registration, signing of vouchers for money received, advance authorization by the director or a supervisor of any payment, a written justification memorandum before payment.

OCD participated at one time in MINT—the Michigan Intelligence Network Team—a group of about fifteen police agencies participating in a surveillance program and an intelligence exchange, originally supported by an LEAA grant. The division still receives valuable information from MINT, but no longer participates actively, apparently because the surveillance targets were not primarily organized crime figures and because the group has not used the most sophisticated techniques. OCD agents are trained in the use of the unit's surveillance photographic equipment.

OCD's attorney sees tax and antitrust investigations as potentially fertile areas, but the unit has yet to undertake any. It does not employ any financial investigators of its own, but can use investigative accountants from the Auditor General's Department.

Because of the director's reputation for concern about the effects of pretrial publicity on defendants' rights and also because of the A.G.'s confidence in him, OCD has a relatively free hand in press relations. Announcement of indictments, however, and statements about major matters, like proposed legislation, came from the A.G. The director makes fairly frequent public appearances and is very active in various law enforcement associations. He spends much time initiating and encouraging interagency task forces and conferences. His concern about interagency cooperation has contributed to an unselfish attitude about helping other agencies earn and receive credit for successful investigations. Some observers, however, contend that this unselfishness has resulted in a failure by OCD to build a public constituency for itself, which may harm its long-run chances of survival and effectiveness.

D. Strategy and Goals

Agents do work on gambling cases when local agencies request their help, but the unit gives gambling investigations a low priority. Loan sharking, believed to be a prime source of revenue for hard core organized crime, receives a higher priority, especially in the Detroit area.

The unit undertakes narcotics investigations in order both to aid local police and to secure intelligence on emerging Hispanic and Black organized crime units.

OCD emphasizes both case making and intelligence activities. It pursues a very active intelligence gathering and dissemination program, but it considers case making important as well. It has been turning increasingly to efforts against official corruption.

In recent years state purchasing agents have started requesting information from OCD about possible organized crime connections of companies seeking state contracts and refusing awards to mob controlled companies. The Division believes that many of the agents feel that OCD knows of prior illegal or improper awards and thus now routinely check to protect themselves.

Another example: Following a recent OCD investigation and prosecution of a judge and a state

senator, the state's Judicial Tenure Commission hired an aggressive director who is vigorously investigating allegations of judicial corruption. Unlike many of his counterparts elsewhere, the director believes that effective coordination among law enforcement agencies is rarer today than ever before. His cooperation with local police, participation in task forces, dissemination of intelligence, and unselfish press policy are all aimed at increasing such coordination.

One impediment to reaching this goal is hostility to OCD among state legislators and other state officials. The unit remains short of manpower; the director has had to struggle to maintain its strength. OCD still has no statutory mandate; it must depend on the excellent reputation of the director, plus the interest and good will of the A.G. When the present director leaves, even OCD's existence may be in jeopardy.

XI. THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY ORGANIZED CRIME AND SPECIAL PROSECUTIONS SECTION

General Information and Jurisdiction

In 1968, the New Jersey Legislature, responding to a public outcry, including the allegation that New Jersey was "the most corrupt state in the Union," enacted a number of measures aimed at organized crime and official corruption. Among these were authorization of court-ordered wiretaps, provision of use immunity, and creation of a grand jury with statwide investigative jurisdiction. Subsequent legislation empowered the Attorney General to prosecute indictments returned by the statewide grand jury. New Jersey's A.G., appointed by the Governor and serving a term coterminous with his, thus has complete original jurisdiction in the area of organized crime. Since the Superintendant of the State Police, also appointed by the Governor, operates under the authority and direction of the A.G., the latter is among the country's most powerful attorneys general.

His office, formally the Department of Law and Public Safety, is divided into divisions, which are in turn divided into sections. The Organized Crime and Special Prosecution Section (OCSPS) is within the Division of Criminal Justice. The men who co-founded OCSPS and initially served as its co-attorneys-in-charge insisted upon, and were granted, three conditions: 1) absence of political interference with the section's work or selection of personnel; 2) freedom to choose the subjects and methods of its investigations; and 3) exclusive authority over its operations.

Unlike similar units, OCSPS has never had to refer a case elsewhere for lack of resources. The section has always emphasized the important relationship between organized crime and official corruption; in fact, on a comparative basis, it now devotes more time and resources to political corruption than traditional organized crime cases.

OCSPS has excellent relations with the Drug Enforcement Administration and with other Federal agencies, due in no small part to one of the section's founders being a past chief of the Criminal Division of the U.S. Attorney's Office in New Jersey and the other a past attorney (assigned to New Jersey) for the Organized Crime and Racketeering Section of the Justice Department. The former has become assistant to the Division Director for Investigators; in that job he screens potential investigations and assigns them to OCSPS (or another section), or refers them to outside agencies. The latter remains OCSPS's Attorney-in-Charge.

By far the most important of OCSPS's connections with other agencies is its relationship with the State Police. A few years before OCSPS's founding, the State Police had established an Intelligence Bureau and an Organized Crime Task Force. The State Police Superintendent, whom OCSPS's founders knew and trusted, convinced them that his agency could provide adequate investigative manpower. As a consequence, the section, unlike most units of its kind, does not have a squad of investigators under its command. Its investigators are officers operating within the traditional State Police chain of command. Yet so good has been the cooperation between police commanders and OCSPS's Attorney-in-Charge that this arrangement is very satisfactory. Section deputies, moreover, instead of remaining in the Trenton main office, spend much time in the field, where their interaction with police officers encourages cooperation.

The State Police Intelligence Bureau is among the most sophisticated such units in the country. Its field agents in the three regions (Northern, Central and Southern) of the state and its central analytical staff in Trenton work closely with OCSPS's attorneys.

B. Structure and Staff of OCSPS

The section's Attorney-in-Charge, who ordinarily reports to the division director but has direct access to the A.G. when necessary, supervises the ten other OCSPS lawyers directly. No intermediate level of supervision exists. The Attorney-in-Charge controls the details of his subordinates' work, making all their assignments and reviewing their progress. He, together with the assistant for Inves-

tigations and State Police Commanders, formulates the unit's strategy, a process in which the other attorneys do not take part.

Attorney positions are not Civil Service jobs, but lawyers who choose to do so may expect to remain with the department through changes of administration. The unit has no rule about prior experience. At least two attorneys are former judicial clerks. One is a former FBI agent; another a former IRS Intelligence Agent; each of these had seven years' investigative experience before joining OCSPS. Others have worked elsewhere in the department: one in the trial section; another in the Civil Division. The common denominator and perhaps the most important qualification is a willingness to work hard.

As a rule most cases developed through the statewide grand jury are tried by the A.G.'s trial section. OCSPS, however, does retain some cases, including those involving electronic surveillance. The section prefers that its lawyers participate in some trials—perhaps three or four a year—as lead attorneys or assistants to Trial Section lawyers, in order to develop trial and grand jury skills.

Moreover, the unit believes that its lawyers have the motivation to present the strongest possible cases (since they initiated them), have the greatest knowledge of their intricacies and are the only ones capable of handling matters involving electronic surveillance.

The Attorney-in-Charge earns $36,000 per year, comparable to pay for equivalent jobs in the U.S. Justice Department. His subordinates earn from $15,000 (for a new law school graduate) to $28,000. After about three years, most earn between $20,000 and $25,000. At that time, many must choose between more lucrative private practice and remaining with the Department. The Department allows no outside legal work, except teaching and writing. Even these must not present any appearance of conflict of interest.

Technically, attorneys are assigned to OCSPS's central office at State Police Headquarters in Trenton. Deputy attorneys are assigned specific geographic areas, however, where they spend a good deal of time. The state is small and has a good road system; deputies can fairly easily travel between Trenton and their regions in state-provided cars.

The section has a capable secretarial staff of five. One secretary has exclusive responsibility for preparation and maintenance of electronic surveillance documents; another serves as clerk of the State Grand Jury, handling all its administrative work. The section employs a former Deputy U.S. Marshal, experienced in the Federal Witness Protection Program, among whose duties is liaison with federal agencies, and an investigative accountant.

State police investigators conduct security checks on all personnel, as does the unit chief through his nationwide network of contacts. The unit's offices, located within the fenced-in State Police Headquarters, are equipped with alarms for security.

OCSPS conducts no formal training program, but does employ an informal, step-by-step orientation of new attorneys. A new attorney becomes familiar with the general operation by working in the central office. He analyses an investigative file and prepares a memorandum on it. He next works with a senior attorney interviewing witnesses, first outside the grand jury, then before it. Finally, he is assigned to the field and develops his own cases. The section assumes that any deputy can handle any case; assignments are geographical rather than topical.

C. Methods of Investigation

The State Police provide OCSPS's electronic surveillance equipment and the personnel to operate and maintain it. The section relies heavily on electronic surveillance; about two-thirds of its organized crime cases are made with the aid of wiretaps, and two-thirds of its official corruption cases with consent recordings.

Department policy requires very detailed documentation for wiretap applications, in contrast to the extreme simplicity of the section's other paperwork, and reviews it all. The division director and the A.G. also review all applications before they are submitted to a judge. Department policy also requires the A.G.'s consent before an informant wears either a body recorder or transmitter. New Jersey is a one-party consent state; both private citizens and police can intercept or record wire or oral communications to which they are parties or where they have the consent of one of the parties.

When the section presents cases to the statewide grand jury, state law enables it to extend use immunity to witnesses. Occasionally, moreover, it will make informal agreements to confer transactional immunity.

No one in the unit discusses pending investigations with the press. The A.G. announces indictments, although he does permit the section chief to decide whether to respond to any inquiry from the press. The Attorney-in-Charge values an informed press, yet remains sensitive to the possibility of prejudicial pretrial publicity and thus is guarded in his press relations. The section does not operate a speakers bureau.

D. Strategy and Goals

The unit began as part of a response to a public demand: "*Do* something about organized crime and official corruption." The Attorney-in-Charge realized that such a public clamor eventually dies down, and that attorneys general—and possibly their commitment to anti-organized crime efforts—change with changes in administration. They thus set out to institutionalize an anti-organized crime capability. They spent much time considering, and committing to paper, procedures—especially for electronic surveillance. They sent State Police officers to New York and other jurisdictions with experience in electronic surveillance. They met frequently with the assignment judge who would supervise the new statewide grand jury. They sought to reinforce their relationship with the State Police Superintendent. They decided that OCSPS would be case rather than research oriented, partly because they saw the need to take highly visible action in order to convince government officials and the public of the section's seriousness and usefulness. (At the same time, the Attorneys-in-Charge feared that a few quick hits might harm their long-term objectives. Opponents, pointing to quick successes, might dispute the need to increase OCSPS's resources.)

It has already been noted that the section emphasizes the connection between organized crime and official corruption and that it now undertakes more cases involving the latter than of typical organized criminal activities like gambling, loan sharking, and so forth.

One of the most interesting and important aspects of the section's work has been its use of feasibility studies, or in intelligence parlance, strategic probes. These are attempts to measure the nature and scope of organized crime in a particular area and to determine the probable effects of a potential investigation. Such knowledge helps OCSPS make the best use of its resources.

The first such feasibility study focused on the Port of Newark-Elizabeth area, the state's primary cargo and freight center and a waterfront of enormous size and economic importance. According to reputation and "abstract intelligence"—general information but not investigative leads—labor racketeering, gambling, loan sharking and cargo theft plagued the area.

The unit assembled a lawyer, an accountant, and two detectives, all expert in matters concerning labor unions. It instructed them to review all pertinent information in State Police files, to determine the nature and extent of organized criminal activity in the area, and to find out who controlled that activity. It charged them to consider such things as the climate of fear in the area and possible reluctance of people to cooperate with law enforcement, and to determine the vulnerability of organized crime to an investigation.

State Police officers debriefed their informants in the area and sent the results to the study group, which reviewed the results of previous wiretaps and undertook a jail interview program to develop new sources of information. After several months of intensive effort, the study group submitted an analytical memorandum. Its conclusion: There was insufficient hard information—leads—to justify a major commitment of resources to an investigation of the port area.[1]

This initial study accomplished two ends: it helped OCSPS avoid a potentially long and costly effort which apparently had little likelihood of success, and it established a pattern for stage development of future investigative efforts.

The unit has since undertaken four more studies. Three have led to major investigations, one of which aimed at the Joseph Zicarelli organization in one New Jersey county. It resulted in the destruction of that organization's control of gambling in the county, fragmentation of a previously cohesive organization, and increasing reluctance on the part of law enforcement and political officials to cooperate with that organization. (One State Police commander suggests a negative result: the movement of criminals from gambling to narcotics operations because the latter became only marginally more risky and remained enormously more profitable.) This whole approach has led to intensive questioning of the best allocation of resources.

[1] A copy of this feasibility study is available from the Cornell Institute on Organized Crime.

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Much of OCSPS's work is still reactive. This is not necessarily a shortcoming; indeed, it may be a sign of success. The unit receives many unsolicited complaints concerning organized crime and official corruption because its record of success over several years has generated public confidence in its competence and integrity.

XII. THE WISCONSIN DEPARTMENT OF JUSTICE

A. General Information and Jurisdiction

The Wisconsin Attorney General, an elected state constitutional officer, presides over the Department of Justice. His term of office is now four years. The present A.G., who bears the distinguished Wisconsin name of LaFollette (in this case, Bronson A.), previously served two two-year terms as A.G. from 1965-69, and was elected to his present four-year term in 1974.

Wisconsin statutory law, from which the department derives all its authority, allows the A.G. considerable discretion in defining his criminal jurisdiction. It specifically assigns him responsibilities in such areas as arson, narcotics, and prostitution. It grants him, moreover, jurisdiction to investigate crimes which are "statewide in nature, importance, or influence."

A statute also provides that the department prosecute any action in which the state or the people thereof may be interested, upon request of the Governor. The department has inferred investigative authority as a corollary to this provision and thus persuaded the Governor on occasion to request by letter that it conduct certain investigations. This process, now institutionalized, permits the pursuit of collateral violations, such as perjury.

Yet another statute mandates that one assistant A.G. investigate and prosecute antitrust violations.

Different Attorneys General exercise their statuory jurisdiction differently. LaFollette's immediate predecessor felt the need for aggressive state-level prosecution of traditional organized crime activity. He felt that the example would cause increased activity by local law enforcement agencies. Yet, perhaps inevitably, aggressive criminal prosecution by an A.G. generates resistance and hostility among local police and prosecutors.

LaFollette holds a more conservative view of his responsibilities. He wishes generally to play a supporting role for local officials, to help improve and expand their criminal law enforcement efforts. In the area of antitrust enforcement, however, the A.G. wants an aggressive statewide effort.

Far from seeing organized crime as principally or exclusively Mafia activity, he sees it chiefly from an economic perspective, and thus considers antitrust enforcement as an effective weapon against it, one which requires central direction. He considers a state-level effort against local official corruption necessary as well.

The department employs about three hundred and fifty people, of whom almost all are covered by civil service regulations. (Exceptions include the Deputy A.G., the Executive Assistant, and the A.G.'s personal secretary.) Its budget in the fiscal year in the fiscal year 1975-76 was $10,300,000.

B. Structure of the Department

The Department of Justice is composed of four divisions, two of which are Legal Services and the Division of Criminal Investigation (DCI). A career employee (administrator) heads each division. Legal Services reports to the A.G. through the Deputy A.G.; the DCI through the Executive Assistant.

Two of the Legal Services Division's eight units are Criminal Prosecutions and Antitrust. The former included five legal and three clerical positions in fiscal 1975–76; the latter four legal and two clerical positions.

A new supervising attorney for the Criminal Prosecutions Unit came on the job on the day of the site visit. A former Assistant U.S. Attorney in the Eastern District of Wisconsin, he was recruited from private practice by the A.G., and shares his boss's view that the department should concentrate on assisting the development of local organized crime capability. The supervising attorney of the Antitrust Unit has been with the unit since its formation. He is a former Dane County A.D.A. who believes strongly in his unit's mission and effectiveness, as well he might, since in one eighteen-month period the unit produced more money in fines, penalties, and settlement (none of it in treble damages) than all its counterparts in the other forty-nine states combined.

The department may hire lawyers directly—without competitive examination—up to ten years after their graduation from law school. It may hire an attorney who has been out of school longer through the competitive exam. The Criminal Prosecution Unit hopes to secure some aggressive, experienced trial lawyers.

Under state civil service regulations, attorneys salaries range from $13,500 to $36,000 per year. A supervising attorney receives an additional $1,200 compensation for his administrative duties. A complicated merit pay formula, moreover, permits each lawyer to earn additional pay, which averages about $1,000. New lawyers serve a probationary year, during which they receive quarterly evaluations; thereafter they may be released only for cause. Non-probationary lawyers receive annual evaluations, plus interim merit pay evaluations and ad hoc promotion evaluations when positions above them open up. Although department lawyers are organized in a bargaining unit, a number of lawyers had resigned from the department because of dissatisfaction with salaries. Vacancies exist in both the Criminal Prosecution and Antitrust Units.

The department permits no outside law practice; attorneys may teach and write on their own time as long as doing so presents not even the appearance of a conflict of interest.

The Division of Criminal Investigation, provides support for all the department's criminal investigations. The DCI includes four bureaus—arson, general investigations, narcotics and dangerous drugs, and white collar crime—plus staff service (administrative) and inspection units. The division administrator, formerly with the Madison Police Department, joined the division in 1966 as a special agent and was promoted to administrator, through the civil service process, in 1969.

In part because of his concern for his constituents' personal privacy, LaFollette is reducing and will ultimately abandon, the intelligence program in DCI. An exception will be made for information aimed at tracing stolen property and weapons.

The division employs some ninety people, of whom about sixty are special agents with peace officer powers. Special agent recruits must have bachelor's degrees in one of the social sciences or psychology; they need have no prior law enforcement experience. Until recently all their training was internal. New recruits without prior law enforcement experience will now attend a modified police recruit training school.

The staff of the DCI understands and accepts the present A.G.'s preference for a less aggressive approach to the division's work. The administrator sees the appropriate relationship between his agents and the department's attorneys as similar to that between the FBI and U.S. Attorneys, with perhaps a closer agent-lawyer relationship required in antitrust work.

The DCI employs no trained investigative accountant, but three special agents have some financial investigative experience. The State Department of Revenue makes auditors available. The Division employs two intelligence analysts. Because of the de-emphasis of intelligence capabilities, the administrator is considering abolition of their positions.

The administrator and his bureau directors meet twice a week to discuss investigations and policy. Lawyers seldom, if ever, take part in such planning, although attorneys from the Antitrust Unit heavily influence decisions in their area.

C. Methods of Investigation

Wisconsin law authorizes electronic surveillance both by court order and with one party consent. The DCI administrator must approve use of body recorders and transmitters. Before any department prosecutor can seek a court order for electronic surveillance, he must secure the approval of the A.G. and of the D.A. in the county where the tap will occur. (Similarly, the A.G. must approve any application made by a D.A.). DCI personnel install and remove equipment and monitor the taps, making sure that adequate minimization procedures are effected.

The DCI has an adequate confidential informant fund, from which it pays for information on a case-by-case basis. It also employs agents trained in surveillance photograhy.

The A.G., concerned about overreaching, is unenthusiastic about use of the grand jury. Wisconsin law provides a less expensive alternative, however: the "John Doe" investigation. A judge, sitting as a magistrate, may conduct an inquiry governed by the same secrecy rules as a grand jury upon reasonable grounds to believe a crime has been committed. He has subpoena and summary contempt powers (state law authorizes a grant of transactional immunity). Unlike grand jury proceedings, the "John Doe" procedure allows witnesses to have

counsel present to advise them during their interrogation before the judge.

The Antitrust Unit institutes both civil and criminal actions. In his first two or three cases, the supervising attorney charged both corporatons and their officers with criminal antitrust violations. (The unit originated largely as the result of a request by two people, during the course of an investigation unrelated to price fixing, to come before the grand jury to talk about price fixing and bid rigging in the plumbing industry.) The state's previous approach had been to use civil suits directed only at corporations. Convictions in these first cases helped establish the unit's credibility. The possibility of criminal prosecution, moreover, has turned out to be a potent weapon. Companies may plead guilty to avoid prosecution of their officers. (They also may agree to substantial settlements to avoid civil suits.) Potential defendants learn that to get off the hook they must provide leads to other violators. The unit will bargain, but it believes in the adage that a defendant has to give a lot to get a little. It will bargain before charges are laid; it will not dismiss a charge already brought. It will, however, negotiate on sentencing. The unit's bargains require guilty pleas and agreements to civil settlements, fines, and injunctions against future violations. Obviously, agreement to prosecute only corporations, and not their officers, can be a powerful inducement to cooperation.

D. Strategy and Goals

Unlike many other attorneys' general and district attorneys' offices, the department has no single, specialized anti-racketeering element. It seeks to improve local efforts against traditional kinds of organized crime, but to mount a very aggressive centralized campaign against organized economic conspiracies; especially through antitrust enforcement.

DCI investigations may begin for various reasons: requests by local police or prosecutors for assistance, receipt from a field agent of intelligence information which warrants a preliminary investigation, request by a state agency for exploration of possible violations of the law, or receipt by telephone or mail of anonymous tips. The DCI administrator allows his bureau directors discretion—which he rarely overrules—to decide which matters to pursue. They must, however, record their reasons for pursuing or declining to pursue them, and the administrator maintains tight review controls over such decisions.

The DCI generally operates quite independently of Legal Service Division attorneys. Criminal Prosecution Unit lawyers do provide technical legal assistance with electronic surveillance applcations, however and Anti-trust Unit attorneys work closely with the DCI on antitrust investigations.

The supervising attorney of the Antitrust unit follows closely Federal antitrust activities. On the few occasions when he has sought Federal assitance, however, he has found the FTC cooperative, but the U.S. Justice Department's Antitrust Division uncooperative.

Unit lawyers educate themselves about particular industries. The unit has been particularly active in the area of highway construction bids, developing informants among Highway Department engineers and receiving informaton about suspect bids. These investigations showed that "black-topping" work was allocated region-by-region and that many contractors agreed among themselves that some would bid only on state work, others only on county work. The unit has pursued price fixing in the dry cleaning industry as well.

Although few antitrust cases are generated by the DCI, one agent did uncover what is in Wisconsin a very serious conspiracy. Off duty, he stopped for a glass of beer and noticed in the tavern a sign announcing an increase in beer prices for the next day. He then found similar announcements in two more taverns in the same town. From professional interest—or a feeling of personal pique—he reported his observations. A preliminary investigation is underway.

The unit's criteria for deciding which cases to pursue include these: statewide importance of the case measured by substantial business volume or impact on the state's citizens; possible involvement of corrupt state officials; possible contribution of effort to the interest and ability of the private bar to pursue antitrust cases; possible curative effect on present violatons and deterrent effect on potential violators.

APPENDIX A
USES OF THE PHRASE "ORGANIZED CRIME"

CONTENTS

USES OF THE PHRASE "ORGANIZED CRIME"

SUMMARY

"Organized crime" is a phrase of many meanings. Nevertheless, it and related phrases are used as words of limitation in many aspects of the criminal process. In each instance, the concept can have a different definition, and it can be framed with a different purpose in mind. How its presence may be shown can also vary, usually depending on where and how in the criminal process the concept is used. Thus, a prosecutor ought to be aware of its many uses and of their different implications.

Even when it is legally defined, the concept may not be clearly defined. Some legal definitions can be read, for example, to refer, in whole or in part, to different types of criminal groups, ranging from teenage gangs to La Cosa Nostra. Generally, however, the concept, properly understood, may be broken down into three separate categories:

1. "enterprise"—a business organization;
2. "syndicate"—a quasi-governmental organization;
3. "venture"—an individual criminal episode with "syndicate" connections.

I. THE PROBLEM

An especially troubling problem with the phrase "organized crime" is that it is used in different contexts with different meanings. Sometimes, too, these different meanings are not always clearly separated. These different uses can, of course, lead to problems both in communication and in the law. For example, a statute creating a legal tool, *e.g.*, a wiretap law, may define "organized crime" restrictively, and as a result, the use of the statute may be drastically limited, perhaps so much so that the tool created becomes unworkable. On the other hand, the use of the phrase without a clear definition or with a broad definition can be challenged as unconstitutionally vague. Such varying and ill-defined definitions can actually confuse issues they attempt to clarify.

The Uses of the Phrase "Organized Crime"

A. Introduction

Like Humpty Dumpty's language,[1] the phrase "organized crime" can mean whatever the speaker chooses to make it mean, and it has meant many things to many people. It can be used, for example, to refer to the crimes committed by organized criminal groups—gambling, narcotics, loan sharking, theft and fencing, and the like.[2] It can also be used to refer, not to the crimes committed, but to the criminal groups that commit them.[3]

Here, a difference of opinion sometimes exists. How sophisticated should a criminal group become before it is called "organized crime"? Should "white collar" criminal groups be called "organized crime"?[4] Should "subversive groups" be called "organized crime"?[5] Usually, "white collar" or "subversive groups" or ad hoc groups, such as youth groups, pickpocket rings, and professional criminal groups put together for one or more

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[1] C. Dodgson ("Lewis Carroll"), *Through the Looking Glass and What Alice Found There,* Chapter 6, at 247 (Modern Library ed.): "When I use a word," Humpty Dumpty said, "it means just what I choose it to mean—neither more nor less."

[2] President's Commission on Crime and Administration of Justice, *Task Force Report: Organized Crime* 6 (1967) (hereinafter referred to as *Task Force Report*).

[3] *Id.*

[4] On the definition of "white collar" crime as generally not including "organized crime," *compare* E. Sutherland, *White Collar Crime,* 9 (Dryden Press Inc. 1949) with H. Edelhertz, *The Nature, Impact and Prosecution of White-Collar Crime,* 3 (U.S. Department of Justice, National Institute of Law Enforcement and Criminal Justice, 1970). *The Report of the National Conference on Organized Crime,* (Washington, D.C. October 1–4, 1975), broadly defines organized crime to be "any group of individuals whose primary activity involves violating criminal laws to seek illegal profits and power by engaging in racketeering activities and, when appropriate, engaging in intricate financial manipulations." *Id.* at v.

[5] IIT Research Institute and Chicago Crime Commission, *A Study of Organized Crime in Illinois* 20 (Summary) (1971) ("independent social process, separate from" organized crime).

"scores," are excluded from definitions of "organized crime."[6]

Among those groups that have some plausible claim to the dubious title of "organized crime," additional distinctions can be helpfully drawn: it is useful, for example, to distinguish between "enterprises," "syndicates," and "ventures." Some, too, would probably not apply the label of "organized crime" to each of these groups; they would, for example, restrict it to "syndicates."

B. "Enterprise"

An organized crime "enterprise" is a criminal group that provides illicit goods or services on a regular basis.[7] An example would be a narcotics wholesaler and his cutting crew.[8] Thus, it is a criminal firm or business organization.[9]

C. "Syndicate"

An organized crime "syndicate" is a criminal group that regulates relations between various "enterprises." It may be metropolitan, regional, national, or international in scope. It may be concerned with only one field of endeavor or it may be concerned with a broad range of illicit activities. A "syndicate," therefore, is a criminal cartel or business organization. It fixes prices for illicit goods and services, allocates black markets and territories, acts as a criminal legislature and court, sets criminal policy, settles disputes, levies "taxes," and offers protection from both rival groups and legal prosecution.[10]

D. "Venture"

A "venture" is a criminal episode usually engaged in for profit by a group. It may be the hijacking of a truck [11] or the robbery of a bank.[12] It is "organized crime" when members of the "venture" have ties to a "syndicate." This tie gives the "venture" access to superior criminal resources, including capital, skilled labor, outlets for stolen property, etc.

E. Other Uses

Finally, "organized crime" may refer to the entire criminal underworld, or at least that part which has some semblance of organization [13] Thus, "organized crime" is distinguished from random acts of violence, passion, or greed.

III. Different Meanings for Different Purposes in Different Contexts

Depending on what "organized crime" refers to, it will have different effects. Confusion of definitions creates problems for the investigation and prosecution of organized crime. As noted above, if a statute creating a legal tool uses a restrictive definition, the tool may be unworkable since its use may require proof that is impossible to obtain, or that involves the very object of the investigation itself.[14] On the other hand, if no definition is provided, the provision may be unworkable or actual-

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[6] The President's Commission on Crime and Administration of Justice in 1967 suggested, for example, that "organized crime" should be limited to groups that have become sufficiently sophisticated that they must regularly employ techniques of both violence and corruption to achieve their criminal ends. *Task Force Report* at 8 ("unique form of criminal activity"); Schelling, "What is the Business of Organized Crime?," 20 *J. Pub. Law* 71 (1971) (concept keyed to "monopoly").

[7] *See* Schelling, "Economic Analysis and Organized Crime," *Task Force Report* at 115; Rubin, "The Economic Theory of the Criminal Firm," *The Economics of Crime and Punishment* 155 (1973).

[8] *See* U.S.C.A. § 848 (1972), "Continuing criminal enterprises." *See, e.g., United States v. Manfredi,* 488 F.2d 588 (2d Cir. 1973), *cert. denied,* 417 U.S. 936 (1974). On the narcotics traffic generally *see The Heroin Trail* (Staff of *Newsday* New American Library 1974).

[9] *See* Schelling, "Economic Analysis and Organized Crime," *Task Force Report* at 115; Rubin, "The Economic Theory of the Criminal Firm," *The Economics of Crime and Punishment* 155 (1973).

[10] *See Task Force Report* at 6–10. *Compare,* Schelling, "What is the Business of Organized Crime," 20 *J. Pub. L.* 71 (1971).

[11] *See, e.g., United States* v. *Persico,* 339 F. Supp. 1077 (E.D. N.Y.), *aff'd* 467 F.2d 485 (2d Cir. 1972), *cert. denied,* 410 U.S. 946 (1973) (trial of Carmine J. Persico, Jr., a member of the Vito Genovese syndicate, *S. Rep. No.* 72, 89th Cong., 1st Sess. 20 (1965) for hijacking).

[12] *See, e.g., United States* v. *Franzese,* 392 F.2d 954 (2d Cir.), *vacated in part as to Franzese only and remanded, otherwise cert. denied,* 394 U.S. 310 (1968); *related case,* 525 F.2d 27 (2d Cir. 1975) (trial of John Franzese, a caporegime of the Profaci syndicate, *S. Rep. No.* 72, 89th Cong., 1st Sess. 28 (1965) for bank robbery). On the background of the robberies and a related homicide trial, *see generally* J. Mills, *The Prosecutor* 96–245 (Farrar, Straus and Giroux, 1969).

[13] *See Task Force Report* at 7; Schelling, *supra* note 10, at 115.

[14] An excellent example is the Massachusetts wiretap statute. It limits permissible wiretaps to crimes connected to organized crime. *See generally* text *infra* at ¶¶ 36–37.

ly unconstitutionally vague.[15] In general, given the nature of our criminal justice system and organized crime, it is probably best to avoid trying to use "organized crime" as a legal concept. The dilemma and its possible solution was aptly recognized by the Pennsylvania Crime Commission:

> Crime syndicates cannot be outlawed or punished *per se*, since they cannot be defined with sufficient exactness, but the substantive prohibitions of our penal law can be better molded to encompass their schemes and activities. [16]

Using the phrase "organized crime" as means of limitation is, moreover, often a mistaken attempt to protect supposed civil liberties.[17] This approach, particularly, should be rejected. Such a limitation sets up a double standard of civil liberties. It suggests that organized crime members have less civil liberties under the Constitution than other citizens. If a statute violates the rights of a general member of the public, it also violates the rights of a member of organized crime.[18]

Finally, many criminal justice statutes may be more effective if they are not limited to organized crime. The study of organized crime has lead to the development of new investigation and prosecution techniques. Some of these techniques can be profitably used in a broad range of criminal prosecutions. Thus, using "organized crime" as a limiting concept might unnecessarily circumscribe a useful tool, while offering only specious protection to civil liberties.[19]

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[15] Classification of prisoners as organized crime members under N.Y. Correc. Law §§ 630 to 634 (McKinney Supp. 1975), Commissioner's General Orders, No. 31 2[d][2f], Nov. 13, 1972, was held to be unconstitutionally vague in *Dioguardi* v. *Warden*, 80 Misc.2d 972, 365 N.Y.S.2d 446 (Sup. Ct. Bronx County 1975). *See* text *infra* at ¶¶ 46–48.

[16] Pennsylvania Crime Commission, *Report on Organized Crime* 92 (1970).

[17] *See, e.g.*, Letter from American Civil Liberties Union [on Organized Crime Control Act of 1970] to each member of the Senate, January 20, 1970, pp. 1–5, *reprinted in*, 116 *Cong. Rec.* 5422–26 (daily ed. January 22, 1970).

[18] McClellan, "The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties?," 46 *Norte Dame Law.* 55, 62 (1970). *But see Catallano* v. *United States*, 383 F. Supp. 346, 351–52 (D.Conn. 1974) (recognizing that organized crime members should be treated differently than ordinary prisoners); *Dioguardi* v. *Warden*, 80 Misc.2d 972, 974, 365 N.Y.S.2d 446, 448 (Sup. Ct. Bronx County 1975) ("the rational basis for different treatment [of organized crime members] is too obvious for comment.").

[19] McClellan, *supra* note 18 at 60–62.

APPENDIX: LEGAL USES OF THE PHRASE "ORGANIZED CRIME" [20]

I. Federal

A. Grants to Law Enforcement Agencies

The Law Enforcement Assistance and Criminal Justice Act [21] defines organized crime as:

> the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.[22]

The purpose of the L.E.A.C.J.A. is to:

> 1. encourage States and units of general local government to develop and adopt comprehensive plans based upon their evaluation of State and local problems of law enforcement and criminal justice;
> 2. authorize grants to States and units of local government in order to improve and strengthen law enforcement and criminal justice; and
> 3. encourage research and development directed toward the improvement of law enforcement and criminal justice and the development of new methods for the prevention and reduction of crime and the detection, apprehension, and rehabilitation of criminals.[23]

Organized crime programs have priority for grants.[24]

B. Organized Crime Strike Force Jurisdiction

The general definition of organized crime followed in the setting up the Federal Strike Forces, is, in fact, an illustration, not a definition; it reads as follows:

> 'organized crime' . . . includes all illegal activities engaged in by members of criminal syndicates operative through the United States, and all illegal activities engaged in by known associates and confederates of such members.

In practice, each investigation or prosecution is under the jurisdiction of the United States Attorney or the Strike Force.[25] If jurisdiction over the case is disputed, the United States Attorney assigns it, but the Chief of the Strike Force can refer it to the Criminal Division at the Department of Justice for a final decision.[26] The jurisdiction granted by this procedure allows a Strike Force attorney to appear before a grand jury in that case.[27] No showing of organized crime is necessary.[28]

C. Depositions

Under 18 U.S.C. § 3503 [29] to obtain an order to take a deposition from a witness, the motion must:

> contain certification by the Attorney General or his designee that the legal proceeding is against a person who is believed to have participated in an organized criminal activity.[30]

There is no definition of the term "organized criminal activity" in the statute.

The phrase is used to limit the cases in which out of court depositions of witnesses may be taken.

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[20] This list does not claim to exhaust all the legal uses of the phrase "organized crime" in legal materials today. It merely collects a number of different examples in different contexts.

[21] 42 U.S.C.A §§ 3701 to 3795 (1973).

[22] 42 U.S.C.A. § 3781(b) (1973).

[23] 42 U.S.C.A. § 3701 (Supp. 1976).

[24] 42 U.S.C.A. § 3737 (1973).

[25] Office of the Attorney General, Order No. 431-70, April 20, 1970, *reprinted in part, In re Subpoena of Persico,* 522 F.2d 41, 69 (2d Cir. 1975).

[26] *Id. See also* 28 C.F.R. § 0.195 (1975).

[27] *In re Subpoena of Persico,* 522 F.2d 41, 67-68 (2d Cir. 1975).

[28] *Id.* For a collection of definitions of organized crime, *see id.* at 47.

[29] 18 U.S.C.A. § 3503 (Supp. 1976).

[30] Under Rule 15 of the Fed. R. Crim. P. certification is not required:

> Whenever due to exceptional circumstances of the case it is in the interest of justice that the testimony of a prospective witness of a party be taken and preserved for use at trial, the court may upon motion of such party and notice the parties order that testimony of such witness be taken by deposition. . . .

This amendment became effective Dec. 1, 1975.

Nevertheless, no proof of organized criminal activity is required, since:

> the decision whether or not a proceeding is against a person believed to have participated in organized criminal activity is to be made by the Attorney General or his designee and not by the court.
>
> . . . Unless the defendant shows bad faith on the part of the Government, the court is only to ascertain whether or not there has been a proper certification as required by statute.[31]

D. Organized Crime Control Act of 1970

Under the Organized Crime Control Act of 1970, "organized crime" is described, but not actually defined.[32] It is also not defined or used in the "Racketeer and Corrupt Organizations" title.[33]

The courts are in conflict over whether a showing of "organized crime" is necessary in the application of this Title. In *Barr* v. *Wui/Tas, Inc.*,[34] the court held that the statute[35] did not apply to a telephone answering service system since the defendant could not be characterized as "organized crime."

In *United States* v. *Campanale*,[36] however, the court stated:

> [Q]uite obviously Congress focused on some of the kinds of activities by which individuals and associations engaged in organized crime maintained their income or influence. The statute[37] . . . makes unlawful such activities *no matter who engages therein* (emphasis added).[38]

This same approach was recently taken in *United States* v. *Mandel*,[39] where the court held,

> absence of any allegation that these defendants are in any way connected with "organized crime" does not require a dismissal of the charge brought under 18 U.S.C. Sec. 1961 et seq.[40]

The court also stated,

> To require proof beyond a reasonable doubt that a defendant was a member of "organized crime," with the highly subjective and prejudicial connotations of that term, would simply render the statute unenforceable. . . .
>
> * * * *
>
> Rather than attempt to define "organized crime" and make membership therein unlawful, a task which would undoubtedly have been impossible and probably unconstitutional, Congress defined an unlawful pattern of racketeering activity. . . .[41]

E. Classifying Prisoners

Under the United States Bureau of Prisons Policy Statement 7900.47 (April 30, 1974), a prison-

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[31] *United States* v. *Singleton*, 460 F.2d 1148, 1154 (2d Cir. 1972), *cert. denied*, 410 U.S. 984 (1973).

[32] Organized Crime Control Act of 1970, at 1073.

> The Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption; (2) organized crime derives a major portion of its power through money obtained from such illegal endeavors as syndicated gambling, loan sharking, the theft and fencing of property, the importation and distribution of narcotics and other dangerous drugs, and other forms of social exploitation; (3) this money and power are increasingly used to infiltrate and corrupt legitimate business and labor unions and to subvert and corrupt our democratic processes; (4) organized crime activities in the United States weaken the stability of the Nation's economic system, harm innocent investors and competing organizations, interfere with free competition, seriously burden interstate and foreign commerce, threaten the domestic security, and undermine the general welfare of the Nation and its citizens; and (5) organized crime continues to grow because of defects in the evidence-gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because sanctions and remedies available to the Government are unnecessarily limited in scope and impact.
>
> It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

[33] 18 U.S.C.A. §§ 1961 *et seq.* (Supp. 1976).

[34] 66 F.R.D. 109 (S.D.N.Y. 1975).

[35] 18 U.S.C.A. §§ 1961 *et seq.* (Supp. 1976).

[36] 518 F.2d 352 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

[37] 18 U.S.C.A. § 1962 (Supp. 1976).

[38] *United States* v. *Campanale*, 518, F.2d 352, 363 (9th Cir. 1975), *cert. denied*, 423 U.S. 1050 (1976).

[39] 19 *Crim. L. Rptr.* 2032 (D. Md. March 23, 1976).

[40] *Id.* at 2033. *See also United States* v. *Roselli*, 432 F.2d 879 (9th Cir. 1970), *cert. denied*, 401 U.S. 924 (1971) (organized scheme to cheat at cards).

> It is true that [18 U.S.C.A. § 1952 (1970)] was aimed at organized crime. . . . Congress did not choose to direct the prohibitions of Section 1952 against only those persons who could be shown to be members of an organized criminal group. . . . *Id.* at 884–885.

[41] *Id.*

er may be classified as a Special Offender if he is a member of organized crime.[42] There is no definition of organized crime; decisions as to Special Offender status are made by the prison staff on a case by case basis.

The purpose of the Special Offender designation is to identify prisoners who require close supervision.[43] Two reasons for the inclusion of organized crime members in the Special Offenders category are to lessen their contact with "young, less sophisticated and impressionable prisoners," [44] and to place them in a facility where they are unable "to conduct any aspect of their illegal businesses. . . ." [45]

The proof required of organized crime membership is that there is "a reasonable basis in fact to conclude that the inmate [is] . . . a prominent figure in a structured criminal syndicate composed of professional criminals who primarily rely on unlawful activity as a way of life." [46] Due process requires:

1. ten days notice that a Special Offender classification is contemplated;

2. that notice must state the reasons for the designation;

3. the prisoner must be allowed to appear before a disinterested decision-maker;

4. he must be permitted to call witnesses and present documentary evidence;

5. he must be informed of the evidence aganst him;

6. he must be given a reasonable time to present his case; and

7. the decision shall be reviewable by the Chief of Classifications and Parole, the Warden, and the Bureau of Prisons.

The full range of procedural safeguards are not required:

1. the hearing need not be recorded;

2. confrontation and cross-examination of witnesses is only in the discretion of the decision-maker; and

3. counsel need not be furnished, although in a complex case the prisoner may retain counsel.[47]

The prisoner is allowed input into the fact-finding process to make it more accurate.[48] His rights are limited to minimize the risk of disrupting the prison.[49]

Recently, in *Marchesani v. McCune,*[50] this hearing requirement was limited to cases where the reason for the classification is organized crime connections. If the Special Offender status is based on the nature of the crime for which a prisoner is convicted, then a hearing is not required.[51]

II. STATE

A. Naming Crimes

1. *Ohio-Engaging in Organized Crime.* Under the Ohio "Engaging in Organized Crime" statute,[52] "organized crime" as such is not used or defined. Instead, a different phrase, "criminal syndicate," is used, and it is defined as:

> five or more persons collaborating to promote or engage in [extortion, prostitution, theft, gambling, illegal traffic in drugs, liquor, or weapons, loan sharking, or any offense for profit]. . . on a continuing basis. . . ." [53]

2. *Pennsyvania-Corrupt Organizations.* Under the Pennsylvania corrupt organizations statute,[54] organized crime is described as,

> a highly sophisticated, diversified, and widespread phenomenon which annually drains billions of dollars from the national economy by various patterns of unlawful conduct including

[42] Other categories meriting "Special Offender" designation are non-federal prisoners, protection cases, extreme custody risks, subversives, notorious individuals, persons who have threatened high government officials, and any other offender who requires "especially close supervision." *See Rothman* v. *Director, United States Board of Parole,* 403 F. Supp. 188, 189-90 (N.D.Ga. 1975).

[43] *Cardaropoli* v. *Norton,* 523 F.2d 990, 992 note 1 (2d Cir. 1975).

[44] *Catalano* v. *United States,* 383 F. Supp. 346, 351-52 (D. Conn. 1974).

[45] *Id.*

[46] *Id.* at 350; *Masiello* v. *Norton,* 364 F. Supp. 1133, 1135 (D. Conn. 1973).

[47] *Cardaropoli v. Norton,* 523 F. 2d 990, 996-997 (2d Cir. 1975); *Stassi v. Hogan,* 395 F. Supp. 141, 143 (N.D. Ga. 1975). *Contra Catalano v. United States,* 383 F. Supp. 346, 352 (D. Conn. 1974) due process requires right to confront and cross-examine witnesses, assistance of counsel, and a recording of the hearing). *See also, Masiello v. Norton,* 364 F. Supp. 1133, 1135 (D. Conn. 1973) (prisoner must be told of organized crime designation before a parole hearing).

[48] *Cardaropoli, supra* note 47 at 997.

[49] *Id.* at 998.

[50] 531 F. 2d 459 (10th Cir. 1976).

[51] *Id.* at 460-61.

[52] Ohio Rev. Code Ann. § 2923.04 (Page—1975).

[53] *Id.* at (C).

[54] Pa. Stat. Ann. tit. 18, § 911 (1973).

the illegal use of force, fraud, and corruption. . . ."[55]

The term "organized crime", as described in the preamble to the statute, is not, however, used as an operative legal concept. Instead, "racketeering activity" is used. This concept is then carefully defined by reference to specified statutes.

B. Jurisdiction

1. *New Mexico-Governor's Organized Crime Prevention Commission.* Under the New Mexico Organized Crime Act[57] organized crime is defined as:

> the supplying for profit of illegal goods and services, including, but not limited to, gambling, loan sharking, narcotics, and other forms of vice and corruption, by members of a structured and disciplined organization. . . .[58]

The statute creates the governor's organized crime prevetion commission. The purpose of the commission is not set out in the statute. Its duties, however, include investigation of organized crime, education of the public, governor, and legislature, coordination of law enforcement agencies, and development of new methods to combat organized crime.[59]

As a result, the jurisdiction of the commission is broad. It is not stated in the statute what proof of organized crime is necessary, but a legislative oversight committee does exist.[60] One of the committee's duties is to

> maintain continuous review and appraisal of the activities of the governor's organized crime prevention commission and the investigations of its staff. . . .[61]

2. *New York-Organized Crime Task Force Before the Grand Jury.* Section 70-a of the New York Executive Law (McKinney 1972) creates a statewide organized crime task force. The phrase "organized crime" is not defined in any portion of the statute. It is used only as a title and to define the general powers of the task force.[62] It is, however, described in the legislative findings:

> Organized crime, based upon an efficient and disciplined organizational structure, is a highly complex and diversified illegal activity which at times involves the corruption of public officials, which annually drains millions of dollars from the state's economy, which is expanding its corrosive influence by continuing to infiltrate and corrupt a variety of legitimate businesses and labor unions, which undermines free competition by coercive tactics, and which threatens the peace, security and general welfare of the people of the state.[63]

Subdivision 7 of section 70-a of the New York Executive Law (McKinney 1972) deals with the appearance of a task force attorney before a grand jury:

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[55] Pa. Stat. Ann. tit. 18, §911(a)(1) (1973).

[56] Pa. Stat. Ann. tit. 18, §911 (h)(1)(i), (iii), (iv) (1973), §911 (h)(1)(ii) (Supp. 1976).

> As used in this section "Racketeering activity" means:
>
> (i) any act which is indictable under any of the following provisions of this title:
>
> Chapter 25 (relating to criminal homicide)
> Section 2706 (relating to terroristic threats)
> Chapter 29 (relating to kidnapping)
> Chapter 33 (relating to arson, etc.)
> Chapter 37 (relating to robbery)
> Chapter 39 (relating to theft and related offenses)
> Section 4108 (relating to commercial bribery and breach of duty to act disinterestedly)
> Section 4109 (relating to rigging publicly exhibited contest)
> Chapter 47 (relating to bribery and corrupt influence)
> Chapter 49 (relating to perjury and other falsification in official matters)
> Section 5512 through 5514 (relating to gambling)
> Chapter 59 (relating to public indecency)
>
> (ii) any offense indictable under section 13 of the act of April 14, 1972 (P.L. 233, No. 64), known as "The Controlled Substance, Drug, Device and Cosmetic Act" (relating to the sale and dispensing of narcotic drugs);
>
> (iii) any conspiracy to commit any of the offenses set forth in subclauses (i) and (ii) of this clause; or
>
> (iv) the collection of any money or other property in full or partial satisfacton of a debt which arose as the result of the lending of money or other property at a rate of interest exceeding 25% per annum or the equivalent rate for a longer or shorter period, where not otherwise authorized by law.
>
> Any act which otherwise would be considered racketeering activity by reason of the application of this clause, shall not be excluded from its application solely because the operative acts took place outside the jurisdiction of this Commonwealth, if such acts would have been in violation of the law of the jurisdiction in which they occurred.

[57] N.M. Stat. Ann. §§39-9-1 to 39-9-15 (Supp. 1975).

[58] *Id.* §39-9-2-A.

[59] *Id.* §§39-9-5, 39-9-10.

[60] *Id.* §§39-9-11 to 39-9-15.

[61] *Id.* §39-9-12-A(1).

[62] N.Y. Exec. Law §70-a-1 (McKinney 1972):

> There shall be established within the department of law a statewide organized crime task force which, pursuant to the provisions of this section, shall have the duty and power: (a) To conduct investigations and prosecutions of organized crime activities carried on either between two or more counties of this state or between this state and another jurisdiction;
>
> (b) To cooperate with and assist district attorneys and other local law enforcement officials in their efforts against organized crime.

[63] Law of May 20, 1970, ch. 1003, §1, N.Y. Laws *reprinted in* N.Y. Exec. Law §70-a Historical Note (McKinney 1972).

248-593 O—78—9

> With the approval of the governor and with the approval or upon request of the appropriate district attorney, the deputy attorney general in charge of the organized crime task force, or one of his assistants, may attend in person any term of the county court or supreme court having appropriate jurisdiction, including an extraordinary special or trial term of the supreme court when one is appointed pursuant to section one hundred forty-nine of the judiciary law, or appear before the grand jury thereof, for the purpose of managing and conducting in such court or before such jury a criminal action or proceeding concerned with an offense where any conduct constituting or requisite to the completion of or in any other manner related to such offense occurred either in two or more counties of this state, or both within and outside this state. In such case, such deputy attorney general or his assistant so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform. In any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by such deputy attorney general.

This subdivision was recently construed by the New York Court of Appeals in *People v. Rallo.*[64] The court held that no showing of "organized crime" is necessary for a task force attorney to appear before the grand jury.[65] The court stated:

> Because of what must be conceded to be the practical difficulty of describing or defining precisely what is intended by the phrase, "organized crime activities", it would appear naive at the least to make prosecutorial authority depend on the resolution of such a quicksilver issue, thereby in practice perhaps materially to handicap the prosecutorial efforts of the [Organized Crime Task Force] by spawning troublesome threshold issues whose resolution could be not only very difficult but also very time consuming and unpredictable.[66]

[64] 39 N.Y.2d 217, 347 N.E.2d 633 (1976).

[65] *Id.* at 224, 347 N.E.2d at 636.

[66] *Id.* at 223, 347 N.E.2d at 635, citing McClellan, "The Organized Crime Act [S. 30] or Its Critics: Which Threatens Civil Liberties?," 46 *Notre Dame Law.* 55 (1970). *But see In re Sussman v. N.Y. State O.C.T.F.*, 39 N.Y.2d 227, 347 N.E.2d 638 (1976) discussed in text *infra* at ¶¶40-41.

3. *Ohio-Attorney General Investigations.* Under the Ohio organized criminal activity statute,[67] the concept of "organized criminal activity" is defined as:

> any combination or conspiracy to engage in criminal activity as a significant source of income or livelihood, or to violate, or aid, abet, facilitate, conceal, or dispose of the proceeds of the violation of, criminal laws relating to prostitution, gambling, counterfeiting, obscenity, extortion, loan sharking, drug abuse or illegal drug distribution, or corruption of law enforcement officers or other public officers, officials, or employees.[68]

At the direction of the governor or the general assembly, the attorney general may investigate this activity, refer evidence to a prosecutor, regular grand jury, or special grand jury, and appear before the grand jury.[69]

4. *Tennessee-Bureau of Criminal Investigation.* Under the Tennessee Bureau of Criminal Investigation statute,[70] organized crime is defined as:

> the unlawful activities of the members of an organized, disciplined association engaged in supplying illegal goods and services, including but not limited to, gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations.[71]

The purpose of this statute is to authorize the use of scientific investigation techniques for the prosecution of organized crime.[72] The powers granted to the investigators in organized crime cases are broad, including the power to issue subpoenas.[73]

There does not appear to be any proof of organized crime required before the investigator for the Tennessee Bureau of Criminal Investigation[74]

[67] Ohio Rev. Code Ann. § 109.83 (Page Supp. 1976).

[68] Ohio Rev. Code Ann. § 109.83 (A) (Page Supp. 1976).

[69] Ohio Rev. Code Ann. § 109.83 (A) (Page Supp. 1976).

[70] Tenn. Code Ann. §§ 38-501 to 38-505 (1975).

[71] Tenn. Code Ann. § 38-502 (1975).

[72] Hopton "Scientific Crime Detection and Law Enforcement," 26 *Tenn. L. Rev.* 129, 129-30 (1959). Narcotic law offenses are emphasized in the statute. Tenn. Code Ann. § 38-502 (1975), §§ 52-1439, 52-1442 (Supp. 1975).

[73] *Sheets v. Hathcock,* 528 S.W.2d 47, 51-52 (Tenn. Crim. App.), *cert denied,* 528 S.W.2d 47 (Tenn. Sup. Ct. 1975).

[74] The T.B.C.I. is also called the Tennessee Bureau of Investigation or the T.B.I., apparently to emulate the F.B.I. *Id.* at 52; Hopton, "Scientific Crime Detection and Law Enforcement," 26 *Tenn. L. Rev.* 129, 131, 133 (1959).

begins his investigation,[75] or when that evidence is presented for trial.[76] This precise issue, however, has not been litigated.

C. Investigative Tools

1. *Massachusetts-Wiretapping.* Under the Massachusetts wiretapping statute[77] organized crime is defined as "a continuing conspiracy among highly organized and disciplined groups to engage in supplying illegal goods and services."[78] The definition is used to limit the crimes against which wiretapping may be used.[79] It, like the other provisions of the statute, is "designed to ensure that unjustified and overly broad intrusions on rights of privacy are avoided."[80]

The quantum of proof of organized crime connections required for the warrant is unclear. The Supreme Judicial Court of Massachusetts has merely stated:

> [T]he application and any supporting affidavits should affirmatively demonstrate knowledge of the requirement that interception be limited to matter material to the designated crimes [specific crimes in connection with organized crime] [81] under investigation. . . .[82]

2. *New Hampshire-Wiretapping.* Under the New Hampshire wiretapping statute[83] organized crime is defined as

> the unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to homicide, gambling, prostitution, narcotics, marijuana or other dangerous drugs, bribery, extortion, blackmail and other unlawful activities of members of such organizations.[84]

Unlike the Massachusetts statute, the term "organized crime" is used to broaden rather than narrow the scope of permissible wiretaps. If there are no connections with organized crime, then wiretaps may be used against only specified crimes, but if organized crime connections are shown, the crime being committed is immaterial under state law.[85] The amount of proof required to show organized crime connections is not set out in the statute and has not been developed in the cases.

3. *New York-Organized Crime Task Force Subpoenas.* Subdivision 4 of New York Executive Law Section 70-a (McKinney 1972) empowers the deputy attorney general in charge of the organized crime task force to subpoena witnesses:

> The deputy attorney general in charge of the organized crime task force is empowered to conduct hearings at any place within the state, to administer oaths or affirmations, subpoena witnesses, compel their attendance, examine them under oath or affirmation, and require the production of any books, records, documents or other evidence he may deem relevant or material to an investigation. He may designate an assistant to exercise any such powers. Every witness attending before such deputy attorney general or his assistant shall be examined privately and the particulars of such ex-

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[75] Tenn. Code Ann. § 38-502 (1975):

> Investigators of the bureau of criminal identification are authorized, without a request from the district attorney general, to make investigations [of] . . . organized crime.

[76] *Sheets v. Hathcock,* 528 S.W.2d 47, 52 (Tenn. Crim. App.), *cert denied,* 528 S.W.2d 47 (Tenn. Sup. Ct. 1975).

[77] Mass. Gen. Laws Ann. ch. 272, § 99 (Supp. 1976).

[78] *Id.* at § 99-A.

[79] *Id.* §§ 99-B-7, 99-F-2(a)(b).

[80] *Commonwealth v. Vitello,* —— *Mass.* ——, *327 N.E.2d 819, 825 (1975).*

[81] Mass. Gen. Laws Ann. ch. 272, § 99-B-7 (Supp. 1976).

[82] *Commonwealth v. Vitello,* —— Mass. ——, 327 N.E.2d 819, 826 (1975).

[83] N.H. Rev. Stat. Ann. § 570-A (1974).

[84] N.H. Rev. Stat. Ann. § 570-A:1(XI) (1974).

[85] N.H. Rev. Stat. Ann. § 570-A:7 (1974):

> The attorney general, deputy attorney general, or a county attorney upon the written approval of the attorney general or deputy attorney general, may apply to a judge of competent jurisdiction for an order authorizing or approving the interception of wire or oral communications, may apply to such judge for, and such judge may grant in conformity with RSA 570-A:9 an order authorizing, or approving the interception of wire or oral communications by law enforcement officers having responsibility for the investigation of the offense as to which the application is made, when such interception may provide or has provided evidence of the commission of *organized crime,* as defined in RSA 570-A:1, XI, *or evidence of commission of the offenses of homicide, kidnapping, gambling, bribery, extortion, blackmail, or dealing in narcotic drugs, marijuana or other dangerous drugs, or any conspiracy to commit any of the foregoing offenses* (emphasis added).

See State v. *Lee,* 113 N.H. 313, 307 A.2d 827 (1973) (marijuana offender not shown to be connected to organized crime). *See also State* v. *Rowman,* —— N.H. ——, 352 A.2d 737 (1976) (gambling ring not shown to be connected to organized crime). *But see* 18 U.S.C.A. § 2516(2) (1970), which limits permissible state wiretaps to those that provide evidence:

> of the commission of the offense of murder, kidnapping, gambling, robbery, bribery, extortion, or dealing in narcotic drugs, marihuana or other dangerous drugs, or other crime dangerous to life, limb or property, and punishable by imprisonment for more than one year . . . or any conspiracy to commit any of the foregoing offenses.

amination shall not be made public. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a class A misdemeanor.

This subdivision was recently construed by the New York Court of Appeals in *In re Sussman* v. *N.Y. State OCTF.*[86] Although a showing of "organized crime" is not necessary for a task force attorney to appear before a grand jury,[87] the court held that such a showing is necessary to issue office subpoenas.[88] As to the proof required, the court stated:

> We do not now delineate the precise quantum of proof with respect to . . . organized crime activities which will be required. . . . The phrase "organized crime activities" is itself not susceptible of precise judicial definition. . . . The proof must establish that the Deputy Attorney-General is proceeding in good faith and that the testimony and documents he seeks bear a reasonable relation to matters properly under OCTF's investigatory jurisdiction, namely, "organized crime activities". . . .[89]

The court also discussed the problem of vagueness:

> It is argued . . . that, because the phrase "organized crime activities" concededly is not susceptible of precise definition, the elusive character and vagueness of its content render subdivision 4 unconstitutional. . . .
>
> It is unquestioned that constitutional due process requires that a statute which defines a substantive crime must "give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden" (citations omitted). Section 70-a, however, does not fall within the category of statutes to which this constitutional principle is applicable.
>
> If after investigation by OCTF a presentment is made to a Grand Jury such presentment and any subsequent charges will be concerned with specific substantive crimes each of which may be tested under the constitutional void-for-vagueness test. The concept of "organized crime activities" will then be irrelevant.
>
> By critical contrast to statutes in which there is asserted vagueness in the definition of substantive crimes, the aspect of subdivision 4 of section 70-a now under reivew relates only to the investigative authority and powers of a prosecutor.[90]

2. *Pennsylvania-Witness Immunity.* Under the Pennsylvania immunity statute[91] organized crime is defined in conjunction with racketeering to:

> include, but not be limited to, conspiracy to commit murder, bribery or extortion, narcotics or dangerous drug violations, prostitution, usury, subornation of perjury and lottery, bookmaking or other forms of organized gambling.[92]

It is not clear whether the term "conspiracy" applies to all the listed crimes or only to murder.[93] The Pennsylvania Supreme Court has assumed that a conspiracy is not necessary.[94]

The purpose of this provision is to obtain evidence otherwise unavailable.[95] It is limited to organized crime because a grant of immunity increases the possibility of perjury, and a broad immunity-granting power may be abused by prosecutors.[96] In organized crime cases, these factors are outweighed by the public's right to every man's evidence.[97]

The organized crime requirement applies only to the proceeding, not to the individual witness.[98] In an investigation of organized crime, the Commonwealth must, "allege . . . that immunization is

[86] 39 N.Y.2d 227, 347 N.E.2d 638 (1976).

[87] *People* v. *Rallo,* 39 N.Y.2d 217, 347 N.E.2d 633 (1976). *See* discussion in text, *supra* at ¶¶ 30-31.

[88] *In re Sussman* v. *N.Y. State O.C.T.F.,* 39 N.Y.2d 227, 229, 347 N.E.2d 638, 639 (1976).

[89] *Id.* at 233, 347 N.E.2d at 641-42.

[90] *Id.* at 234-35, 347 N.E. 2d at 642-43.

[91] Pa. Stat. Ann. tit. 19, §§ 640.1 to 640.6 (Supp. 1976).

[92] Pa. Stat. Ann. tit. 19, § 640.6 (Supp. 1976).

[93] *See Commonwealth v. Brady,* 228 Pa. Super. 233, 240-41, 323 A. 2d 866, 870 (1974) (Dissent Judge Cercone) (allocatur granted, pending before Pa. Sup. Ct.).

[94] *In re Falone,* —Pa.—, 346 A. 2d 9 (1975). "Section 6 (of the immunity statute) defines 'organized crime or racketeering' to include 'bribery or extortion.'" *Id.* at 16. But a conspiracy was shown. *Id.*

[95] *Id.* at 17.

[96] *Commonwealth v. Brady,* 228 Pa. Super. 233, 234, 323 A. 2d 866, 867 (1974).

[97] *In re Falone,* —Pa.—, 346 a. 2d 9 (1975).

[98] *Id.* at 15-16.

necessary for the grand jury to obtain information that is relevant to its inquiry from a witness who, it is reliably informed, possesses it." [99] This must be shown in a hearing "to the satisfaction of the court." [100]

D. Classifying Prisoners—New York

Under the New York prisoner furloughs statute,[101] organized crime is not defined. Under the Commissioner's General Orders, No. 31, 2[d][2f], Nov. 13, 1972, "[p]ersons identified with large scale or organized criminal activity," are ineligible. The General Orders do not define the phrase.

The reason for not allowing organized crime members to be eligible for furloughs is that they can exert their criminal power much more easily outside the prison, even without violating the limits of their furlough.[102]

The lack of definition, however, was held in *Dioguardi v. Warden* [103] to make the classification unconstitutionally vague. Such vagueness creates "the potential for invidious discrimination . . . such as to negate equal protection." [104]

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[99] *Id.* at 16–17.

[100] *Id.* at 17.

[101] N.Y. Correc. Law §§ 630 to 634 (McKinney Supp. 1975).

[102] Dioguardi v. Warden, 80 Misc. 2d 972, 974, 365 N.Y.S. 2d 446, 448–49 (Sup. Ct. Bronx County 1975).

[103] *Id.* at 974–75, 365 N.Y.S. 2d at 448–49.

[104] *Id.* at 974, 365 N.Y.S. 2d at 449.

APPENDIX B

MISSION PAPER: EXCERPTS FROM PROJECT PLAN OF THE COLORADO ORGANIZED CRIME STRIKE FORCE

PROJECT PLAN AND SUPPORTING DATA

Specific Crime Problem Being Addressed

This project has in the past two years, attempted to coordinate the efforts of a number of local and state law enforcement agencies in the investigation and prosecution of persons involved in an organized criminal activity. The project has accomplished this objective and has been quite successful in the investigation and prosecution of both "family-oriented" conspiracies and non-family groups, especially those persons involved in violation of the Colorado gambling laws.

Intelligence data continues to indicate a westward movement of a possible syndicate takeover in Colorado which is ripe for such with the "identified" family members either in prison, awaiting trial or attaining a relatively old age.

This project presently constitutes the entire state program of major narcotic trafficking detection and apprehension.

During the past year, Federal and State law enforcement agencies throughout the United States have warned that Organized Crime possesses significant control in economic crime which amounts to approximately a $40 billion a year "rip off." This Unit has heeded these warnings and intends to pursue the investigation of persons involved in "white collar" crime.

As implied in the project title, Special Prosecutions are to include cases that must be pursued that do not necessarily fall within the definition of Organized Crime to which this agency has the expertise to undertake.

Alternate Solutions

1. Local law enforcement agencies should resolve the problems of organized criminal activity within their jurisdictions in the same manner they deal with other crimes.

2. Local law enforcement agencies should establish separate and distinct Organized Crime Units within their jurisdiction.

3. Let the federal agencies attack organized crime, alleviating the state of the cost and burden of making the effort.

These alternatives are neither practical nor economically feasible. Alternative 1 and 2 would require considerably more funding to provide staff personnel and equipment. There would result in considerable duplication of effort as organized crime knows no boundaries while each agency is restricted to its own jurisdiction. Alternative 3 is not practical in that the federal government does not enforce state laws and doesn't have the manpower to commit to the problems of organized crime in Colorado.

Hence, the only solution at this time is to continue the present project specializing in the detection and apprehension of those persons engaged in organized criminal activity. Having the project under the Attorney General alleviates the problems of jurisdictional authority. Having a number of state and local agencies cooperating directly in the project relieves the fear of a state police force.

Project Goals, Methods and Resources

Project Goals

Immediate

The influences of organized crime in Colorado have not attained the proportions of many other states, i.e., New York, New Jersey, Florida, Michigan, Illinois, and California. If Colorado continues its phenomenal growth and prosperity, it becomes more attractive to organized family syndications. Intelligence reports continue to indicate that organized crime is filtering money into legitimate business from which precipitates business take overs, bankruptcy frauds, corruption of public officials and labor union infiltration. Successfully concluded investigations by this program along with intelligence information indicate that Colorado is a major distribution center for narcotics and dangerous drugs. The program is designed to maintain a vigil against these activities through a cooperative effort

with other state and federal law enforcement agencies. The Unit intends to monitor and self-evaluate the project's performance during the forthcoming grant period.

The Unit will continue to identify, gather evidence, and prosecute those individuals connected with the "family" and/or non-family affiliated organized crime factions.

The identification process is attained by use of informants, undercover officers, surveillance of known suspects and hangouts, and intelligence data received from other agencies.

An investigation when commenced, using undercover agents, and/or other investigative means, i.e., Court authorized wire taps, grand juries, etc., will provide the evidence that organized criminal activity is in fact taking place.

The Unit also will devote attention to other investigations as the need occurs, providing assistance to other state regulatory and local law enforcement agencies. By having the authority to request and conduct State Grand Juries, this Unit can provide a most effective investigative tool.

When an investigation culminates, the case is finalized by providing our legal staff with sufficient facts to successfully prosecute the individuals involved in the criminal conspiracy.

Long Range

Organized Crime has existed and been tolerated in Colorado for more than twenty years. Organized crime exists by the power it purchases with its money. The real impact in the battle against organized crime is attained when a project such as this can reduce the influence, scope and financial resources of organized criminal activity.

To accomplish the goals of this program, the following are task oriented projects:

Task 1. To reduce the illegal professional gambling profit of organized crime through the investigation and prosecution of at least one major bookmaking operation.

Task 2. To disrupt the organized criminal conspiracy of white collar crime in Colorado through prompt investigations using undercover agents to infiltrate the conspiracy.

Task 3. To diminish the financial return of legitimate business takeovers by organized crime through identification of these legitimate business fronts and through enforcement of the tax laws, securities laws and regulations, and fair trade regulations.

Task 4. Through efficient and effective use of limited personnel in the enforcement of this State's dangerous drug and narcotic laws, major distributors will be apprehended. Disruption of the interstate and inter-national trafficking systems will reduce the quantity of drugs available in the State of Colorado.

Task 5. Monitoring organized criminal activity in other areas, especially theft and theft receiving and preparing at least one substantial case involving a major "fencing" operation.

Task 6. To disrupt organized crime in areas outside the Denver metropolitan areas through assistance to local law enforcement agencies and encouraging their request for assistance.

Task 7. To assist in grand jury probes, not necessarily defined under organized crime, by making available the legal staff and investigators to direct and assist these grand jury investigations.

Objectives and Evaluation Measurement

The specific objectives of this project cannot be expressed only in statistical form, as the unit performs an intelligence function as well as a prosecution function. Statistical data that the Unit anticipates can be used as a measurable criteria in evaluating the project is provided for this purpose.

Immediate Objectives (within a 12-month period) and Related Evaluation Measures

Objective 1. Implementation of investigative procedures that will yield leads faster, using less manpower than conventional intelligence methods. Measurement of these procedures will be accomplished by compiling the number of leads obtained through informants, citizens and investigators and the related number of investigations undertaken and resulting arrests.

Objective 2. The apprehension of twenty people in traditional organized crime activity is contemplated. Of these arrests, we anticipate 80 percent will be charged with felonies. Though many of these individuals will be the result of task oriented investigations, some should be individuals previously targeted by this unit.

This objective will be measured by total number of arrests made, and comparison of number of targeted individuals that have been apprehended during the period.

Objective 3. We anticipate the apprehension of twenty-five suspected narcotic traffickers as a result of targeting a major system each two or three months. With the apprehensions, seizures of at least 5 million dollars (street level value) of narcotics and dangerous drugs will be made.

Statistical data comparing the objective to results will be provided. In addition, a measurement of the reduced quantity of drugs available in the State of Colorado by statistical comparison of drugs seized over the same period by major law enforcement agencies in Colorado compared to the amount seized by the Unit over the same period will provide an indicator of the reduced availability of drugs in Colorado.

Quantity of these drugs seized will be further measured by the individual number of individual doses that become unavailable to the users.

Objective 4. We anticipate 90% successful prosecutions of cases filed by the Unit as well as substantial criminal sentences on major targets and fines and probation to minor criminals arrested in connection with cases filed. Continued cultivation of new informants as a result of plea bargaining with the defendants is expected.

This objective can be evaluated by presenting the number of cases prosecuted and the results thereof.

Objective 5. There will be continued agent surveillance of suspected organized crime figures and their hangouts by the Unit's agents providing intelligence data. Informants will provide substantial intelligence data, intelligence from other law enforcement agencies, and surveillance will result in an expected increase of 3,000 names or places in the intelligence files.

Measurement will be by presenting:

A. Statistical data representing the number of new suspected people and places added to the intelligence files thought to have organized crime associations.

B. Major surveillances conducted, search warrants executed and the results of same.

Other data that will be provided for purposes of evaluation as to attainment of the program goals will include the following:

A. Estimated dollar value of weekly handle lost and the related profits, by the apprehension and disruption of bookmaking through the Unit's efforts.

B. Dollar amounts of state and federal taxes being assessed to businesses investigated by the Unit.

C. Presenting evidence that organized crime families in Colorado thought only to be involved in bookmaking and /or narcotic trafficking are actively engaged in or actually control the major fencing operations in the state.

The evaluation and monitoring of the project during the grant period will be the burden of the Unit. The investigation and prosecution reporting procedures will be revised to provide the meaningful data that can be analyzed, collated and summarized into measurable data comparing results to goals.

The following are Long Term Objectives (5 year program) of this Unit:

Objective 1. Remove the volume of money generated by organized crime through illegal gambling operations, by identifying the bettors and using them to testify against the bookmaker. Continuously disrupting the bettor and bookmaker will eventually destroy the entire gambling operation.

Objective 2. Through strict enforcement of the drug laws, disruption of the trafficking system will require the distributors to find other states through which to funnel their drugs. Thus, Colorado will no longer have the distinction of being one of the major distribution centers.

Objective 3. Identify the legitimate businesses used by organized crime to "launder" their profits from illegal operations.

Objective 4. Eliminate the power organized crime has in public corruption through exposure of the officials influenced by them.

Results or Benefits Expected:

As the objective of this program is not to compete with other law enforcement agencies, but to coordinate our efforts with them, we cannot expect to compile impressive statistics in the number of successful prosecutions of those arrested through the efforts of this project.

Project Methods and Resources

The project will continue to use the same methods of investigation in the past, as these have proven to be reliable and successful in attaining the objectives of the Unit.

Prosecution methods may be realigned as the assistant attorneys general assigned to the project will control the prosecutions of our cases rather

than having the local district attorney decide whether plea bargaining or reduced charges should be allowed.

A closely coordinated group of experienced investigators with proper direction from the director complemented with sound legal advice during an investigation, will result in a substantial number of quality cases being filed.

Investigative equipment previously acquired or provided to the Unit by the Denver Police Department and C.B.I. as required allows the investigators to have at their disposal, the most efficient tools to use in conducting their investigation.

APPENDIX C
RACKETS BUREAU INVESTIGATIVE PLAN

APPENDIX C
RACKETS BUREAU INVESTIGATIVE PLAN

What follows is a hypothetical investigation and investigative plan:

Part I.

At the inception of every investigation the assistant assigned to the matter should complete an *INVESTIGATIVE REPORT.*

The *Synopsis* should be a clear and concise precise of the facts upon which the investigation is based. It need not be exhaustive, including every bit of information known. Its value is in allowing the reader to immediately understand the nature of the matter under investigation.

The *Investigative Plan* should articulate a thoroughly and carefully thought-out plan for accomplishing the objectives of the investigation. Generally, alternative approaches should be suggested accompanied by an evaluation of the relative merits of each.

Potential *Legal Issues* should be noted as they are perceived and should be researched and analyzed in the context of the various investigative alternatives.

Under *Police Command* and *Officers,* the assistant should enter the name of the superior officers, and one or two knowledgeable detectives or police officers who could be contacted for information about the case. The *Criminal Activity* category can contain either a list of the statutory crimes being investigated (e.g. forgery, conspiracy) or preferably a more general and informative description (e.g. counterfeiting of gas rationing coupons). Finally the known *Subjects* of the investigation should be identified by name and/or alias.

Part II. Sample Investigative Plan

The sample investigative plan, set forth below, is based on the following hypothetical fact pattern:

During the execution of a search warrant on a bookmaking establishment on May 25, the police observed one Joseph Black, who was ultimately charged with illegal gambling activity, flushing some pieces of paper down the toilet. By the time they reached him, they were only able to retrieve a single piece, information from which is reproduced below. In addition 83 slips of paper bearing wagers were seized from a table.

May			2	9	16	23	30
Dom	500	2	v	v	v	v	
Nick	1000	3	v				
Yo Yo	1000	2	v	v	v	v	

A search of Black's person disclosed a small telephone book containing approximately 150 entries, most of which corresponded to names on the seized bookmaking records. Included in the book were numbers for "Dom," "Nick," and "Yo Yo," which, according to the telephone company, were assigned to Do-

minick Mossi, Nicholas Poulas, and Frank Connell respectively.

The police department's loansharking expert has examined the records and concluded the number next to the name represented the outstanding principal as of May 1, the number to the right was the interest charged in % per week, "v" represented a vigorish payment, and a number next to the v, a principal payment. The expert has heard of Black and doubts that he personally could put a large amount of money on the street.

Mossi, Poulas, and Connell were interviewed with the following results:

Mossi stated he never heard of Joe Black, never borrowed any money from a loanshark, and thinks it's nobody's business whether or not he gambles.

Connell refused to answer any questions.

Poulas bet with a bookmaking operation through an answering service. He received the number from his runner—Art Tisdale. He lost $1,500, had only $500 and asked Tisdale for a loan. Tisdale set up a meeting between Black and Poulas and Poulas borrowed $1,000 at 3%/week. He paid $30/week for 5 months but missed a payment on May 23. Black slapped him around and warned that it better not happen again. Poulas is scared and will not testify under any circumstances. He does not have the money to keep paying Black.

He has Tisdale's number, but has not been given the new number for the bookmaking office. He meets Black every week at the Hemlock Cigar Store where Black hangs out between 2:30 and 4:30. On numerous occasions Black has used the telephone in the store. (On the 23rd, Black pointed to the phone and said that "All I have to do is call, and have you taken care of"). Poulas thinks that the cigar store is involved, because on two occasions when he payed the vig by check, it had been deposited in the Hemlock account.

Part III. Rackets Bureau—Investigative Plan

CRIMINAL ACTIVITY:	Gambling Usury Extortion	ASSISTANTS:
SUBJECTS:	Joseph Black Arthur Tisdale Hemlock Cigar Store	POLICE OFFICERS: DATE:

SYNOPSIS:

The investigation was initiated after a search of bookmaking wireroom, disclosed the clerk, JOSEPH BLACK, in possession of loansharking records. A borrower, NICHOLAS POULAS, introduced to BLACK by a runner ARTHUR TISDALE, borrowed $1,000 from BLACK at 3 points in January to pay off a gambling debt. POULAS missed an interest payment in May and was threatened by BLACK. On two occasions, POULAS paid BLACK by check, both of which were deposited in the account of the HEMLOCK CIGAR STORE, the location where POULAS makes the payments and frequented by BLACK. POULAS will not testify because of fear, but has no money to continue paying BLACK. BLACK is most likely lending money for an UNKNOWN INDIVIDUAL and may have access to an ENFORCER. Two other probable borrowers have refused to cooperate.

INVESTIGATIVE PLAN:

To determine if BLACK has a "MONEY MAN" and "ENFORCER" and if so, to identify and obtain evidence sufficient to convict those individuals.

There is sufficient evidence to indict ar. convict BLACK for bookmaking and possible possession of usurious loan records. It is not likely, however, that, even with the threat of a prison sentence, he would disclose the identity of his accomplice(s).

Nevertheless, it does appear that BLACK must carry some notations of the identity of his borrowers, the amount of the outstanding principal, and the interest rate, if he is to continue his collections. Since the list seized was incomplete, a second search might be beneficial in identifying additional borrowers. The search could be made pursuant to a warrant (surveillance and additional information from Poulas would likely produce probable cause) or as incident to an arrest of BLACK on possession of usurious records charges. Once the list is obtained, the borrower could be identified from the previously seized telephone book. Even if the borrowers chose to cooperate they would unlikely, however, be able to implicate BLACK's higher-up(s).

The examination of the books and records and bank account of the HEMLOCK CIGAR STORE should be undertaken. But to do it now, before additional investigation, would tip off the targets to the extent of our knowledge.

The use of an undercover officer may be indicated. Since POULAS needs money to pay BLACK, he may be willing to introduce an undercover as a "friend" or "relative" willing to assume the obligation. BLACK is likely to agree since the $1000 principal is still outstanding. After the undercover makes a number of payments, he can ask to bet with BLACK. He then has the option of:

(1) asking for a large loan for a short period of time for "his business" (which could be set up on paper) in the hopes that BLACK could not handle it, and the money man be brought in, or (2) in defaulting and producing the enforcer, or both.

It may be necessary to use electronic surveillance with the above plan or instead of it, in the event that course of action is unsuccessful. Given the use of the store and its telephone by BLACK and BLACK's statement to POULAS regarding calling "to have him taken care," it seems possible that the additional physical surveillance might produce probable cause for the crimes of usury, extortion, and assualt.

LEGAL ISSUES:

1) Would a search of BLACK for loan records as incident to the execution of an arrest warrant be considered a "subtrafuge search?"

2) Would the federal RICO statute apply to the HEMLOCK CIGAR STORE if that business were being used to "launder" loanshark payments?

APPENDIX D
ENJOINING ILLEGALITY: USE OF CIVIL ACTIONS AGAINST ORGANIZED CRIME

CONTENTS

SUMMARY

Civil actions, particularly those affording equitable relief, offer promise of being effective in combatting the economic activities of organized crime. Remedies can be tailored to attack the profit-making and distributing mechanisms directly. Civil actions have important procedural advantages over criminal prosecutions. Civil and criminal sanctions presently exist side by side in many situations. The general rule that equity will not enjoin a crime grew out of the self-imposed limits of equity jurisdiction and not out of the character of conduct as inherently criminal or tortious. Statutes significantly expand equity jurisdiction to control criminal conduct by declaring that in specified situations the requirements for equity jurisdiction are met. There is also room for expansion of the use of civil actions against crime under existing case law. A civil action cannot be a subterfuge, but when the intent and effect of a remedy is preventative and compensatory rather than retributive and punitive, the civil action is constitutional.

I. Introduction

Organized crime is a big business in America today; it operates from a profit motive just as legitimate business does. Perhaps, if the activities of criminal organizations can be made less profitable, their control by the criminal justice system will be facilitated. These materials explore how economic aspects of organized crime can be regulated by the same methods used to regulate legitimate economic activity. Emphasis is placed on constricting both the means of production of illicit wealth—the buildings, cover businesses, and positions of influence used by organized crime to make its profits—and the outlets for investment of illicit wealth—the legitimate businesses used to launder mob money, and the enterprises into which organized crime expands using coercive and monopolistic tactics.

The vehicle of such efforts is the civil suit, grounded either in statute or case law. The typical remedy requested is an injunction[1] aimed at preventing future conduct, rather than punishing or compensating for past conduct. Damages may also be requested; however, the party seeking relief—the prosecutor—is not the type of plaintiff-victim who can generally collect damages.

Historically, injunctions were issued only by courts of equity, and while law and equity have been merged in all but a few states,[2] the traditional label is still used. Whether the power of the court to issue an injunction comes from case law developed by ancient courts of equity or is conferred by statute, injunctions are referred to as equitable remedies. In addition, several extraordinary writs,[3] issued by law courts, but operating like injunctions, are termed equitable remedies.

An injunction is a coercive order of the court directing the defendant to do or not do some act. It is enforced by the contempt power; if the order is not obeyed, the defendant can be imprisoned.[4] An injunction may be issued *ex parte;* such an order is called a temporary restraining order. It is normally effective for a few days only.[5] Its purpose is to prevent actions of the defendant from rendering further litigation useless. A preliminary injunction may follow to preserve the status quo during litigation. A permanent injunction is a final adjudication of the controversy; it may have whatever duration the court thinks appropriate.

Because the controversy is brought into civil court, there are important procedural advantages over criminal proceedings. Generally, relief is faster, especially where a temporary restraining order or preliminary injunction is granted. Evidence is easier to obtain; there is no evidence-suppression rule; the privilege against self-incrimination has only limited impact; and pre-trial discovery may be granted to obtain relevant facts. The burden of proof is lower in a civil case. There is no right to a jury trial in cases where relief is equitable. Remedies are flexible because an injunction can be drawn to fit the facts of a particular case and the defendant can be ordered to do what "ought to be done." The court has power to continue to monitor compliance with its order.

These materials will focus on equitable remedies, asking two questions:

1. Why use civil actions?; and
2. How may civil actions be directed against organized crime?

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[1] *See generally* D. Dobbs, *Remedies* ch. 2 (1973).

[2] The exceptions are Tennessee, Delaware, Arkansas, and Mississippi. D. Dobbs, *Remedies* § 2.6 Appendix (1973).

[3] The most useful of these writs for the prosecutor is *quo warranto,* now called "information in the nature of a quo warranto which, though in form a criminal proceeding, is in effect a civil remedy similar to the old writ, and is the method now usually employed for trying the title to a corporate or other franchise or to a public or corporate office. . . . [*Ames v. Kansas,* 111 U.S. 449 (1884)]. An extraordinary proceeding, perogative in nature, addressed to preventing a continued exercise of authority unlawfully asserted. . . . [*Johnson v. Manhattan Ry. Co.,* 289 U.S. 479, 502 (1933)]" *Black's Law Dictionary* 1417 (4th ed. 1968).

[4] Contempt may be either civil or criminal and the distinction has important procedural consequences. *See* discussion in text, *infra,* at ¶¶ 8, 12 and 42.

[5] Fed. R. Civ. P. 65 (ten day limit on temporary restraining orders).

II. Advantages of Civil (Legal and Equitable) Actions

A. Litigation Advantages

Civil actions, seeking equitable relief from the effects of crime, have important advantages over criminal prosecutions in the ease and speed with which relief may be granted. A temporary restraining order prohibiting certain conduct or maintaining the status quo pending trial can usually be obtained *ex parte* or by default before a trial on the merits.[6] In contrast, criminal sanctions are imposed following a complex or lengthy jury trial. An injunction, once granted, usually remains in force pending appeal; a criminal defendant on bail during trial is usually not imprisoned until his appeal is final. In a civil action, the government may appeal a denial of relief. The government is usually precluded from seeking appellate review in a criminal action. Injunctions and similar court orders can be readily and summarily enforced through the use of civil contempt.[7] When a contempt sanction aims to coerce obedience rather than punish disobedience it is civil, and it may be imposed summarily by the court hearing the issue on the merits.[8]

To convict for a crime, the state must prove its case beyond a reasonable doubt.[9] To prevail in a civil action, the state must prove its case merely by a preponderance of the evidence.[10] The prosecution's evidentiary burden is further lightened by the broad discovery available in civil actions. Generally, all evidence relevant to the action may be discovered.[11] Evidence of the general reputation of an establishment is admissible in a civil suit to enjoin an activity conducted there.[12] The defendant may be called to testify in a civil suit, and his failure to testify is a proper subject of judicial comment and a factor for the fact-finder to weigh. Unlike an indictment, a civil complaint can normally be amended before or during trial to correspond to facts actually discovered or proved. Finally, where the relief sought is equitable (as it will be in the typical civil action brought by a prosecutor), there is no right of a jury trial. This increases the speed of litigation and has been said to provide a forum less sympathetic to "white collar" criminals.[13]

B. Strategic Remedial Advantages

Organized crime is an economic, profit-oriented activity. High level members are often insulated from prosecution because they do not themselves engage in visible crime, and low level members are typically processed through the criminal justice system in revolving-door fashion. Equitable remedies, by contrast, can be tailored to attack the means necessary to the continued operation of a criminal enterprise. For instance, the maintenance of brothels, bookmaking headquarters, and the like can be directly enjoined. Criminals may be forced to divest themselves of businesses used as covers for illegal activities. Activities which are not crimes *per se,* but can be demonstrated to be related to a criminal enterprise, can be enjoined. The threat of punishment too often seems to have little effect on the leaders of organized crime. Civil remedies aim to incapacitate these individuals by making it impossible for them to use legitimate businesses to channel illegal profits or as fronts for illegal activities.[14] Essentially, injunctions work against *activities* as well as persons, so they may be appropriate in dealing with organized crime's ability to protect itself by not being dependant on individual members.

Civil remedies are diverse. A defendant may be forced to pay damages far in excess of any fine the

[6] *United States v. Cappetto,* 502 F.2d 1351, 1356 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975).

[7] *But see Bloom v. Illinois,* 391 U.S. 174 (1968), giving a criminal contempt defendant in a non-petty case the right to jury trial.

[8] The Supreme Court has distinguished between civil and criminal contempt:

> If [the sanction] is for civil contempt, the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court.

Gompers v. Buck Stove and Range Co., 221 U.S. 418, 441 (1918). Civil contempt seeks to enforce compliance, criminal contempt seeks to deter future misconduct. *McComb v. Jacksonville Paper Co.,* 336 U.S. 187 (1949); *Nye v. United States,* 313 U.S. 33 (1941). *See also* federal contempt statutes 18 U.S.C.A. §§ 401, 402 (1966).

[9] *Holt* v. *United States,* 218 U.S. 245 (1910); *In re Winship,* 397 U.S. 358 (1970).

[10] *Davis* v. *Auld,* 96 Me. 559, 53 A. 118 (1902) (liquor nuisance enjoinable on petition of 20 voters of town).

[11] Fed. R. Civ. P. 26–37; especially rules 26(a) (scope of examination), 34 (production of documents and things), and 37 (refusal to make discovery; consequences).

[12] *Gregg* v. *People,* 65 Colo. 390, 176 P. 483 (1918); *Balch* v. *State,* 65 Okla. 146, 164 P. 776 (1917).

[13] R. Leflar, "Equitable Prevention of Public Wrongs."

[14] National Association of Attorneys General, *The Use of Civil Remedies in Organized Crime Control* 2 (1975) (hereinafter *Civil Remedies*).

criminal law provides.[15] This is especially true when class action suits allow private plaintiffs to join the government in claiming damages from organized crime's activities. The injunction is a flexible tool. When a business is syndicate-controlled, the corporate charter may be revoked, and divestiture of its assets ordered. Necessary business licenses may be cancelled or not granted at all. Illegal contracts, such as loan shark debts, may be rescinded and their enforcement in the courts or in the streets enjoined. Organized crime elements can be forced to divest themselves of any interests they have in legitimate business. Finally, the court will normally retain jurisdiction of a case to see that the court's order is carried out; it may also require the defendant to submit periodic reports verifying his compliance.

Despite these advantages in litigation and in remedies, civil actions share many of the infirmities of criminal prosecutions. Persons willing to violate criminal laws are unlikely to be more intimidated by civil process. Contempt proceedings, if punitive in nature and non-petty, are criminal proceedings in which the defendant is entitled to all the protections guaranteed any criminal defendant.[16] In some cases, too, the civil remedy itself may be found to be punitive;[17] consequently, criminal standards of due process may be applicable. Ideally, courts, legislatures, and prosecutors will fashion their remedies and enforcement processes to preserve their civil character, retaining the advantages for which such actions were originally chosen. Other constitutional limitations, discussed below, will, however, restrict civil actions, especially in the area of enforcement by contempt citations.

III. Requirements for Equity Jurisdiction

Under the common law and during the formative era of American legal thought, injunctive relief in equity was seen as an "extraordinary remedy,"[18] to be used with circumspection. Early cases reflect the maxim "equity will not enjoin a crime."[19] This maxim, however, is little more than a generalization of the requirements for equitable jurisdiction applied to crimes. While equity will not enjoin an action simply because it is a crime,[20] where there exists a personal or property right which equity will protect, such protection will not be denied simply because the conduct is also criminal.[21] Thus, there are several classes of well-recognized exceptions to the maxim.

Equitable jurisdiction is normally discretionary, to be granted or withheld in conformity with settled equitable principles and considerations.[22] Where it is clear that the "hard" law will not give a litigant adequate protection or relief, an injunctive remedy may become a matter of right. But equity will not right all wrongs; it is rarely available to enforce a complaint's political rights, or rights not peculiar to him. Further, equity does not punish bad acts; its remedies are mainly remedial and compensatory.

Despite the vagueness of equitable jurisdiction the American judiciary has developed a number of specific tests of the suitability of equitable remedies to a given controversy. Such tests are more specific in definition than in application, and are applied on a distinctly case-by-case basis.[23] Generally, an enjoinable action is one which meets the following requirements:

1. the conduct sought to be enjoined is capable of enjoinment;

2. the complainant has an interest equity will protect;

3. the plaintiff's legal remedy is inadequate;

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[15] Civil damages in a massive antitrust case, for instance, may reach hundreds of millions of dollars.

[16] *Bloom* v. *Illinois*, 391 U.S. 194 (1968).

[17] As was a forfeiture provision, labeled civil, but found to be criminal in *Aztec Motel* v. *State ex rel. Faircloth*, 251 So. 2d 849 (Fla. 1971).

[18] *Ex Parte Fahey*, 332 U.S. 258 (1947).

[19] *Gee* v. *Pritchard*, 36 Eng. Rep. 670, 2 Swanst. 402 (Ch. 1818); *In re Debs*, 158 U.S 564 (1895); *Bennett* v. *Laman*, 277 N.Y. 368, 14 N.E. 2d 439 (1938).

[20] . . . [I]t is objected that it is outside of the jurisdiction of a court of equity to enjoin the commission of crimes. This, as a general proposition, is unquestioned. A chancellor has no criminal jurisdiction. . . .

In re Debs, 158 U.S. 564 at 593 (1895).

[21] *Id.*

[22] *State ex rel Ellis* v. *Creech*, 364 Mo. 92, 259 S.W. 2d 372 (1953).

[23] The very nature of equitable relief necessarily forecloses any extensive specificity in its application. Both at early common law and today, equity has been available only in those controversies which call for judicial intervention over and above any relief which the "hard law" could grant to an aggrieved party. Although the old common law distinction between courts of law and courts of equity has been generally abolished in the modern United States, equitable relief to a great extent, still exists apart from "law" in its technical forms and is molded, when applied, to bring forth an "equitable" result in a given controversy.

248-698 O—78——10

4. the plaintiff has standing to assert his interest; and

5. the plaintiff himself is "doing equity"—his action is timely and brought with clean hands.

To explain:

1. Conduct is not capable of enjoinment if it cannot be altered by an injunction; to save face, the courts will not issue a futile injunction. Beyond this, the defendant's conduct must be such that an injunction will operate on specific behavior, will be preventative not punitive, and will affect conduct which is noxious to specific personal or property rights, or to the public at large.[24]

2. Interests equity will protect are generally property rights of the complainant.[25] Equitable jurisdiction has, in recent years, been expanded to protect the public welfare. In such an action the plaintiff must be a proper party to assert the public interest. This requirement is particularly important in the context of equitable actions against crime.

3. Inadequacy of the legal remedy is the cornerstone of equitable jurisdiction. With few exceptions, the existence of an *effective* remedy at law will bar a complainant from injunctive relief. Legal remedies are generally considered ineffective when a plaintiff will suffer *irreparable* injury despite the legal remedy. A person seeking an injuction must demonstrate that he has a *clear* legal right[26] which is being substantially impaired by the defendant's conduct. The impairment or threat of impairment must be *real* and *material;* equity courts will not step in to enforce rights only potentially threatened or insubstantial in nature.[27] The notion that criminal sanctions were inherently effective legal remedies[28] gave life to the maxim "equity will not enjoin a crime." Today, however, it is clear in many situations that the criminal law is not fully effective. The urban criminal court system which acts as a revolving door for petty criminals (bookmakers, prostitutes, and muggers for instance) is a prime example of the possible inadequacy of legal remedies.

4. Standing to seek injunctive relief is particularly important in the context of civil actions against crime. Standing requirements for private parties have been substantially lessened in recent federal law,[29] but the plaintiff must still show a direct threat of harm to a right personal to himself. In many states, the attorney general or district attorney is given standing by statute to seek relief protecting the public welfare. Even absent statute, however, most state attorneys general retain the common law powers and duties of that office.[30] These generally include the power to bring writs of *quo warranto, mandamus,* and *scire facias;*[31] to protect the properties and revenues of the sovereign; to enforce trusts; and to prevent public nuisances.[32]

5. The plaintiff is otherwise entitled to equitable relief if he has "clean hands"; laches does not bar the action; and the decree is practically enforceable. Thus, a suit based on evidence procured through fraud or police illegality might fail. A suit brought after excessive delay will be dismissed. A court will save face by not issuing an ineffectual decree. Equity courts examine not only the factual and legal aspects of the controversy, but also the parties themselves, particularly the party seeking relief.[33]

IV. Present and Possible Uses of Equity in Organized Crime Control

This section sketches some of the presently recognized uses of equitable actions against criminal conduct, and suggests possible uses of equitable and administrative actions against organized crime as an

[24] For a concise discussion of the use of equitable remedies in controlling crimes of vice, *see* J. Oliff, "Equitable Devices for Controlling Organized Vice," 48 *J. Crim. L. C. & P. S.* 623 (1958).

[25] Recently, equity began protecting civil rights also, *see Everett v. Harron,* 380 Pa. 123, 127, 110 A.2d 383, 385 (1955).

[26] Equity will not step in to protect a right the existence or legality of which is uncertain. *Russell v. Farley,* 105 U.S. 433 (1881); *Schubach v. McDonald,* 179 Mo. 163, 78 S.W. 1020 (1904), *error dismissed,* 196 U.S. 644 (1904).

[27] *McCombs v. McClelland,* 223 Or. 475, 354 P.2d 311 (1960); *Greenwood Lodge, No. 118, I.O.O.F. v. Hyman,* 180 Miss. 198, 177 So. 43 (1937).

[28] *State ex rel. Turner v. United Buckingham Freight Lines,* 211 N.W.2d 288 (Iowa, 1973).

[29] The relaxation of the standing requirement in federal law has generally occurred in the context of having standing to assert a constitutional question, *see Eisenstadt v. Baird,* 405 U.S. 438 (1972); or having standing to institute an action under a particular federal statute, *see Coalition for Environment v. Volpe,* 504 F.2d 156 (8th Cir. 1974).

[30] *People v. Miner,* 2 Lans. 396 (N.Y. Sup. Ct. 1868); Earl DeLong, "Powers and Duties of the State Attorney General in Criminal Prosecutions," 25 *J. Crim. L. C. & P. S.* 358 (1934).

[31] D. Dobbs, *Remedies,* § 2.10 (1973).

[32] This list is not exhaustive. *See People v. Miner,* 2. Lans. 396 (N.Y. Sup. Ct. 1868); *Civil Remedies* 16-17.

[33] D. Dobbs, *Remedies* ch. 2 (1973).

economic, profit-oriented phenomenon. Presumably, if organized crime can be made unprofitable, its control by the criminal justice system will be facilitated. The same type of decisional and statutory law which regulates legitimate economic activity should be available for use against illegitimate economic activity.

The general rule against injunctive relief from criminal activity does admit some exceptions—exceptions which are triggered when the requirements for equitable jurisdiction are met wholly apart from the criminality of the conduct. Presently recognized exceptions can be grouped under five major headings:

1. national emergencies;
2. widespread public nuisances, including threats and conspiracies to threaten public welfare, and situations where legal remedies are inadequate;
3. refusal to enforce rights illegally obtained;
4. disabilities placed on corporations and other publicly licensed businesses by reason of their *ultra vires* acts; and
5. use of existing regulatory and administrative law to restrain illegal businesses, and especially to abate the infiltration of organized crime into legitimate business.

The leading case on the use of injunctions in a national emergency is *In re Debs*,[34] arising out of Eugene v. Debs's Pullman Strike, which crippled rail transportation by shutting down the railroads in and out of Chicago. The government successfully sued for an injunction barring the union leaders or anyone conspiring with them from stopping trains, disrupting rail service, entering railroad property, or inducing others to engage in such conduct. When this did not end the strike, the court jailed Debs for criminal contempt. The case reached the Supreme Court on a writ of *habeas corpus*. The Court, sustaining the original injunction and the contempt citation, based its holding in part on the injunction remedy of the Sherman Antitrust Act, but went on to say it is within the inherent power of the federal government to protect public welfare and interstate commerce by an

> appeal to the civil courts for an inquiry and determination as to the existence and character of any alleged obstructions, and if such are found to exist, or threaten to occur, to invoke the powers of those courts to remove or restrain such obstructions; that the jurisdiction of courts to interfere in such matters by injunction is one recognized from ancient times and by indubitable authority; that such jurisdiction is not ousted by the fact that the obstructions are accompanied by or consist of acts in themselves violations of the criminal law; that the proceeding by injunction is of a civil character, and may be enforced by proceedings in contempt; that such proceedings are not in execution of the criminal laws of the land; that the penalty for a violation of injunction is no substitute for and no defense to a prosecution for any criminal offenses committed in the course of such violation. . . .[35]

Whether or not the activity of organized crime can be such a crisis, the Court expressly recognized that equity is not limited to non-criminal conduct. Presumably, if organized crime infiltrated an enterprise or industry, causing substantial harm to public welfare, the precedent of *Debs* would be applicable.

The power of the state to abate public nuisances and enjoin threats to, and conspiracies to threaten public welfare is widely recognized.[36] Criminal conduct must threaten such grave and irreparable harm that a punitive criminal sanction would not adequately protect the state's interests. This could be true either because the criminal process is too slow, because the conduct is ongoing, or because the harm threatened will not be put right by a punitive, "moral" vindication of the state's interests. Whether this exception is viewed as common law nuisance[37] or as an independent means of control-

[34] *In re Debs*, 158 U.S. 564 (1895).

[35] *Id.* at 599.

[36] *See generally*, Oliff, "Equitable Devices for Controlling Organized Vice," 48 *J. Crim. L. C. & P. S.* 623 (1958); R. Leflar, "Equitable Prevention of Public Wrongs," 14 *Tex. L. Rev.* 427 (1936).

[37] The state's power to enjoin a public nuisance has never been doubted. The criminality of the conduct enjoined is irrelevant. *Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938). Such conduct must be harmful to the health, safety, or morals of the community at large. *State ex rel. Allan v. Thatch*, 361 Mo. 190, 234 S.W.2d 1 (1950); *Harvey v. Prall*, 250 Iowa 1111, 97 N.W.2d 306 (1959) (collecting garbage without a permit enjoined as nuisance). Criminal conduct cannot be enjoined unless it threatens a civil or property right of the public. *Southland Theaters, Inc. v. State*, 254 Ark. 192, 492 S.W.2d 421 (1973); *State v. Ehrlick*, 65 W. Va. 700, 64 S.E. 935 (1909). Standing to prosecute such a suit is reserved to the appropriate public official. *Penna. S.P.C.A. v. Bravo Enterprises*, 428 Pa. 350, 359, 237 A.2d 342, 348 (1968) (suit to enjoin bullfight dismissed).

ling anti-social conduct,[38] this exception to the no-injunction rule cannot be applied, absent a statute, unless the requirements for equity jurisdiction, including inadequacy of the legal (*i.e.,* criminal) remedy, are met.

When specific property is used for criminal activities, nuisance actions are available to enjoin such uses of property.[39] Thus, where property is used as a bawdy house, as a gaming house, or for storing and fencing stolen merchandise, the jurisdiction of civil courts to issue injunctions against the use of the property has been upheld. A decree may operate *in personam* or *in rem.*[40] If the operation of the premises threatens public morals or welfare, the prosecutor may sue, and if it damages neighborhood property values, private parties may sue.[41]

When criminal laws are repeatedly, openly, and intentionally violated (for example, the "revolving-door" processing of prostitutes, street pushers, and petty gamblers through an urban criminal court system), the legal remedy is demonstrably inadequate to curb a widespread threat to public welfare.[42] An injunction against such violations, treated as public nuisances, is more effective than light criminal penalties which are seldom imposed. An injunction can act on a large group of people and can remain effective indefinitely, thus controlling future conduct.

Conspiracies which threaten public welfare are enjoinable under the same conditions as other threats to public welfare. Equity can reach the inchoate crime of conspiracy in circumstances where the conspiracy itself may pose a threat to public welfare and may not be reachable by traditional criminal penalties. Because of lower standards for the admissibility of evidence and lighter burden of proof, conspiracies may be easier to prove in civil court than in criminal court. Negotiations between known gangsters and legitimate businessmen may well be conspiracies to threaten the public welfare.

The power to enjoin invasions of civil or property rights is generally invoked by the injured party, but the institution of injunctive actions by law enforcement officials who are not themselves injured, on behalf of a specified group of private individuals, is not unheard of. For instance, the Securities and Exchange Commission's use of injunctions directed at a particular issue of securities is generally intended to protect the buyers or potential buyers of those securities.[43] Of course, such actions contemplate a public benefit over and above the protection of particular buyers. State and federal agencies like the Equal Employment Opportunities Commission and the Civil Rights Commission have the power to request restraints on conduct which violates the civil rights of individuals.[44] The distinction between public and private nuisance, dependent on who has been injured and who may seek relief, has been further blurred by the emergence of the "private attorney general" and the "citizen's suit."[45] But the same equitable principles apply to both private and public nuisance.[46] The

[38] Basis for equitable jurisdiction found where there was a "high public interest which the state is entitled to have protected and [where] the criminal remedy is inadequate to protect it." *State v. Holcomb,* 245 S.C. 63, 138 S.E.2d 707 (1964). Injunction justified by flagrant and persistent violations of the law. *State ex. rel. Turner v. United Buckingham Freight Lines,* 211 N.W.2d 288 (Iowa 1973); *State v. House of Vision-Belgard-Spero,* 259 Wisc. 87, 47 N.W.2d 321 (1951).

[39] *See, e.g., City of Sterling v. Speroni,* 336 Ill. App. 590, 84 N.E.2d 667 (1949) (gambling); *State v. Brush,* 318 Ill. 307, 149 N.E. 262 (1925) (liquor); *Balch v. State,* 65 Okla. 146, 164 P. 776 (1917) (prostitution).

[40] Although the owner's lack of knowledge may prevent him from being made a party to the injunction or being bound for the costs of the action, it will not prevent the issuance of a closing or removal and sale order. *People ex rel. Bradford v. Barbiere,* 33 Cal. App. 770, 778, 166 P. 812, 815 (1917); *People ex rel. Crowe v. Lipschultz,* 240 Ill. App. 411 (1926).

[41] *People ex rel. L'Abbe v. District Court of Lake County,* 26 Colo. 386, 58 P. 604 (1899) (writ of prohibition issued to halt lower court proceedings to enjoin gambling house when private plaintiffs below had shown no special injury); *Redway v. Moore,* 3 Idaho 312, 29 P. 104 (1892) (complaint must allege facts sufficient to show special injury).

[42] *City of Sterling v. Speroni,* 336 Ill. App. 590, 599 84 N.E.2d 667, 672 (1949); *Repass v. Commonwealth,* 131 Ky. 807, 115 S.W. 1131 (1909); *Stead v. Fortner,* 255 Ill. 468, 474, 99 N.E. 680, 682 (1912). *Compare State v. Vaughan,* 81 Ark. 117, 98 S.W. 685 (1906).

[43] *See Frank v. United States,* 384 F.2d 276 (10th Cir. 1967), *aff'd,* 395 U.S. 141 (1969).

[44] 42 U.S.C.A. §§ 1971, 2000a-3, 2000e-5, 2000e-6 (1974).

[45] Although nuisances have traditionally been the sole province of public officials, the incorporation of what is termed a "private attorney general" right of action into various statutes at both the state and federal level, (in other words, an action against a threat to *public* welfare which a private citizen may bring) may engender a blurring of the distinctions. *See, e.g.,* the "citizen's suit" provision of the 1970 Clean Air Amendments, 42 U.S.C.A. § 1857h-2 (Supp. 1976). Section 1857h-2 has been read to require a showing by the plaintiffs of the equitable prerequisites for an injunction, *Citizens' Ass'n of Georgetown v. Washington, D.C.,* 383 F. Supp. 136 (D.C.D.C. 1974); *Wuillamey v. Werblin,* 364 F. Supp. 237 (D. N.J. 1973).

[46] *See Action v. Garron,* 450 F.2d 122 (8th Cir. 1971); *Lanvin Perfumes v. LeDans Ltd.,* 9 N.Y.2d 516, 174 N.E.2d 920, 215 N.Y.S.2d 257, *cert. denied,* 368 U.S. 834 (1961).

criminality of the defendant's conduct is generally not relevant to the decision to grant an injunction.

The notion that courts will not enforce a right acquired by criminal means is a corollary to the equitable principle that a person shall not profit by his own inequity. In the absence of a public interest in the right, this exception may be available only to private parties wronged by the person seeking enforcement. A prosecutor might, however, have standing to sue where a right under a state license *(e.g.,* a liquor license) was obtained through bribery or corruption.[47] An individual indebted to a loan shark or gambler could bring a nuisance action to enjoin collection of the debt, an action for rescission of the contract, or defend an action for the debt (which may appear legal on its face) as a right illegally obtained.[48] The debtor may, however, be deemed to have an adequate legal remedy if, by statute, he can recover the excess interest or amounts paid as gambling debts.[49]

Perhaps the greatest potential for affecting organized crime as an economic phenomenon lies in blocking the expansion of mob money, power, and tactics into legitimate business. This might be accomplished through common law restraints on the *ultra vires* acts of corporations, and through use of state regulatory administrative laws, and licensing procedures.

A corporation acting in violation of the law, or through the use of syndicate money, is arguably acting *ultra vires* and a writ of *quo warranto* may issue to remedy the situation. When a corporation has abused or misused its franchise or powers granted by the state, the attorney general may seek to have the corporation dissolved or its powers restricted.[50] The court may retain jurisdiction of the case to monitor compliance with its decree. It may require the corporation to submit reports of its activities, or allow law enforcement officials access to its books and records. It may appoint a receiver to manage the affairs of the corporation in accord with its decree.[51]

A business run as a cover for organized crime activities can be restrained in the civil courts through the use of writs of *quo warranto,* injunctions against stated persons conducting such businesses, and denials or revocations of necessary business licenses. For instance, a court might order divestiture or dissolution of an import-export business used for smuggling, or a pawnshop used for fencing. A known racketeer might be enjoined from engaging in businesses related to his past criminal conduct.[52]

If a business is shown to be infiltrated by criminals, a necessary business license may be revoked or denied. State licensing schemes offer flexible hearing procedures, relaxed evidentiary rules, and often require that applicants complete detailed questionnaires demonstrating their honesty and good moral character.[53] Giving false information on such questionnaires is often a criminal offense. An administrative case may take only a fraction as much time as criminal trial.[54] Finally, racketeer expansion into legitimate business is often accomplished by use of coercive and collusive tactics prohibited by antitrust laws [55] and consumer fraud laws [56] presently in force in many states.

The above uses of equity to combat organized crime are only possibilities. The judiciary has been reluctant to apply them liberally. It is particularly difficult to demonstrate the inadequacy of the legal

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[47] *See, e.g., Sportservice Corp. v. Oregon Liquor Control Comm.,* 115 Ore. App. 226, 515 P.2d 731 (1973); *United States v. Polizzi,* 500 F.2d 856 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120 (1975); Oregon Department of Justice, *The Use of State Regulatory Action Against Criminal Infiltration of Legitimate Business,* paper presented at the National Conference on Organized Crime, Washington, D.C., Oct., 1975.

[48] *But see Caribe Hilton Hotel V. Toland,* 63 N.J. 301, 307 A.2d 85 (1973) (court enforced gambling debt contracted in a jurisdiction where gambling legal).

[49] N.Y. Gen. Oblig. Law §§ 5-421, 5-513 (Supp. 1976).

[50] *State ex rel. Landis v. S. H. Kress & Co.,* 115 Fla. 189, 155 So. 823 (1934); *Attorney General v. Contract Purchase Corp.,* 327 Mich. 636, 642, 42 N.W. 2d 768, 771 (1950).

[51] *CF. United States v. Grinnell Corp.,* 384 U.S. 563 (1966); United States v. Bausch & Lomb Co., 321 U.S. 707, 726-28 (1944).

[52] Authority for this type of order is clearer under statutory grants of injunctive power, but is possible without additional authority.

[53] *Civil Remedies* at 9.

[54] *United States v. Polizzi,* 500 F.2d 856 (9th Cir. 1974), *cert. denied,* 419 U.S. 1120 (1975) (parent corporation convicted of federal felony); *Sportservice Corp. v. Oregon Liquor Control Comm.,* 155 Or. App. 226, 515 P.2d 713 (1973) (subsidiary denied liquor license for use at racetrack).

[55] National Association of Attorneys General, *Prosecuting Organized Crime* 45-47 (1974).

[56] Committee of State Officials on Suggested State Legislation, Council of State Government, *Suggested State Legislation* 141 (1970).

remedy.[57] Thus, statutory authority for the use of equitable actions is the most useful means of obtaining such relief on a regular basis.

V. Statutory Grants of Injunctive Power

Statutory grants of injunctive power are by far the most fertile means by which the prosecutor acquires the necessary legal tools to seek civil relief from crime. The Supreme Court has declared this avenue to be a constitutional exercise of state power.[58] Such statutes can obviate the need to show all the usual common law prerequisites for equitable jurisdiction. For instance, an express grant of power to seek an injunction is usually held to be a binding legislative determination that the legal remedy is inadequate.[59] The statute may establish *per se* the existence of the equitable requirements.[60] Standing to invoke such statutes is reserved to the state absent express grants of standing to private parties, [61] which are common at the federal level.[62]

Examples of statutory uses of civil remedies to control conduct also subject to the criminal law are numerous. Federal legislation in the antitrust, income tax, food and drug, and price control areas provides civil remedies along with criminal sanctions.[63] While the focus of these statutes is regulatory not criminal, they offer examples of how civil and criminal enforcement provisions might be combined in statutes directed specifically against organized crime. The federal government[64] and several states[65] have such statutes. In addition, several states have statutes declaring houses of prostitution, places where alcohol is sold illegally, gambling houses, and the like to be public nuisances and hence enjoinable. Such statutes are constitutional.[66] Whether acts declared by statute to be public nuisances can be enjoined throughout the jurisdiction, without reference to a specific place, is an open question, unless the statute in question specifically authorizes such a decree.[67] The National Prohibi-

[57] *See State ex rel. Turner v. United Buckingham Freight Lines*, 211 N.W.2d 288 (Iowa 1973), where the court enjoined violations of criminal highway transportation laws because of persistent and open violations, despite repeated prosecutions. *Cf. Sanvita v. Common Laborer's and Hod Carriers Union of America, Local 341*, 402 P.2d 199, 202 (Alas. 1965) (repeated violence in union hall).

[58] *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Tigner v. Texas*, 310 U.S. 141 (1940).

[59] Conceptually, an express statutory grant of injunctive power under explicit conditions results in the statutory injunction becoming a *legal* remedy.

[60] *See, e.g.*, Cal. Pen. Code § 11225 (West 1970) (red light abatement law; nuisance *per se*). Sometimes the nuisance label is not explicit but is clearly suggested by the terms of the statute. N.Y. Civ. Prac. § 330 (McKinney 1975) (injunctions against sale of obscene prints and articles); 42 U.S.C.A. § 1983 (1974) (Civil Rights Act—civil action for deprivation of rights).

[61] *See* note 29, *supra*.

[62] *See, e.g.*, 21 U.S.C.A. § 882 (1972) (narcotics); 15 U.S.C.A. §§ 4, 25 (1973) (antitrust); 18 U.S.C.A. § 1964 (Supp. 1976) (racketeering in interstate commerce.)

[63] *See, e.g.*, antitrust provisions of 15 U.S.C.A. § 4 (1973) (jurisdiction of federal courts to enjoin violations of Sherman Antitrust Act); 15 U.S.C.A. § 6 (1973) (property of illegal trust then in transit forfeit to government); and 15 U.S.C.A. § 21 (1973) (regulatory commissions given power to seek cease and desist orders and orders requiring divestiture of stock and ouster of corporate officers). While injunctions under these sections must be granted or denied in accordance with equitable principles *(Appalachian Coals v. United States*, 288 U.S. 344[1933]), if a violation is found, the remedy will be upheld if it reasonably tends to restrain the prohibited conduct. *(United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707 [1944]). *See also*, 26 U.S.C.A. §§ 7402, 7403 (1967) (civil enforcement of income tax law); 21 U.S.C.A § 332 (1972) (civil enforcement of food and drug laws, providing that a violation of an injunction which is also a violation of the statute will be tried to a jury on demand of accused); and 12 U.S.C.A. § 1904 note (Supp. 1976) (civil enforcement of price controls).

[64] 18 U.S.C.A. § 1961 *et seq.* (Supp. 1976), discussed in text, *infra* at ¶¶37–41.

[65] The Florida (Fla. Stat. §932.58 *et seq.* [1973]), Connecticut (Conn. Gen. Stat. Ann. §§ 3–129a, b [1971]), and Rhode Island (R.I. Gen. Laws Ann. §§ 7–14–1 to 7–14–3[1970]) statutes are substantially identical, giving the attorney general the power to seek, in civil court, revocation of a corporate charter or permit to do business, or an injunction against any noncorporate business, when: any official of the corporation is a racketeer or engages in racketeering activities in conducting corporate business, under circumstances where a majority of the board of the board of directors should have known of such activity; or when any person actually in control of a non-corporate business has, in conducting such business, engaged in racketeering activities with intent to induce others to deal with the business; and where the civil remedy is necessary to prevent future illegal conduct. The Florida statute was declared unconstitutional by that state's highest court in *Aztec Motel v. State ex rel. Faircloth*, 251 So.2d 849 (Fla. 1971), discussed in text *infra* at ¶42. The Hawaii statute (Hawaii Rev. Stat. ch. 742 [1972]) combines the essentials of the above statutes with the provisions of RICO (18 U.S.C.A. §§ 1961 to 1968 [Supp. 1976]), discussed in text *infra* at ¶¶37–41.

[66] *Mugler v. Kansas*, 123 U.S. 623 (1887); *Kingsley Books, Inc. v. Brown*, 354 U.S. 436 (1957); *Bennett v. Laman*, 277 N.Y. 368, 14 N.E.2d 439 (1938).

[67] *See, e.g.*, Cal. Pen. Code § 11225 (West 1970) (gambling, prostitution); Ill. Ann. Stat. ch. 100-½, § 1 (Smith-Hurd 1935) (prostitution); Me. Rev. Stat. Ann. tit. 141, § 1 (1965) (liquor, drugs); Mass. Gen. Ann. Laws ch. 139, § 6, (Supp. 1976), § 16 (1972) (prostitution).

tion Act contained such a provision,[68] the validity of which was never settled. Lower federal courts were split on the question, and it never reached the Supreme Court.[69]

An example of a statute explicitly directing civil remedies, and in particular injunctions, against organized crime is the Racketeer Influenced and Corrupt Organizations (RICO) section[70] of the federal Organized Crime Control Act of 1970, which provides civil and criminal remedies against the activities of racketeering enterprises in interstate commerce. RICO defines racketeering activity as "any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotics or other dangerous drugs, which is chargeable under state law and punishable by imprisonment for more than one year; . . ."[71] or any act indictable under a variety of federal criminal laws from bribery to extortion to gambling; or any act involving bankruptcy or securities fraud. A "pattern of racketeering activity" is two racketeering acts within ten years of each other.[72] An "enterprise" is any "group of individuals associated in fact."[73] By this last definition, the Act brings within its ambit both legal and illegal enterprises.[74]

Prohibited activities[75] under RICO are:

1. use of racketeering income to acquire an interest in an enterprise affecting interstate commerce;

2. use of racketeering income to maintain an interest in an enterprise affecting interstate commerce; and

3. conducting the affairs of any enterprise through a pattern of racketeering activities.[76]

The Act provides stiff criminal penalties.[77]

The civil remedies of RICO are found in section 1964.[78] Part (a) gives district courts jurisdiction to prevent and restrain violations of section 1964 by ordering a person to divest himself of interests in an enterprise, restrain a person from engaging in similar enterprise and ordering dissolution or reorganization of an enterprise. The Attorney General may bring actions under RICO. The court may grant preliminary relief pending trial. Private parties may also sue, and recover treble damages. A final judgment in a criminal case has collateral estoppel effect in a subsequent civil suit.[79]

The government is given broad civil discovery powers,[80] equivalent to the reach of a subpoena *duces tecum* in aid of a grand jury investigation.[81] These powers may be enforced in a contempt proceeding.

The civil remedies section has, to date, been tested only once, in *United States v. Cappetto.*[82] Defendants were operating an illegal gambling business out of a pool hall, with the knowledge of the owner. The government alleged violations of section 1962(b) in acquiring the gambling business through a pattern of racketeering activity; and of section 1962(c) in conducting the affairs of the enterprise through a pattern of racketeering activity. Jurisdiction was alleged under section 1964, the civil remedy provision. The government sought injunctions against the conduct of the business, divestiture of the building, disclosure of the names of associates, and a 10 year monitoring order. Defendants refused to appear for discovery, and the court entered a default judgment against them, held them in contempt of court, and ordered them jailed until they complied with the discovery orders. On review, the court, relying on *In re Debs,*[83] held that Congress had the power to restrain acts threatening interstate commerce which were also crimes. The

[68] National Prohibition Act, 41 Stat. 314, rendered inoperative by U.S. Const. Amend, XXI.

[69] *See* discussion in 5 J. Moore, *Federal Practice* § 38.24[3] at 195–97 (2d. 1968).

[70] 18 U.S.C.A. §§ 1961–1968 (Supp. 1976).

[71] 18 U.S.C.A. § 1961 (Supp. 1976).

[72] *Id.*

[73] *Id.*

[74] *United States v. Cappetto,* 502 F.2d 1351, 1355 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975). *Contra, United States v. Moeller,* 402 F. Supp. 49 (D.C. D.C. 1975).

[75] 18 U.S.C.A. § 1962 (Supp. 1976).

[76] These provisions are not unconstitutionally vague. *United States v. White,* 386 F. Supp. 882, 883 (E.D. Wisc. 1974). They should be read like a regulatory statute. *United States v. Stofsky,* 409 F. Supp. 609, 613 (S.D.N.Y. 1973).

[77] 18 U.S.C.A. § 1963 (Supp. 1976) provides up to 20 years imprisonment and/or $25,000 fine, plus criminal forfeiture, held constitutional in *United States v. Amato,* 367 F. Supp. 547 (S.D.N.Y. 1973).

[78] 18 U.S.C.A. § 1964 (Supp. 1976).

[79] *Id.* (subsections a-d).

[80] 18 U.S.C.A. § 1968 (Supp. 1976).

[81] *See Universal Manufacturing Co. v. United States,* 508 F.2d 684 (8th Cir. 1975).

[82] *United States v. Cappetto,* 502 F. 2d 1351 (7th Cir. 1974), *cert. denied,* 420 U.S. 925 (1975).

[83] 158 U.S. 564 (1895).

court distinguished cases civil in name but criminal in substance and sanctions, and cases of forfeitures, holding that section 1964 relief is remedial rather than punitive. The act was meant to apply to illegitimate as well as legitimate business.[84] Neither irreparable injury nor inadequacy of the legal remedy need be shown. The statute is not unconstitutionally vague. Finally, the court held that a defendant who had been "use" immunized could not refuse to answer civil interrogatories, and the remedy for his silence was civil contempt. Whether a contempt proceeding against the defendants for refusing to obey the injunction would be civil or criminal was not decided. Use of the advantages of civil actions, discussed above (¶¶8–9) withstood constitutional attack.

VI. PROBLEMS AND LIMITATIONS

There are both practical and legal limitations on the use of civil actions to control organized crime. First, a person willing to violate criminal laws is unlikely to be awed by civil process. If contempt proceedings for violations of injunctions are criminal, then it will be just as difficult to get a contempt citation as to convict for the substantive offense,[85] since the government will have to prove, beyond a reasonable doubt, conduct equivalent to a violation of the underlying criminal offense.[86]

If a civil action is found to be a criminal action in disguise, all the constitutional protections afforded any criminal defendant will apply. The Supreme Court has enunciated two tests of the criminal character of an action. The punitive intent test of *Trop v. Dulles*[87] precludes resort to civil remedies where the intent of the legislature is punitive and no valid and substantial regulatory basis for the statute exists.[88] A statute with a real effect on public welfare or commerce would presumably pass this test. The balancing test of *In re Gault*[89] and *In re Winship*[90] bars the use of civil standard of proof by a preponderance of the evidence where the punitive effect of the remedy on the defendant outweighs the governmental interest in flexible procedure. On this ground, the Florida Supreme Court held that state's civil remedy statute[91] invalid. Because the statute contained a forefeiture provision, it had to measure up to criminal standards of exactness. Since it did not give adequate notice of what acts by officers of a corporation would subject it to forfeiture of its charter, the statute was declared void for vagueness. In *Gault* and *Winship,* youngsters, being dealt with through the civil processes of the juvenile courts, faced loss of their liberty for a period of years. The evidence against Winship was convincing by a preponderance, but not beyond a reasonable doubt. The Supreme Court held that[92] when a person faces imprisonment, the proof against him must be convincing beyond a reasonable doubt despite the label given the proceeding. In *Gault* the Court held that self-incrimination, notice, and counsel protections had to be given a juvenile as they would an adult criminal defendant.[93] Absent forfeiture or imprisonment remedies as part of the civil jurisdiction invoked, economic loss and injury to reputation are probably not enough to trigger criminal constitutional protections.[94]

The government cannot use in a criminal prosecution testimony, privileged under the Fifth Amendment, obtained from the defendant in a civil proceeding where the options were to testify or default.[95] Thus, testimony unobtainable in a criminal

[84] *Accord, United States v. Parness,* 408 F. Supp. 440 (S.D.N.Y. 1975).

[85] In light of *Bloom* v. *Illinois,* 391 U.S. 194 (1968) (requiring a jury trial for a defendant subjected to a "non-petty" criminal contempt proceeding for violating an injunction issued by the court) and in light of the line of Supreme Court cases extending the various protections of the Constitution to state criminal defendants by way of the Fourteenth Amendment (*see, e.g., Mapp v. Ohio,* 367 U.S. 643 [1961]), all the procedural safeguards of criminal prosecutions seem to be applicable to criminal contempt.

[86] *See, e.g., United States v. Rastelli,* 75 Cr. 160 (E.D.N.Y. 1975).

[87] *Trop v. Dulles,* 356 U.S. 86 (1958) (defendant voted in foreign election. Government in civil suit argued that he had forfeited citizenship. Supreme Court held forfeiture to be punitive and unrelated to a legitimate regulatory purposes, invalidating the civil judgment).

[88] Comment, "Organized Crime and the Infiltration of Legitimate Business: Civil Remedies for 'Criminal Activity'," 124 *U. Pa. L. Rev.* 192, 212 (1975) (hereinafter *Infiltration of Legitimate Business).*

[89] *In re Gault,* 387 U.S. 1 (1966).

[90] *In re Winship,* 397 U.S. 358 (1970).

[91] Fla. Stat. § 932.58 *et seq.* (1973), declared unconstitutional in *Aztec Motel v. State Ex rel. Faircloth,* 251 So. 2d 849 (Fla. 1971).

[92] *In re Winship,* 397 U.S. 358, 368 (1970).

[93] *In re Gault,* 387 U.S. 1, 31–56 (1966).

[94] *United States v. DuPont,* 366 U.S. 316, 326 (1961); *see also Infiltration of Legitimate Business* at 217.

[95] *United States v. Kordel,* 397 U.S. 1 (1969).

action may not be elicited first in a civil action and then used in a subsequent criminal action. But, the defendant must raise his Fifth Amendment privilege in the civil action: if self-incriminating evidence comes in without objection in the civil suit, it can be used in a later criminal prosecution.[96] If the defendant raises a valid privilege in civil court, the government can either forego his testimony or grant him "use" immunity from later prosecution,[97] as was done in *Cappetto.*

Records required by statute or by court order (as where the court seeks to monitor compliance with injunctions), cannot be the basis of a criminal prosecution or criminal contempt proceeding unless such records:

1. are of a kind the defendant normally keeps;
2. involve a "non-criminal and regulatory area of inquiry"; or
3. are records of a publicly licensed business.[98]

Thus, while the government may legitimately require a wide range of records, which are not privileged under the Fifth Amendment, it cannot, under the guise of civil or regulatory record keeping requirements, force persons to record their own criminality. Thus, where gambling is illegal, the government cannot convict on the basis of records required by a wagering tax law which only imposed a tax on illegal gambling income. Where ". . every portion of these requirements had the direct and unmistakable consequence of incriminating petitioner; the application of the constitutional privilege to the entire registration procedure was in this instance neither 'extreme' nor 'extravagant'."[99] The record requirements under the gambling tax law passed none of the three tests above. Presumably, a grant of "use" immunity as to any records would remove all Fifth Amendment objections.[100]

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[96] *Id.* at 10.

[97] 18 U.S.C.A. § 6002 (Supp. 1976); *note* that, since a corporation has no Fifth Amendment privilege, *Hale v. Henckel,* 201 U.S. 43 (1905), it must have some agent who can testify to what it knows without fear of self-incrimination.

[98] *United States v. Marchetti,* 390 U.S. 39, 57 (1968); *Infiltration of Legitimate Business* at 220.

[99] *United States v. Marchetti,* 390 U.S. 39, 49 (1968).

[100] *United States v. Cappetto,* 503 F.2d 1351, 1356, *cert. denied,* 420 U.S. 925 (1975).

APPENDIX E
SENTENCING THE RACKETEER

Appendix E
Sentencing the Racketeer

CONTENTS

Summary

The primary goals of a sentence in an organized crime prosecution should be deterrence and incapacitation, not rehabilitation. Traditionally, the prosecutor's task was thought to stop at the conviction. This view is misguided; the prosecutor should seek, through all lawful means, to secure an appropriate sentence in all criminal prosecutions, but particularly in organized crime cases. The presentence report usually provides the sentencing judge with the information essential to his decision in imposing sentence within the statutory range. Few statutory or constitutional requirements limit its scope. Individualized sentencing requires that the judge's scope of inquiry not be limited. The prosecutor, therefore, ought to provide the probation department with all relevant information in organized crime cases. Further, he should actively draw the court's attention to the report's significance, recommending, in the public interest, appropriate sentences in all organized crime prosecutions. His goal should be to obtain, in appropriate cases, the maximum authorized jail time and fine. Statutory and constitutional limits remain on the prosecutor's right to appeal a sentence, but recent decisions have begun to broaden this right; it should be vigorously pursued. When possible, the prosecutor should use recidivist and special dangerous offender provisions to secure extended terms.

I. Introduction

A. The Special Problem

The sentencing process can be a crucial phase in the prosecution of organized crime.* It is here that the risks of involvement in organized crime can be made clear to present and prospective members and associates. Similarly, sentencing can be a key tool for imposing economic burdens on those involved in organized crime. (To keep this memorandum within reasonable lenghts, only Federal, New York, New Jersey and Massachusetts law will be reviewed).

Organized crime functions, on the conscious level, as a business. The motives of those engaged in its activities are "rational." Thus, organized crime participants should be influenced by altering the risks of punishment and the rewards of criminal endeavor. At the same time, a sentencing policy designed to render a criminal useless, and possibly burdensome to his associates for substantial periods of time, will strike at the special strenght of organized crime. It can force a new cost-benefit analysis; profits will be realized only at a higher price. Membership in an organization may appear less attractive, and the rewards for joining may have to be commensurately greater. The long-term loss of a convicted member's services may not wholly cripple the activities of the organization, but it should render it somewhat less profitable.[1]

> A presentence investigation of an "unimportant" numbers runner, bookie or gambling operator may reveal him as a stable individual; if it also reveals him as a salaried employee of a criminal organization, he should be incarcerated for as long a time as possible under the law. Maximum imprisonment inflicts heavy costs on the syndicate for his family's support and other "fringe benefits," in addition to legal fees and bail which the organization must provide to maintain its operations. His ties to the organization and his financial needs make it improbable that he will want or be allowed to seek other employment until he himself is too expensive a risk. Despite his otherwise apparent eligibility for a fine, suspended sentence, or probation, he must be regarded as a capillary feeding the heart of organized crime and he be committed for the purpose of increasing the operation costs of the business of crime and racketeering. Rector, "Sentencing the Racketeer," 8 *Crime and Delinquency* 386, 389 (1962).

The special character of organized crime, in short, demands a sentencing policy designed to render its activities more difficult to conduct,[2] and if no other goal is served, the commission of additional crime may be made more difficult through long-term imprisonment.

> . . . [I]f the crime is a calculated one and part of a widespread criminal skein, the needs of society may dictate that the punishment more nearly fit the offense than the offend-

[1] The Director of the National Council on Crime and Delinquency, Milton G. Rector, aptly observed:

[2] There is legal support for this policy. In *State* v. *Ivan*, 33 N.J. 197, 202-03, 162 A. 2d. 851, 853-54 (1960), the New Jersey Supreme Court observed:

er. There the sentencing judge may conclude he should give priority to punishment as a deterrence to others and as an aid to law enforcement . . . [W]hen the offense serves the interests of a widespread conspiracy, it would be a mistake to think of the defendant as an isolated figure. He is part and parcel of an enterprise. . . . [I]f the crime is part of a larger operation, it merits stern treatment.

B. The Traditional Sentencing Pattern: Leniency

Ironically, studies have shown that stern sentences for racketeers are the exception, not the rule. A Department of Justice study of the years 1960-1969 revealed, for example, that two-thirds of the Cosa Nostra members indicted by the Department faced maximum jail terms of only five years or less. Only 23% of the convicted members subject to indeterminate sentences received the maximum; most of the sentences ranged from 40% to 50% of the maximum.[3]

Such a pattern of leniency neither deters nor incapacitates. The conclusion seems inescapable: prosecutors should direct their efforts not only to securing evidence and conviction, but also to securing higher sentences.

C. The Prosecutor's Power: Beyond the Recidivist Statutes

Organized crime offenders may be vulnerable to an increased sentence under an "habitual criminal" or "persistent felony offender" statute. Such a statute will usually require that the maximun penalty imposed on such an offender.[4] These special procedures, where appropriate, should be vigorously pursued. There is more, however, that the prosecutor can do in the *typical* situation where the task is to secure higher maximums within *normal* ranges.[5] Here, too, there is a need for vigorous action.

II. FUNCTION OF THE PRESENTENCE REPORT

A. Individualized Sentencing and the Presentence Report

The American judicial system has long recognized the importance of individualizing criminal sentences.[6] The task of matching the sentence to the individual requires the judge to balance a series of factors in the context of the facts of a particular case. The judge must rely heavily on the presentence report in making his decision. Influencing the contents of that report is the first step towards influencing the judge's decision.

B. Functions of the Prosecutor and the Probation Office

The prosecutor must make available to the court any information he has that is material to the determination of the punishment. Information both favorable and unfavorable to the defendant should go to the court.[7] He must, of course, make sure that the sentence is not based on a mistake of fact or faulty information.[8] As a rule, the prosecutor conveys this information to the court through the probation office. It may, in fact, be a violation of due process for the prosecutor to convey informa-

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[3] *See* S. Rep. No. 91-617, 91st Cong., 1st Sess. 85 (1969). For a similar pattern, *see* Report for 1971 by New York State Joint Legislative Committeee on Crime, its Causes, Control and Effect on Society, reprinted in *Hearing before the Subcommittee on Criminal Laws and Procedures of Committee on the Judiciary of the United States Senate,* 92d Cong., 2d Sess. 4188-90 (1972). A study of 1,762 cases involving organized crime members in New York State courts showed that 44.7 percent of all indictments against racketeers ended in dismissal; while only 11.5 percent of indictments against all defendants resulted in dismissal. Organized crime figures were convicted in 193 cases; 46 percent of those cases ended in suspended sentences or fines. The Committee computed the probabilities for an organized crime figure going to jail; the figures are sobering.

Arrested for:	Probability of going to jail or prison
Larceny	1 in 5
Gambling	1 in 50
Extortion	1 in 3
Narcotics	1 in 4
Assault	1 in 7

For a vivid journalistic description of the leniency problem, *see* the *New York Times,* Sept. 25, 1972, p. 1, col. 6, *reprinted,* the Senate Hearing cited *supra.*

[4] *See, e.g.,* Mass. Gen. Laws Ann. ch. 279 § 25:

> Whoever has been twice convicted of crime and sentenced and committed to prison in this or another state, or once in this and once or more in another state, for terms of not less than three years each, and does not show that he has been pardoned for either crime on the ground that he was innocent, shall, upon conviction of a felony, be considered an habitual criminal and be punished by imprisonment in the state prison for the maximum term provided by law as a penalty for the felony for which he is then to be sentenced.

The constitutionality of this statute was upheld in *McDonald* v. *Massachusetts,* 180 U.S. 311 (1901).

[5] *See* Section V of this appendix for bibliography on recidivists and "dangerous special offender" sentencing.

[6] *See Williams* v. *New York,* 337 U.S. 241, 247 (1949):

> The belief no longer prevails that every offense in a like legal category calls for an identical punishment without regard to the past life and habits of a particular offender.

[7] *Brady* v. *Maryland,* 373 U.S. 83, 92 (1963).

[8] *United States* v. *Malcolm,* 432 F.2d 809, 818 (2d Cir. 1970).

tion directly to the sentencing judge in absence of the defendant's counsel.[9] The probation department is, therefore, a necessary intermediary. The probation department should seek to obtain all the relevant information the prosecutor possesses; the prosecutor has a duty to respond.[10]

The probation department summarizes the information it has collected in a presentence report. This report is the sentencing judge's primary guide.

C. The Right of Allocution

The presentence report, of course, is not the judge's only source of information. All jurisdictions recognize the defendant's right to make a statement before sentencing—the right of allocution. New Jersey Court Rule 3.21-4(b), for example, provides:

> Before imposing sentence the court shall address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information in mitigation of punishment. . . .

N.Y. Crim. Pro. Law § 380.50 (1971) also permits both the defendant and his counsel an opportunity to speak before sentence is set. The judge must ask the defendant whether he wishes to make a statement.

The general acceptance of the right of allocution, however, does not qualify the central importance of the presentence report. It remains the sentencing judge's primary guide, and its scope should then be a matter of great concern to the prosecutor.

Section 380.50 also provides the prosecutor with a right to speak before sentencing. The statute reads: "At the time of pronouncing sentence, the court must accord the prosecutor an opportunity to make a statement with respect to any matter relevant to the question of sentence." New Jersey Court Rule 3.21-4(b), however, contains no such provision. In all cases the prosecutor ought to seek to be heard in the public interest.

III. Scope of the Presentence Report

A. General Admissibility of Information

The pertinent statutes offer only general guidance, but they do indicate the wide range of information which may be included in a presentence report. Rule 32(c)(2) of the Federal Rules of Criminal Procedure, for example, states:

> The report of the presentence investigation shall contain any prior criminal record of the defendant and such information about his characteristics, his financial condition and the circumstances effecting his behavior as may be helpful in imposing sentence or in granting probation or in the correctional treatment of the defendant, and such other information as may be required by the court.

The analogous New York statute, N.Y. Crim. Pro. Law § 390.30(1)(1971), provides that the presentence investigation should consist of:

> the gathering of information with respect to the circumstances attending the commission of the offense, the defendant's history of delinquency or criminality, and the defendant's social history, employment history, family situation, economic stature, education and personal habits.

This section of the statute also allows the agency conducting the investigation to include any other information it considers relevant to the question of the sentence. Other statutes in New Jersey and Massachusetts are less explicit on what information, beyond the criminal record of the defendant, may be included in the presentence report.[11] The gener-

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[9] *Haller* v. *Robbins*, 409 F.2d 857, 861 (1st Cir. 1969).

[10] *See United States* v. *Needles*, 472 F.2d 652, 654–55 (2d Cir. 1973):

> [N]o defendant can reasonably expect the probation office to refrain from seeking whatever information the prosecutor may have regarding the case then before the court or any other case involving that defendant. In fact, a failure to so inquire or refusal to respond accurately *would be a breach of duty* (emphasis added).

[11] *See* N.J. Court Rule 3:21-2 and Mass. Gen. Laws Ann. ch. 279 § 4A, ch. 276 § 85, ch. 276 § 100. The vagueness of the New Jersey requirements, however, should not lead the presecutor in that state to underestimate the importance of the presentence report. In New Jersey, the sentencing judge is strictly confined to reliance on material contained in that report. Rule 3:21-2 requires that, "The report shall be first examined by the sentencing judge so that matters not to be considered by him in sentencing may be excluded. The report, thus edited, shall contain all presentence material having any bearing on the sentence. . . ."

This principle was followed in *State* v. *Leckis*, 79 N.J. 479, 487, 192 A. 2d 161, 165 (1963), which held that a judge should limit himself in passing sentence to what he learned in the course of the trial or from the presentence report. A New Jersey court has even held that a judge's personal knowledge of the defendant's history must be officially recorded in the presentence report in order for the judge to use it in sentencing. *State* v. *Gattling*, 95 N.J. Super. 103, 230 A.2d 157 (1967).

al rule underlying these statutes is that there should be no formal limitations on the contents of presentence reports. This rule reflects the philosophy of the individualized sentence; a judge must have a wide scope of inquiry in determining the proper sentence.[12] The rules of evidence and the due process guarantees of the trial therefore, play no role here.

Accordingly, the sentencing judge may usually consider information not ordinarily admissible at trial, including hearsay evidence or evidence not related to the crime for which the defendant was convicted.[13] 18 U.S.C. § 3577, for example, reflects this principle in federal law:

> No limitation shall be placed on the information concerning the background, character and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence.

New York has a similar statute applicable to persistent felony offenders.[14]

The prosecutor should use this liberal policy when he seeks a long-term sentence for the convicted racketeer. Upper echelon organized crime figures often face prosecution for nonviolent crimes, such as tax evasion. The prosecutor may, however, use a history of violence associated with the offender to shape the presentence report to obtain a longer sentence. The general character of the sentencing process, therefore, seems well suited to the control of organized crime.

B. General Limits

There are, of course, certain general due process limits on what information can be used to determine a sentence.[15] The Supreme Court wrote broad tests for reviewing the sentencing process in *Hill* v. *United States*.[15a] Is sentencing infected with fundamental defects resulting in a miscarriage of justice?—Is it consistent with the rudimentary demands of fair procedure? The application of this language usually turns on a determination of whether the report's factual assertions have an appropriate degree of reliability. Sentences founded upon "misinformation of a constitutional magnitude" or "extensively and materially false" information cannot stand.[16] This qualification tempers the general rule that presentence reports need not conform to the rules of evidence or limit themselves to established facts.[17]

The sentencing judge is free to decide the degree of required factual support on a case-by-case basis. The enormous variety of information available requires such an *ad hoc* method.[18] The Ninth Circuit has tried, however, to set certain minimum stan-

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[12] *See Williams* v. *New York*, 337 U.S. 241, 247 (1949):

> . . . modern concepts individualizing punishment have made it all the more necessary that a sentencing judge not be denied an opportunity to obtain pertinent information by a requirement of rigid adherence to restrictive rules of evidence properly applicable to the trial.

See also United States v. *Baratta*, 360 F. Supp. 512, 514–15 (S.D.N.Y. 1973):

> No clamp should be placed upon the sentencing judge or barrier created to prevent him from pursuing . . . a reasonable inquiry into a defendant's behavioral pattern over a substantial period of time antedating the criminal act which brought him before the court—for whatever good or bad may come from it.

[13] *See Williams* v. *New York*, 337 U.S. 241, 246 (1949); *Williams* v. *Oklahoma*, 358 U.S. 576, 586 (1959). There is generally no special burden of proof applicable in sentencing. Nevertheless, where the sentencing judge wishes to rely on trial perjury to enhance the sentence, the trend is to require that the fact of perjury be found beyond a reasonable doubt. *See United States* v. *Hendrix*, 505 F. 2d 1233, 1236–37 (2d Cir. 1974) and authorities cited therein.

[14] N.Y. Crim. Pro. Law §400.20(5) (1971). For this separate problem of the special dangerous offender see section II of the Appendix to these materials.

[15] Note first a special limitation defined in New Jersey. If the defendant may have the presentence report disclosed to him certain irrelevancies, confidential statements, and medical/diagnostic opinions should be excluded if they would harm the defendant's rehabilitation. Such matters may certainly be investigated, but may not be included in the report. *See State* v. *Green*, 62 N.J. 547, 303 A.2d 312 (1973).

[15a] s 368 U.S. 424, 428 (1962)

[16] *See United States* v. *Tucker*, 404 U.S. 443, 447 (1972) (sentence founded in part upon misinformation of a constitutional magnitude); *Townsend* v. *Burke*, 334 U.S. 736, 741 (1948) (prejudice created by the prosecution's submission of misinformation regarding defendant's prior criminal record or by the court's careless misreading of that record yielded a denial of due process of law; sentence invalid.)

[17] For a statement of that general rule, *see Farrow* v. *United States*, 373 F. Supp. 113 (S.D. Cal. 1974) (presentence reports are not required to conform to the rules of evidence, and their contents are not restricted to established facts).

[18] A court may rely on "responsible unsworn or 'out of court' information relative to the circumstances of the crime and to the convicted person's life and characteristics." *Williams* v. *Oklahoma, 358 U.S. 576, 584 (1959).*

dards. In *United States* v. *Weston,*[19] the defendant received an *additional* fifteen year sentence on the basis of an unsworn statement of unverified reports, by an anonymous informer, alleging that the defendant engaged in additional and far more serious crimes; the court stated:

> . . . In *Townsend* v. *Burke,* the Supreme Court made it clear that a sentence cannot be predicated on false information. We extend it but little in holding that a sentence cannot be predicated on information of so little value as that here involved. A rational penal system must have some concern for the probable accuracy of the informational inputs in the sentencing process.

The Ninth Circuit, however, recently limited *Weston* in *Santorio* v. *United States,*[20] holding that the *defendant* must make an affirmative showing of direct prejudice (*i.e.,* led to higher sentence) for the court to disregard the hearsay portion of the presentence report. The defendant, therefore, bears the double burden of showing both the falsity of the information and its prejudicial effect. An attempt to use the *Weston* holding in the First Circuit failed in *United States* v. *Williams.*[21] There, the court found that sworn testimony from three individuals concerning the defendant's role in a heroin distribution racket was adequate to justify a sentence in the upper range of the authorized maximum.

What happens when the defendant challenges the factual basis of a presentence report? The Supreme Court in *Specht* v. *Patterson* held:

> The Due Process Clause of the Fourteenth Amendment . . . [does] not require a judge to have hearings and to give a convicted person an opportunity to participate in those hearings when he comes to determine the sentence to be imposed.[22]

Thus, as a general rule, the manner of rebutting hearsay assertions in a presentence report is determined by the informed discretion of the sentencing judge.[23] This policy of reliance upon the judge's discretion keeps the defendant from initiating an endless series of collateral disputes.[24]

C. The Admissibility of Information: Specific Issues

1. *Hearsay.* Judges often view hearsay evidence, inadmissible at trial, as sufficiently reliable for sentencing.[25] A court may rely, for example, on pertinent evidence from another case in determining sentence, although such evidence is hearsay with respect to the defendant.[26]

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[19] 448 F. 2d 626, 634 (9th Cir.1971), *cert. denied,* 404 U.S. 1061 (1972). The court stated:

Here the other criminal conduct charged was very serious, and the factual basis for believing the charge was almost nil. It rested upon only two things: the opinion of unidentified personnel in the Bureau of Narcotics and Dangerous Drugs, and the unsworn statement of the one agent that an informer had given him some information lending partial support to the charge. *Id.* at 633.

[20] 462 F. 2d 612 (9th Cir. 1973). The District Court of the Southern District of California, part of the Ninth Circuit, applied this qualification in *Farrow* v. *United States,* 373 F. Supp. 113, 119 (1974) (absent an affirmative showing of direct prejudice, there is no compulsion to disregard the hearsay portion of the presentence report).

[21] 499 F.2d 52 (1st Cir. 1974).

[22] 386 U.S. 605, 606 (1967).

[23] *Farrow* v. *United States,* 373 F. Supp. 113, 118 (1974). *See also State* v. *Green,* 62 N.J. 547, 303 A.2d 312, 321 (1973, *citing State* v. *Pohlabel,* 61 N.J. Super. 242, 160 A.2d 647 (1960):

> Ordinarily, where there is an issue of prejudice claimed by a defendant, it is presumed that a sentencing judge disregarded incompetent or immaterial evidence in estimating the appropriateness of a particular degree of punishment.

[24] The Second Circuit, in *United States* v. *Needles,* 472 F. 2d 652, 657-58 (2d Cir. 1973), remarked on this problem of challenges by the defendant:

> The real question is whether the judge was entitled to credit the statements of unidentified undercover agents over defendant's denials and explanations. It is conceded that "material false assumptions as to any facts relevant to sentencing render the entire sentencing procedure invalid as a violation of due process (citations omitted). It does not follow, however, that an evidentiary hearing must be held whenever a defendant asserts the falsity of some statement in his sentence report. . . . Since sentences should not be based upon misinformation, a defendant should not be denied an opportunity to state his version of the relevant facts (citations omitted) and in some circumstances the probation office or prosecution should be requested to provide substantiation of challenged information submitted to the judge. . . . In appropriate instances the defendant ought to be allowed to present evidence in the form of affidavits, documents, or even oral statements by knowledgable persons on matters the court deems material to its decision on the severity of sentence. But this court has generally left the decision as to the appropriateness in any particular case of these procedures largely to the discretion of the sentencing judge. . . .

Perhaps in a case where the defendant denied everything and there was a chance that an entire incident had been manufactured or that serious charges in the presentence report on which the judge sought to rely were completely false, we would require further corroboration of the report even though the sentencing judge thought it unnecessary. But this is not such a case. . . .

[25] *See Williams* v. *New York,* 337 U.S. 241 (1949); *Williams* v. *Oklahoma,* 358 U.S. 576 (1959).

[26] *United States* v. *Powell,* 487 F.2d 325, 328 (4th Cir. 1973).

2. *Polygraph test.* A New Jersey court has held that expert testimony interpreting a polygraph test may be used in sentencing.[27] Note that the taking of the test was voluntary, and that the expert testimony could only be used to show facts not decided by the trial jury or material to its deliberations. Even this circumscribed use of the polygraph, however, reflects the liberal standards for the use of evidence in sentencing.

3. *Prior conviction record.* The prosecutor may also use a prior conviction record to argue for a long sentence for the racketeer. This practice does not create double jeopardy for the defendant since he is not being tried or punished again for the earlier offense.[28] Instead, the judge tries to determine if the record indicates a pattern of criminal behavior aggravating the latest offense.

4. *Invalid prior convictions.* The judge may not consider previous convictions which are constitutionally invalid.[29] This rule of *Tucker* may, however, be narrower than it appears. In *Lipscomb* v. *Clark,* the Fifth Circuit defined a test for the use of invalid prior convictions.[30] If on review, without consideration of the invalid conviction, the maximum sentence seems appropriate then it may be affirmed. If it does not, then a special evidentiary hearing must be held.[31] *Tucker,* in short, does not require automatic resentencing. The Eighth and Fourth Circuits have taken an alternate route. They require the defendant to invalidate the disputed prior conviction in the court from which it was originally obtained before using it to seek relief under *Tucker.*[32] Taking still another approach, the Ninth Circuit has held that "the mere fact that an invalid conviction has been obtained does not immunize the facts underlying the conviction from consideration by the sentencing judge." [33]

5. *Evidence derived from arrests not leading to convictions.* The law is unclear as to the use of evidence obtained from prior arrests not leading to conviction. The dispute turns on whether the facts underlying the arrest may be considered by the sentencing judge. The Second Circuit, in *United States* v. *Malcolm,* stated the general rule:

> A sentencing judge is not so narrowly restricted in imposing sentence that he cannot predicate sentence on habitual misconduct, whether or not it resulted in conviction.[34]

Certain jurisdictions have statutes, however, which limit the judge's power to consider evidence derived from prior acquittals. Examples of such statutes are Mass. Gen. Laws Ann. ch. 276 § 85 and Mass. Gen. Laws Ann. ch. 279 § 4A, which require that the presentence report "shall not contain as part thereof any information of prior criminal prosecutions, if any, of the defendant wherein the defendant was found not guilty by the court or jury in said prior criminal prosecution."

The Supreme Court of New Jersey noted that a prior arrest could be relevent in certain circumstances.[35] The sentencing judge may not infer guilt from the mere fact of arrest, but the fact of arrest may lead the court to other admissible facts. The

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[27] *State* v. *Watson,* 115 N.J. Super. 213, 218, 278 A.3d 543, 546 (1971).

[28] Cf. Moore v. *Missouri,* 159 U.S. 673, 677 (1895) (aggravation of present offense by special circumstances).

[29] *United States* v. *Tucker,* 404 U.S. 443, 444 (1972). *Note also* that a conviction void under statutory or decisional law, or because of constitutional infirmity, cannot form the basis for the application of a recidivist statute. *Burgett* v. *Texas,* 389 U.S. 109, 114 (1967) (". . . to permit a conviction obtained in violation of *Gideon* v. *Wainwright,* 372 U.S. 335 (1963), to be used against a person either to support guilt or enhance punishment for another offense . . . is to erode the principle of that case.")

[30] 468 F .2d 1321 (5th Cir. 1972).

[31] The First Circuit followed *Lipscomb* in *United States* v. *Sawaya,* 486 F. 2d 890, 893 (1st Cir. 1973) (case remanded to district court for review of the presentence report to determine whether the sentence would be appropriate without consideration of prior constitutionally invalid convictions). The Southern District of California followed *Lipscomb* in *Farrow* v. *United States,* 373 F. Supp. 113, 117 (1974).

[32] *Brown* v. *United States,* 483 F. 2d 116, 118 (4th Cir. 1973) (if prior state convictions have been invalidated for want of counsel in *habeas corpus* proceedings begun initially in the convicting state court, then *Tucker* demands resentencing. If there is no such invalidation in that court the *Tucker* rule may not be invoked); *Young* v. *United States,* 485 F.2d 292, 294 (8th Cir. 1973) (*Lipscomb* rejected; petitioner invoking the *Tucker* rule must first invalidate the prior convictions in the jurisdictions where they were obtained).

[33] *United States* v. *Atkins,* 480 F.2d 1223, 1224 (9th Cir. 1973). *Note,* however, that in *Farrow,* a district court within the Ninth Circuit followed the *Lipscomb* rule (*see* note 31, *supra*).

[34] 432 F.2d 809, 816 (2d Cir. 1970). *See also Jones* v. *United States,* 307 F.2d 190, 192 (D.C. Cir.), *cert. denied,* 372 U.S. 919 (1962) (Fed R. Crim. P. 32(c)(2) interpreted as permitting consideration of criminal charges not leading to convictions).

[35] *State* v. *Green,* 62 N.J. 547, 571, 303 A.2d 312, 325 (1973) (*i.e.,* the sentencing judge may find it significant that a defendant who experienced an unwarranted arrest was not deterred by that fact from committing a crime thereafter). Here the Supreme Court of New Jersey found that the challenged items in the arrest report did not influence the sentencing court to enlarge the penalties.

court may, for example, consider factual material which the defendant did not contest and which bears on the question of sentence.[36] The judge may also consider that the earlier arrest failed to deter the defendant from committing the current offense.

The courts have also held that evidence from pending indictments and from charges dismissed without adjudication may be considered by the sentencing judge.[37] A court may even admit, for sentencing purposes, evidence of crimes for which the defendant has neither been charged nor indicted,[38] and, at least in the Second Circuit, evidence of crimes of which the defendant has been acquitted.[39]

6. *Evidence excluded from trial because of fourth amendment violations.* In *United States* v. *Verdugo,*[40] the Ninth Circuit held that it is not proper to use evidence obtained in violation of the Fourth Amendment to determine the sentence. The court rested its holding on the rationale that the "use of illegally seized evidence at sentencing would provide a substantial incentive for unconstitutional searches and seizures."[41] *Verdugo,* however, has not resulted in the blanket exclusion of such evidence. In *United States* v. *Schipani,*[42] the Second Circuit allowed the use in sentencing of evidence derived from illegal wiretaps. The court observed:

> The information obtained by the wiretaps was highly relevant to the character of the sentence to be imposed. . . .
>
> We believe that applying the exclusionary rule for a second time at sentencing after having applied it once at the trial itself would not add in any significant way to the deterrent effect of the rule. It is quite unlikely that law enforcement officials conduct illegal electronic auditing to build up an inventory for sentencing purposes, although the evidence would be inadmissible on the issue of guilt. . . .
>
> Where illegally seized evidence is reliable and it is clear, as here, that it was not gathered for the express purpose of improperly influencing the sentencing judge, there is no error in using it in connection with fixing sentence.[43]

7. *Reputation.* A New York District Court, in *United States* v. *Rao,*[44] ruled that "the defendant's alleged underworld associates and his alleged status in the Mafia or Cosa Nostra cannot and do not constitute a predicate or criterion for punishment."[45] This is no longer good law. The Second Circuit decision in *Schipani* undermined this ruling. There, the court affirmed a District Court judge's decision to consider in sentencing the defendant's reputation as a racketeer. The First Circuit followed a similar course of action in *United States* v. *Strauss.*[46] In *Strauss,* the sentencing judge had before him sworn Senate testimony alleging that

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[36] *Id.* at 571.

[37] The Second Circuit held in *United States* v. *Metz,* 470 F.2d 1140, 1142 (3d Cir. 1972), *cert. denied,* 411 U.S. 919 (1973):

> . . . that indictments for other criminal activity are of sufficient reliability to warrant their consideration by a sentencing judge.

Accord, United States v. *Doyle,* 348 F.2d 715, 721 (2d Cir.), *cert. denied,* 382 U.S. 843 (1965):

> [F]ew things could be so relevant as other criminal activity of the defendant.

But see State v. *Barbato,* 89 N.J. Super. 400, 215 A.2d 75, 80 (1965):

> . . . reliance upon other pending charges as a basis for increasing the penalty for the charge before the court is of highly questionable propriety.

[38] *United States* v. *Weston,* 448 F.2d 626, 633 (1971), *cert. denied,* 404 U.S. 1061 (1972):

> We do not desire to transform the sentencing process into a second trial, and we believe that other criminal conduct may properly be considered, even though the defendant was never charged with it or convicted of it.

[39] *See United States* v. *Sweig,* 454 F.2d 181, 184 (2d Cir. 1972):

> Acquittal does not have the effect of conclusively establishing the untruth of all evidence introduced against the defendant. For all that appears in the record of the present case, the jury may have believed all such evidence to be true, but have found that some essential element of the charge was not proved. In fact the kind of evidence here objected to may often be more reliable than the hearsay evidence to which the sentencing judge is clearly permitted to turn, since unlike hearsay, the evidence involved here was given under oath and was subject to cross-examination and the judge had the opportunity for personal observation of the witnesses.

[40] 402 F.2d 599 (9th Cir. 1968), *cert. denied,* 397 U.S. 925 (1970), *cert. denied,* 402 U.S. 961 (1971).

[41] *Id.* at 613.

[42] 435 F.2d 626 (2d Cir. 1970), *cert. denied,* 401 U.S. 983 (1971).

[43] *Id.* at 28. The Fourth Circuit recently followed *Schipani* and distinguished *Verdugo. United States* v. *Lee,* 19 *Crim. L. Rptr.* 2194 (4th Cir. June 2, 1976).

[44] 296 F. Supp. 1145 (S.D.N.Y. 1969).

[45] *Id.* at 1149.

[46] 443 F.2d 986 (1st Cir. 1971). The court stated:

> Although the judge failed to articulate why he thought this evidence warranted an additional two years, we note that membership in a criminal syndicate is clearly relevant to questions of corrigibility and likelihood of reformation in a short period of time. *Id.* at 990.

The Seventh Circuit recently refused to follow *Rao* and approved the use of "organized crime connections in imposing a sentence." *United States* v. *Cardi,* 519 F.2d 309 (7th Cir. 1975).

the defendants were members of a criminal syndicate. Accordingly, he gave them seven years instead of five, out of a possible ten.

In addition, the New Jersey Supreme Court, in *State* v. *Leverette,*[47] affirmed a long-term sentence for a defendant whose presentence report showed no prior criminal record and that he was a responsible husband and father. In so doing, the court upheld the sentencing judge's reliance in making his decision on the defendant's identity as a racketeer.[48] The court amplified this holding in *State* v. *Souss,*[49] stating that:

> [A] defendant's connection with organized crime is a most important factor to consider, along with all the other circumstances, in determining the severity of punishment to be meted out.[50]

The prosecutor's ability to use what he knows about the racketeer, therefore, appears to be growing.[51]

8. *Defendant's right to view and challenge the presentence report.* New Jersey, Massachusetts, and the federal system have statutes requiring disclosure of the presentence report.[52] The New York statute leaves disclosure to the judge's discretion.[53] The New York courts have tended, however, to encourage disclosure as the rule of practice.[54] The defendant also has different kinds of statutory protection in New York. He may file a presentence memorandum covering his entire life history.[55] The court, in its discretion, may hold a presentence conference to resolve any discrepancies between the information submitted by the defendant and that received from other sources.[56] The prosecutor must have reasonable notice of that conference, and an opportunity to participate.[57] The court may compel the prosecutor to reveal questioned evidence to the defendant at that conference for the purpose of rebuttal.

A policy of disclosing presentence reports to defendants can help the prosecutor. If the defendant has an opportunity to view and challenge the report, the prosecutor's responsibility to verify the report's allegations may lessen. Those allegations may have to meet a lower measure of reliability.

In sum, these flexible safeguards provide the prosecutor with clear opportunities to introduce the defendant's connection with organized crime.

IV APPELLATE REVIEW OF SENTENCE

A. In General

The hornbook rule is that an appellate court will not disturb a criminal sentence unless it either ex-

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[47] 64 N.J. 569, 319 A.2d 219 (1974).

[48] *Id.* at 571, 323 A.2d at 220. The court observed:

> The sentencing judge, based on the trial record, characterized the defendant as the key figure in a substantial gambling operation. The sentence was bottomed on the foregoing evaluation of the defendant's involvement and warrants the sentence imposed.

[49] 65 N.J. 453, 323 A.2d 484 (1974).

[50] *Id.* at 461, 323 A.2d at 488–89.

[51] The recent New Jersey cases echo an earlier decision, *State* v. *Destasio,* 49 N.J. 247, 229 A.2d 636, *cert. denied,* 389 U.S. 830 (1967). There, the New Jersey Supreme Court defended an administrative rule directing a single judge in each county to impose sentence in gambling cases, in the interest of uniformity.

> By and large the defendants who are caught are not vicious and do not menace society in other respects, but they are the hired help of the syndicate without which it could not operate. The difficulty has been that some judges cannot see beyond the individual they are sentencing. If such a judge imposes nothing more painful than a fine, his view is almost certain to become the rule of the county in which he sits. This is so because defendants will wait for that judge, if they can, and plead guilty before him. Moreover, a soft judge can make a sensible one seem harsh and severe, and hence, unhappily, judges tend to abide by the performance of the most unrealistic among them. 49 N.J. at 254–55, 229 A.2d at 640.

The court then concluded:

> Nor is there substance to the claim that the individual is denied equality when the court deals specially with the special evils of syndicated crime . . . *Id.* at 260, 229 A.2d at 643.

[52] For New Jersey, *see* N.J. Court Rule 3:21–2. *See also State* v. *Kunz,* 55 N.J. 128, 259 A.2d 895 (1969). For Massachusetts *see* Mass. Gen. Laws Ann. ch. 279 § 4A and ch. 276 § 85. For the federal courts, as of Dec. 1, 1975, *see* Fed. R. Crim. P. 32 (c)(3). Note that the Federal Rule has changed from leaving disclosure to the judge's discretion to mandating it. A total refusal to disclose remains a permissible option in certain extraordinary situations. The court in *United States v. Long,* 411 F. Supp. 1203 (E.D. Mich. 1976) found that such an extraordinary situation did not exist in that case and that the sentencing magistrate erred in following such a course. The magistrate should have disclosed the contents of the report to the counsel and instructed him not to pass the information along to his client. The court remarked that this alternative would be helpful in cases involving potential harm to third persons if the defendant learned the contents of the report. This procedure may be of limited use in the organized crime context, in situations where the defense attorney may ignore the judge's instructions

[53] N.Y. Crim. Pro. Law § 380.50 (McKinney 1971).

[54] *See People* v. *Perry,* 36 N.Y.2d 114, 120, 365 N.Y.S.2d 518, 522, 324 N.E.2d 878, 881 (1975) (fundamental fairness and the appearance of fairness may be best served by the disclosure of presentence reports, but the refusal to disclose the report does not constitute an abuse of discretion).

[55] N.Y. Crim. Pro. Law § 390.40 (McKinney 1971).

[56] *Id.* § 400.10.

[57] *Id.*

ceeds statutory limits or represents a clear abuse of discretion.[58] Most jurisdictions, however, have statutes authorizing the appeal of illegal sentences. Traditionally, these statutes have been construed as not sanctioning the increase of a sentence on review.[59] In New York, for example, the prosecutor may appeal only those sentences which are invalid as a matter of law.[60] Nevertheless, it might legitimately be argued that a judge, as a matter of law, abuses his discretion when he sets too lenient a sentence.[61] If so, then a sentence substantially too lenient could be characterized as illegal, and it could be reviewed on appeal by the prosecutor. The New York prosecutor may, however, under the usual interpretation, challenge only those sentences which fail to meet the minimum legal terms.

B. Defendant's Right to Appeal and the Danger of an Increased Sentence

Massachusetts, Connecticut, and Maryland allow the appellate court to increase the sentence when certain *defendants* appeal.[62] The constitutional objection usually raised against such proceedings is that the possibility of an increase in sentence violates the defendant's due process rights. The Supreme Court's decision in *North Carolina* v. *Pearce* is the usual base upon which this objection rests.[63] There, the Court held that a defendant who has obtained a retrial after making an appeal should be protected from the imposition of an increased sentence by a vindictive judge. The crux of the *Pearce* decision was the fear of vindictiveness because of a defendant's appeal. Later cases, however, have read *Pearce* narrowly.[64] In short, the ". . . lesson that emerges from *Pearce, Colten,* and *Chaffin* is that the Due Process Clause is not offended by all possibilities of increased punishment upon retrial after appeal, but only those that pose a likely threat of vindictiveness." [65]

The Supreme Judicial Court of Massachusetts has held since *Pearce* that its statutory procedure precludes the possibility of vindictiveness.[66] Under Mass. Gen. Laws Ann. ch. 278 § 278A, the sentencing judge cannot sit as a member of the appellate division, the court that sets the final sentence. The court also supported its decision by pointing to the record of the appellate division proceedings from July 1, 1955 to June 30, 1969; the record showed a greater than four-to-one ratio of sentence

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[58] *Gore* v. *United States,* 357 U.S. 386, 393 (1958) (sentence imposed by federal district judge, if within statutory limits, held generally not subject to review).

[59] *See, e.g.,* Fed. R. Crim. P. 35; N.J. Court Rule 3:21-10. For a brief description of other such state statutes *see* McClellan, "The Organized Crime Act (S.30) or its Critics: Which Threatens Civil Liberties?" 46 *Notre Dame Lawyer* 55, 178-79, note 567 (1970). The leading case propounding this interpretation is *Ex Parte Lange,* 85 U.S. (18 Wall.) 163 (1874). *See also United States* v. *Benz,* 282 U.S. 304, 307 (1931) (to increase the sentence already in service is to subject the defendant to double punishment in violation of the Double Jeopardy Clause of the Fifth Amendment). In *United States* v. *Sacco,* 367 F.2d 368 (2d Cir. 1966), the court considered, but finally rejected, the defendant's proposed exception to the rule of *Lange, supra.*

[60] N.Y. Crim. Pro. Law §§ 440.40, 450.30 (McKinney 1971).

[61] *But see, id.,* § 450.30, Commission Staff Comment. The comment casts doubt on this argument.

[62] Mass. Gen. Laws Ann. ch. 278 §§ 28A and 28B (Cum. Supp. 1975); Conn. Gen. Stat. Ann. § 51-196 (Supp. 1976); Md. Ann Code art. 27, §§ 645JA to 645JG (1976). Mass Gen. Laws Ann. ch. 278 § 28A reads in part:

> There shall be an appellate division of the superior court for review of sentences to the state prison imposed by final judgments in criminal cases, except in any case in which a different sentence could not have been imposed, and for the review of sentences to the reformatory for women for terms of more than five years imposed by final judgments in such criminal cases. . . . No justice shall sit or act on an appeal from a sentence imposed by him.

The relevant portions of Mass. Gen Laws Ann. ch. 278 § 28B stipulate:

> A person aggrieved by a sentence which may be reviewed may appeal to the appellate division for a review of such sentence . . . The justice who imposed the sentence appealed from may transmit to the appellate division a statement of his reasons for imposing the sentence and shall make such a statement within seven days if requested to do so by the appellate division.
>
> The appellate division shall have jurisdiction to consider an appeal with or without a hearing, review the judgment so far as it relates to the sentence imposed and also any other sentence imposed with the sentence appealed from was imposed, notwithstanding the partial execution of any such sentence, and shall have jurisdiction to amend the judgment by ordering substituted therefore a different appropriate sentence or sentences or any other disposition of the case which could have been made at the time of the imposition of the sentence or sentences under review, but no sentence shall be increased without giving the defendant an opportunity to be heard. If the appellate division decides that the original sentence or sentences should stand, it shall dismiss the appeal. Its decision shall be final. . . . The appellate division may require the production of any records, documents, exhibits or other things connected with the proceedings. . . .

[63] U.S. 711 (1969).

[64] *See Colten* v. *Kentucky,* 407 U.S. 104 (1972) (higher sentence after "appeal" from lower trial court to higher court for *de novo* trial upheld); *Chaffin* v. *Stynchcombe,* 412 U.S. 17 (1973) (higher sentence after retrial imposed by jury not shown to be vindictive).

[65] *Blackledge* v. *Perry,* 417 U.S. 21, 27 (1974).

[66] *Walsh* v. *Commonwealth,* 358 Mass. 193, 260 N.E. 2d 911 (1970).

reduction to sentence increase.[67] Finally, the same court suggested that the *Pearce* holding was actually inapplicable to the Massachusetts statute:

Disposition		
Appeals Entered	4,201	
Appeals Withdrawn	1,644	
Appeals Dismissed	1,892	
Sentences Reduced	395	(9.42%)
Sentences Increased	87	(2.07%)
Appeals Pending	139	
Appeals Moot	44	

> We note finally that the *Pearce* rule does not seem suited to Appellate Division proceedings. It does not permit consideration of any factors but the defendant's conduct subsequent to the first trial. Such a rule would seriously hamper the work of the Appellate Division because it would limit it to the brief period that the defendant has been serving the sentence in the State prison or a reformatory awaiting hearing on the appeal. Moreover, the rule would preclude consideration of the very factor which the Appellate Division was established to consider: whether a particular defendant's sentence is excessively short or long compared to other defendants' sentences for the same or similar offenses. Since the Supreme Court was not considering this procedure, we do not believe that it meant the *Pearce* rule to apply to it. . . .[68]

C. Prosecutor's Appeal for Increased Sentence

The Massachusetts statute allows an increase in sentence only upon a defendant's appeal. The need remains, however, for a way in which prosecutors can call for an increase in sentence. There should be some means of supervising those trial judges who, because of corruption, political considerations, or lack of knowledge, give light sentences to racketeers.[69]

The constitutional barriers to such a power do not appear insurmountable. Due process objections present the least difficulty. *Pearce,* it should be emphasized, turns on the issue of vindictiveness caused by a *defendant's* appeal. Absent this factor, the due process rationale for denying an increased sentence seems thin, particularly when the *prosecutor,* not the defendant, appeals a sentencing decision made in favor of the defendant. The *Pearce* rationale of vindictiveness should, therefore, be limited to a situation in which a resentencing judge is reversed for making an error against the defendant after an appeal brought by the defendant.

The Double Jeopardy Clause of the Fifth Amendment also should not pose an insuperable difficulty. As the Supreme Court recently observed, ". . . [T]he Double Jeopardy Clause of the Fifth Amendment is written in terms of potential or risk of trial and conviction, not punishment."[70] This distinction gains force from other recent Supreme Court decisions expanding the government's right of appeal in criminal cases. In *United States* v. *Wilson,*[71] the Court held:

> We therefore conclude that when a judge rules in favor of the defendant [on a legal question] after a verdict of guilty has been entered by the trier of fact, the government may appeal from that ruling without running afoul of the Double Jeopardy Clause.[72]

Under *Wilson,* only facts going to guilt or innocence resolved by the trier of fact are protected from appellate review.

The prosecutor should, therefore, be aware of these new possibilities for appealing a sentence thought to be too lenient. Prosecutors in states with statutes like New York's should also take them into account when seeking to define the scope of their states' relatively liberal statutes. These recent decisions suggest that there is no consititutional barrier to seeking review of a judge's abuse of discretion in sentencing. A new interpretation of the present appeal statute might also be secured in the right case.

V. BIBLIOGRAPHY ON RECIDIVIST AND SPECIAL OFFENDER SENTENCING

A. Recidivist Sentencing

The following bibliography on recidivist sentencing was obtained from T. Amsterdam, B. Segal and M. Miller, *Trial Manual 3 for the Defense of Criminal Cases,* ALI-ABA Joint Committee on Continu-

[67] *Id.* at 199, 260 N.E. 2d at 915:

[68] Id. at 201, 260 N.E.2d at 916.

[69] *See The Challenge of Crime in a Free Society,* The Report of the President's Commission on Law Enforcement and Administration of Justice, 203 (1967).

[70] *Price* v. *Georgia,* 398 U.S. 323, 329 (1970).

[71] 420 U.S. 332 (1975).

[72] *Id.* at 352.

ing Legal Education (1975), pp. 2–154 to 2–155. (Note: Works predating *Specht* v. *Patterson*, 386 U.S. 605 (1967), and *Burgett* v. *Texas*, 389 U.S. 109 (1967) do not reflect the current state of the law).

Note, "Defendant's Right to Protection from prior Uncounseled Convictions," [1973] *Wash. U.L.O.* 197.

Comment, "Constitional Law—Right to Counsel—Valid Misdemeanor Conviction Cannot be Used as Basis for Recidivist Sentence if Defendant Was Not Represented by Counsel at Misdiemeanor Trial," 43 *N.Y.U.L. Rev.* 1012 (1968).

Annot., "Pardon as affecting consideration of earlier conviction in applying habitual criminal statute," 31 *A.L.R.* 2d 1186 (1953).

Annot., "Chronological or procedural sequence of former convictions as affecting enhancement of penalty for subsequent offense under habitual criminal statutes," 24 *A.L.R.*2d 1247 (1952).

Annot., "Determination of character of former crime as a felony, so as to warrant punishment of an accused as a second offender," 19 *A.L.R.*2d 227 (1951).

Annot., "What constitutes former 'conviction' within statute enhancing penalty for second or subsequent offense," 5 *A.L.R.*2d 1080 (1949).

Note, "'Defective Delinquent' and Habitual Criminal Offender Statutes—Required Constitutional Safeguards," 20 *Rutgers L. Rev.* 756 (1966).

Note, "Recidivist Procedure," 40 *N.Y.U.L. REV.* 332 (1965).

Annot., "Form and sufficiency of allegations as to time, place, or court of prior offenses or convictions, under habitual criminal act or statute, enhancing punishment for repeated offenses," 80 *A.L.R.*2d 1196 (1961).

Annot., "Propriety, under statute enhancing punishment for second or subsequent offense, of restricting new trial to issue of status as habitual criminal," 79 *A.L.R.*2d 826 (1961).

Annot., "Evidence of identity for purposes of statute as to enhanced punishment in case of prior conviction," 11 *A.L.R.*2d 870 (1950).

B. Dangerous Special Offender Sentencing

The Sixth Circuit has recently affirmed the constitutionality of the federal dangerous special offender statute, 18 U.S.C. § 3575, a part of Title X of the Organized Crime Control Act of 1973, in *United States* v. *Stewart*, 531 F.2d 326 (1976). Section 3575 provides an increased sentence for dangerous special offenders once certain age, frequency of conviction, and time standards are met. Section 3575(b) reads:

> . . . the court shall sentence the defendant to imprisonment for an appropriate term not to exceed twenty-five years and not disproportionate in severity to the maximum term otherwise authorized by law for such felony.

The court below had ruled that section 3575(b) was unconstitutionally vague and that a sentence given under its terms would be a denial of due process in violation of the Fifth Amendment. The court similarly held that section 3575(f) was unconstitutionally vague. Section 3575(f) reads:

> . . . a defendant is dangerous for purposes of this section if a period of confinement longer than that required for such felony is required for the protection of the public from further criminal conduct by the defendant.

The Sixth Circuit reversed both holdings. First, the court listed several procedural safeguards regulating use of the increased sentence, and found that those procedures were far less arbitrary than those employed in ordinary sentencing practices. For example, section 3575(b) requires a presentence hearing, detailed notice to the defendant, and reasonable time for verification of allegations. The statute expressly guarantees the defendant the right to counsel, compulsory process, and cross examination. The court found these procedural safeguards, extraordinary for a presentence hearing, to reflect Congress's intent to control carefully the use of the statute. The court also pointed to the specific language of the statute ". . . and not disproportionate in severity to the maximum term otherwise authorized . . ." as further manifesting that intent. Finally, the court emphasized that the very broad scope for review of such sentences, allowed under section 3576, would check any abuse of judicial discretion.

Second, the court distinguished this statute from the New Jersey statute discussed in *United States* v. *Duardi*.[73] that New Jersey statute made it a crime to be a "gangster"; Title X, in contrast, did not make it a crime to be "dangerous." Section 3575 is

[73] 384 F. Supp. 874 (W.D.Mo. 1974). The statute was held unconstitutional for vagueness by the district court. The Eighth Circuit did not reach the issue of vagueness, however, when it affirmed the district court's decision. *United States* v. *Duardi*, 529 F.2d 123 (8th Cir. 1975).

directed, instead, at those who have actually been convicted of a crime. Having made this distinction, the court held, on the basis of *United States* v. *National Dairy Products*,[74] that when a statute is challenged for vagueness, a court must seek an interpretation which supports the constitutionality of the legislation. Accordingly, the district court's finding of vagueness was reversed, and the constitutionality of section 3575(f) affirmed.

[74] 372 U.S. 29 (1965).

APPENDIX F
CHART OF LAW AND UNIT RESOURCES

Codes:

A.G. = Attorney General
Att. = Attorney
B. = Bureau
Co. = County
D.A. = District Attorney
Div. = Division
Econ. = Economic
Inc. = Intelligence
Inv. = Investigative[ion]
Narc. = Narcotics
O.C. = Organized Crime
Pub. Corr. = Public Corruption
Prog. = Program
Pros. = Prosecution
Sect. = Section
S.F. = Strike Force
T.F. = Task Force
U. = Unit

EE = Electronic Eavesdropping
x = present
Imm = Immunity
T = Transactional Immunity
U = Use Immunity
h = No Immunity

S/S = Search and Seizure
EE = Electronic Eavesdropping
CR = Consensual Recording
PR = Pen Register
BB = Bumper Beeper
UO = Undercover Officer
PI = Paid Informant
UI = Unpaid Informant
GH = Grand Jury
CIV = Civil Remedies

N = Narcotics
T/F = Theft and Fencing
G = Gambling
L = Loansharking
LR = Labor Racketeering
E = Extortion
CS = Conspiracy
CT = Contempt
P = Perjury
B = Bribery

AC = Accountant
IA = Intelligence Analyst
PL = Police
CIV INV = Civilian Investigator

6m = 6 months experience
1y = 1 year experience
15k = $15,000 salary
20k = $20,000 salary
#Inv = Number of Investigations
#Trial = Number of Trials

State	Sf/Imm.	Office	Methods of Investigation: S/S	EE	CR	PR	BB	UO	PI	UI	GJ	CIV	Jurisdiction	Criminal Activity Investigation: N	T/F	G	L	LR	E	CS	CT	P	B	Investigatores: AC	IA	PL	CIV	INV	Attorneys: #	6m	1y	15k	20k	Work Load: # Inv	# Trial
ARIZONA	x/T	Maricopa Co. Att. O.C.B.	x	x	x	x				x	x		County	x	x	x			x	x			x	x					6	3	1	2	2	4	8
		A.G. Spec. Pros. Sect.			x				x	x	x		State				x	x	x	x	x	x	x	1			4		5	5			4	
																																		8-	8-
CALIFORNIA	/T	Los Angeles O.C. & Narc. Div.	x		x			x	x	x	x		County	x	x		x	x		x					4					9					13	13
		San Diego D.A. O.J. Prev. Prog.	x		x		x	x	x	x	x		County			x				x					1		6			3					15	5
COLORADO	x/T	A.G. O.C. S.F.	x	x	x				x	x	x	x	State	x	x	x				x					1	13				3	1					
CONNECTICUT	x/T	Statewide O.C. Inv. T.F.	x	x	x			x	x	x		x	State			x	x			x		x	x		230					3	2			2	100
FLORIDA	x/T	Orange-Osceola O.C. S.F.	x	x	x	x	x	x	x	x	x		Jud. Cir.		x	x	x			x	x	x	x		2					2						
		Dade Co. State's Att. O.C. Pub. Corr. Pros. U.	x	x	x	x		x		x	x	x	County	x		x			x	x			x	x				3		3	1			30	
		Palm Beach Co. State's Att. Spec. Pros. S.F.	x	x	x			x	x	x			County	x	x	x				x	x	x			1					2					60	45
HAWAII	/T	Honolulu Pros. Att. Spec. Crime U.							x	x	x	x	County			x			x	x							4	4		1						
ILLINOIS	/T	Crim. Just. Div.	x						x	x	x	x	x	State	x	x					x			x	x	3	4	7			20					3	6
INDIANA	/T	Vanderburgh Co. Pros. O.C. & Composite Inc. U.	x				x		x	x	x		County	x	x	x														1	1			1	25	300
KANSAS	x/T	Kansas Bureau of Inv. Int./O.C. Div.	x	x	x	x			x	x			State		x	x				x						4	4			1				1		
LOUISIANA	/U	Metropolitan O.C. S.F.	x		x		x		x	x	x	x	Metrop.		x			x		x					2	3	6		3	3	1			1	20	15
		A.G. O.C. and Racketeering U.	x		x				x	x	x		State	x		x			x	x				x	2	1	7			6			1	5		
MASSACHUSETTS	x/T	State Police U.	x	x		x			x		x	x	State	x	x	x	x		x	x	x	x	x	x	1	3	16		3	1				9		
		Suffolk Co. Inv. & Pros. U. (SCIPP)	x	x	x	x			x	x	x	x	County	x	x	x	x		x	x	x	x	x	x	2	1	7		4	4		2	1	15	25
MICHIGAN	/T	A.G. O.C. Div.			x				x		x	x	State	x			x			x		x	x			1		9		1					30	
		Wayne Co. O.C. T.F.	x		x				x	x	x	x	County	x	x					x	x	x	x		1	36		4		7					19	12
MISSISSIPPI	/N	A.G. O.C./Int. U.	x							x		x	State		x	x				-	x					1		4		1					140-200	
NEVADA	/T	Las Vegas D.A. Int. Div.	x		x				x	x	x	x	County	x	x	x		x		x	x	x			1		9									
NEW JERSEY	x/U	Newark-Essex Co. City-Co. S.F. to Combat O.C.	x	x	x		x		x		x		County		x	x	x			x	x			x	1	3	35			4					75-100	35
		Mercer Co.-Trenton O.C. T.F.	x	x	x				x	x	x		County	x	x	x				x					1		9			3	1			1	24	20
		A.G. Spec. Pros. Sect.	x	x	x	x	x		x	x	x	x	State	x	x	x	x	x		x	x	x	x		1		1			10					4	25	5
NEW YORK	x/T	N.Y. Co. Spec. Narc. Proj.	x	x	x	x			x	x	x	x	N.Y.C.	x						x							3		1	32					3	40
		Bronx D.A. Rackets B.	x		x				x		x	x	County		x	x	x			x		x	x		1	13		4		7	2		2	6	20	10
		Erie Co. D.A. O.C.B.		x									County			x				x		x	x		1	-		1		5				3	10	13
		N.Y. Co. D.A. Rackets B.	x	x	x				x		x	x	County		x	x	x	x	x	x	x	x	x	x	15	55		15		10		1		7	15	15
		Nassau Co. D.A. Rackets B.	x	x	x	x	x		x	x	x	x	County		x	x	x	x	x	x	x	x	x	x		242				5		3		5	10	5
		Kings Co. D.A. Rackets B.	x	x	x	x			x	x	x		County	x	x	x	x		x	x	x	x	x	x	3	4	14		2	10		3	4	6	10-15	
		Queens Co. D.A. Inv. B.	x	x	x				x	x	x		County	x	x	x			x	x				x	1		24			4					10-20	0-20
		Suffolk Co. D.A. Rackets B.	x	x	x				x	x	x		County		x	x	x		x	x	x	x	x	x	1	1	29			7					10-15	12
		Westchester Co. D.A. Rackets B.	x	x	x	x	x		x	x	x	x	County	x	x	x	x		x	x	x	x	x	x	3		15			4	3				5	15	4
OREGON	x/T	Crim. Just. Spec. Inv. Div.			x							x	State			x														1					25	10
PENNSYLVANIA	/U	Philadelphia D.A. Econ. Crime U./Inv.	x						x		x	x	City	x	x		x			x	x			x	1	5				5	5			5	150	25
RHODE ISLAND	x/T																																			
SOUTH DAKOTA	x/T	Econ. Crime U.	x		x				x		x	x	State	x	x	x				x		x			1			1		4	1			1	5	
TEXAS	/T	A.G. Crim. T.F. for O.C.	x						x		x	x	State	x	x	x				x	x	x	x	x	1			5		5					15-20	
		San Antonio Spec. Crimes Sect.	x								x	x			x	x				x					1			4		3	1			4	40	40
		Greater Dallas Area O.C. T.F.	x				x		x	x	x	x	Metrop.		x	x				x					1	1	14			1					150	80
		Dallas Co. D.A. Spec. Crime Div.											County														3		4	7	1	1			250	140
		Harris Co. D.A. Spec. Crimes B.	x		x				x		x	x	County	x	x					x	x				1					8					45	40
UTAH	/T	Econ. Crime U.			x						x	x				x	x	x			x	x		x	1			1		3					7	50	15
WISCONSIN	x/T	Milwaukee Co. D.A. O.C. Controlled Substances U.	x						x		x		County	x	x	x	x			x				x			1			3					7		
		A.G. Crim. Pros. U.			x				x		x	x	State			x						x	x	x													

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Developing or implementing new projects	[ ]	[ ]	[ ]

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6. Do you feel that further training or technical assistance is needed and desired on this topic? If so, please specify needs.

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