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NATIONAL DISTRICT ATTORNEYS ASSOCIATION
ECONOMIC CRIME PROJECT

REPORT OF SYMPOSIUM ON DEVELOPMENT OF A NATIONAL STRATEGY FOR WHITE-COLLAR CRIME ENFORCEMENT
JULY 20-21, 1978

SUBMITTED BY

BATTELLE LAW AND JUSTICE STUDY CENTER
HUMAN AFFAIRS RESEARCH CENTERS
SEATTLE, WASHINGTON

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FOREWORD AND ACKNOWLEDGEMENTS

In 1973 the National District Attorneys Association (N.D.A.A.) moved forcefully to encourage the substantive attention of its membership of prosecutors to the area of white-collar crime and related abuses. It was clear, even at that time, that this was an unusual effort for N.D.A.A. Like most organizations dealing with law enforcement, N.D.A.A. was accustomed to addressing challenges more broadly perceived, such as violent crime or property crimes in all their varieties. White-collar crime, after all, can be viewed as just one possible sub-category of property crime.

What distinguished this effort from others is that it developed from the perception that a particular kind of wrongful behavior which should be dealt with by the local prosecutor was somewhat neglected. This law enforcement gap was seen to exist for many reasons, not the least of which were two conceptions which had wide but far from universal currency. The first was that white-collar crime enforcement was for the most part a federal responsibility because of the nature of the crimes involved and the resources needed to respond to them. The second was that local prosecutors should concentrate on more common crimes which had immediate and dramatic impact on their constituencies.

Led by Prosecutor Robert F. Leonard of Genesee County (Flint), Michigan, a group of district attorneys within N.D.A.A. persisted in the effort to find resources which could help them

to demonstrate and to convince the prosecutive community and the public that white-collar crime enforcement is both an appropriate and necessary operational area for the local prosecutor. They finally gained the support of the Law Enforcement Assistance Administration to establish the major nation-wide demonstration effort now known as the N.D.A.A. Economic Crime Project. The Project is currently active through special prosecutive units serving communities which represent a major part of the population of the United States.

The symposium which is the subject of this report represents a new watershed in prosecutive activity directed against white-collar crime. Local prosecutors now seek to deal with a new set of issues which go beyond the original objectives of the Economic Crime Project. They are joining with others who are concerned with the problem of white-collar crime containment to ask how our nation's resources and capabilities, federal or state or local or private, can best be mobilized to deal with challenges presented by white-collar crime and related abuses. As part of this same inquiry, other essential questions are considered, such as the utility of criminal, civil, regulatory and other processes in this area. Examination of these issues made it necessary to also ask what objectives should determine the architecture of responses which would be structured to deal with white-collar crime as part of any national strategy. All of these issues are but a shaping prelude to the planning of actual operations to implement a national strategy.

Key issues were considered by the symposium participants as described in a written outline which detailed the rationale of each session and proposed particular questions for consideration, and by three papers which were the primary bases for discussion. This report contains these documents, and also rapporteurial reviews of the three sessions.

Many individuals and organizations have made contributions to this effort which warrant special acknowledgment. We hope that we may be forgiven for any we inadvertently overlook. First, we must recognize the consistent support of the National District Attorneys Association through its President, Lee C. Falke, Prosecuting Attorney for Montgomery County (Dayton), Ohio; Prosecutor Robert F. Leonard of Genesee County (Flint), Michigan, Chairman of the N.D.A.A. Economic Crime Committee and the members of his Committee; Patrick F. Healy, Executive Director of N.D.A.A. and James Heelan of the N.D.A.A. staff. Second, we should note the support of the Adjudication Division, Office of Criminal Justice Programs, L.E.A.A., which made this symposium possible, and the personal and concerned participation in the symposium of its Chief, James C. Swain. Third, we gratefully acknowledge the contributions of Professor Mark H. Moore of Harvard University; Daniel L. Skoler of the American Bar Association; and William A. Morrill of Mathematica Policy Research who prepared the discussion papers which were the starting point for the symposium discussions. Fourth, we owe a debt of gratitude to all of the participants who joined with us in this

symposium as concerned citizens and as representatives of federal, state and local government, the private sector, and academia.

Finally the contributions of the Battelle staff must be recognized. Dr. Marilyn Walsh and Dr. Mary McGuire of the Battelle Law and Justice Study Center worked with us on the planning of this symposium and were rapporteurs for the first and second of the symposium sessions. Frederic A. Morris of the Battelle Science and Government Study Center served as rapporteur of the third symposium session. Scott Coplan, a Research Assistant in the Battelle Law and Justice Study Center, served as coordinator and one-man secretariat for this entire effort, and made major contributions to the preparation and editing of the contents of this report; Donna Randall, also a Research Assistant in the Center, unobtrusively but very effectively provided all those elements of support which are essential to the smooth workings of any meeting. Ingrid McCormack and Cheryl Osborn of the Center staff prepared the numerous drafts of papers and invaluable secretarial support which is the basis for any successful project. Lastly, we express our appreciation to the staff of the Battelle Conference Center in Seattle for the care which they gave to every detail involving the physical setting for the symposium and the accommodations provided for its participants.

Herbert Edelhertz and
Charles Rogovin
Symposium Co-Directors

INTRODUCTION

White-collar crime is a pervasive form of anti-social behavior which must be countered by a broad range of remedies provided by both the public and the private sector. In the public sector these responses include investigation, prosecution, regulation, and a mass of administrative measures to prevent and detect such crime. The problem of dealing with white-collar crime is made more difficult by the fact that there is no clear separation between criminal, civil, and regulatory responses, since the same wrongful behavior may be, and often is, subject to these different remedies. Compounding the problem is the existence of overlapping authority, or jurisdiction, to deal with such crime.

It is against this background that the current efforts to develop a national strategy to contain white-collar crime must be viewed. Clearly many such crimes and abuses are not dealt with because of confusion over enforcement boundaries and because that which is everyone's responsibility is frequently the subject of mutual and counterproductive deferral to one another. Likewise, there is frequently duplicative attention to the same crimes and few clear sources of information as to the frequency and impact of such abuses. Therefore, it is difficult for any agency, on any level, to properly set priorities or to plan enforcement or containment in this very important area of law enforcement.

The National District Attorneys Association (N.D.A.A.) established its Economic Crime Project in 1973, to develop a clear role for local prosecutors in this enforcement area. Starting with only 15 prosecutive units throughout the United States, it expanded to approximately 66 such units in 1978. At the same time, local resources, supported by L.E.A.A. funds, were provided to maintain an N.D.A.A. Economic Crime Project Center to coordinate and provide services to the membership and support local prosecutive units.

It is difficult to assess the impact of this N.D.A.A. program in conventional evaluative terms because of the absence of both baseline data and a consistent system for collection of information on all of the activities of the project. Nevertheless, certain results are evident. A clear recognition, on the part of prosecutors, has developed in every part of the United States. Enforcement of laws against white-collar crime is the business of the local prosecutor, and that warrants the allocation of substantial prosecutive resources. Cadres of local prosecutors have been developed to assume responsibility for more sophisticated and complex cases in this area. Prosecutive horizons have been broadened. Included are more innovative and broader ranging activities to protect the public against white-collar crime and related abuses through civil remedies and the provision of consumer mediation services in district attorneys' offices. This has been accompanied by the forging of stronger links to other agencies concerned with

white-collar crime containment, whether on the state, federal, or local levels.

The N.D.A.A. Economic Crime Project has clearly come a long way toward achieving its overall goal of improving the capability of local prosecutors' ability to contain white-collar crime. Having come this distance, it is imperative to address the needs of the general community for protection and enforcement in this area, and determine how such services can best be provided and coordinated regardless of which agencies provide them. In the belief that a national strategy to deal with white-collar crime is a pressing need, N.D.A.A. has made the development of such a strategy a major Project objective.

To promote a national white-collar crime strategy, N.D.A.A. looks to the need for mechanisms to coordinate investigations and prosecutions of white-collar criminal offenses which are subject to concurrent federal, state, and local jurisdictions; to provide resources and services to support such mechanisms; to establish liaison with federal, state, and local investigatory and regulatory agencies; to identify policy and operational issues in coordinating federal, state, and local white-collar crime enforcement strategies; to develop guidelines to aid local prosecutors in assuming greater responsibility in white-collar crime enforcement; to develop guidelines for resource allocation to aid state and local white-collar crime enforcement efforts that require resources beyond that which they can provide; to convene regular meetings of federal, state, and local law

enforcement agencies to encourage and create relationships that would facilitate implementation and operationalization of coordinated strategies to control white-collar crime; and to identify gaps and duplications in federal, state, and local jurisdictions, as well as those found in the private and public sectors, in white-collar crime control responses.

Conceiving a plan for a white-collar crime containment strategy required immediate discussion of several critical issues. First, it is difficult to detect white-collar crime. The detection problem lies in the nature of both the crime and in the capabilities available for containment. The blurred distinction between illicit and illegal behavior has had an evolutionary development. Over the years there has been little concern for white-collar crime and adequate resources for detection have not been available. For example, in this age of political and corporate corruption, people tolerate such crimes as shading on taxes, because everyone does it or because the violation does not resemble a street crime. Nonetheless, this growing lack of concern has resulted in containment strategies that treat white-collar crime offenders leniently, provide inadequate remedies for victims, and only sporadically enforce existing laws. With a multiplicity of alternative private and public administrative and regulatory remedies available for white-collar criminal-type behavior, it sometimes appears inappropriate to enforce criminal sanctions, and offers an easy way out of complex criminal enforcement responsibilities.

Second, the scope of white-collar crime has not been precisely assessed. Reliance on the wide-ranging estimates of white-collar crime could result in a misdirected national containment strategy. Without fully understanding the nature and extent of white-collar crime, we cannot pinpoint the type of emphasis required to effectively secure white-collar crime control. For example, prioritizing a white-collar crime control strategy to focus on organizations that commit crimes against individuals may exclude offenses committed by individuals. Individual crimes against social welfare programs illustrates how a few crimes, taken one-by-one, may appear inconsequential, but actually signficantly erode government integrity and cripple confidence necessary for public support of such programs.

Third, the nature and mix of white-collar crime control is presently distributed among an array of administrative, civil, and criminal responses. No one response is effective alone. Yet the present mix is not coherently organized to effectively challenge white-collar crime. Detection, investigation, and prosecution operate under legitimate constraints of legal jurisdiction, lack of resources, and enforcement policies. However, there are numerous cases of disjointed control policies. For example, consumer protection is relatively uncoordinated on the federal level, with responsibilities located in several agencies and departments and even more fragmented in the state, local, and private sectors. In the case of antitrust enforcement, responsibilities are divided between the United States Department of Justice, the Federal Trade Commission, state attorneys general, and local prosecutors. It is often a

matter of chance which determines who will respond to particular behavior, and with what remedy. Key consideration must be given to how the limited available resources are used if white-collar crime is going to be effectively controlled.

Fourth, the nature of private and public responses to white-collar crime control presently involves several gaps and duplicative jurisdictional and organizational arrangements. Private businesses spend several million dollars every year on internal audits to detect and deter white-collar crime. For example, the insurance industry mounts investigative programs specifically directed against white-collar crime. Unfortunately, the enforcement value is limited. Business is reluctant to refer cases for criminal prosecution because publicity could put the victimized company in a bad light, upset stockholders, or expose officers and directors to litigation in which they would be charged with negligent management of company affairs.

Aside from the interaction between government and private industry, cooperation within government needs improvement. White-collar crime is often not properly contained because there is little coordination between governmental agencies' jurisdictions. Although the federal government has broad jurisdictional capability to cope with white-collar crime, local jurisdictions are rarely given the technical, investigative or prosecutive manpower that they need. Vigorous attempts to clarify and rationalize relationships between governmental levels is required; however, institutional arrangements and barriers must be considered and overcome.

The call for development of a national strategy to deal with white-collar crime has simultaneously developed at a number of points. The U.S. Department of Justice, for example, has designated the fight against white-collar crime as one of its major priorities, and expressed its determination to develop such a national strategy. In statements by both Attorney General Griffin B. Bell and Deputy Attorney General Benjamin R. Civiletti, specific attention has been given to devoting resources to effectively coordinate the national criminal justice system against white-collar crime. Furthermore, the Subcommittee on Crime of the House Committee of the Judiciary has embarked upon developing a long-range examination of white-collar crime issues, and has recognized the potential need for such a strategy.

To support the development of a national strategy, N.D.A.A. convened a conference to address the critical issues necessary to the development of such a strategy. In this conference, conducted on behalf of N.D.A.A. by the Battelle Law and Justice Study Center, N.D.A.A. sought to identify the crucial issues, interests, capabilities, barriers and objectives relevant to criminal justice and non-criminal justice groups important to the consideration of a national white-collar crime enforcement strategy. At this conference, held at the Battelle Conference Center in Seattle, Washington, on July 20-21, 1978, these issues were discussed by prosecutors and by representatives of the Federal Bureau of Investigation, the U.S. Securities Exchange Commission, the U.S. Department of Justice, the Law

Enforcement Assistance Administration, the American Bar Association, and various representatives from academia, research institutes, a congressional subcommittee, the judiciary and the private sector.* The conference was co-chaired by Battelle's Law and Justice Study Center Director, Herbert Edelhertz, and Charles Rogovin, Visiting Scientist at Battelle and Professor of Law at Temple University in Philadelphia.

To focus the discussion, Battelle commissioned three discussion papers, which comprise Appendix B of this report, to raise the major issues concerning a national white-collar crime control strategy. The structure of the conference, as well as the structure of this rapporteurial document, is divided into three sections, with each section based on one of the papers.

The first section, by Marilyn E. Walsh, reports and comments on the discussion of the institutional challenge of white-collar crime, which responded to the discussion paper prepared and presented by Professor Mark Moore of Harvard University's John F. Kennedy School of Government. Alternative conceptualizations of the white-collar crime problem and the implications for institutions and institutional arrangements are considered. Exploration of the barriers to as well as the potential for the interaction of such institutions with the criminal justice system are examined to identify key elements needed for a coherent white-collar crime containment effort.

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*The list of participants and the statement of preliminary discussion questions for the conference are included in this report as Appendix A.

The second section, by Mary V. McGuire, which responded to the discussion paper prepared and presented by Daniel Skoler of the American Bar Association, reports and comments on the role and function of the criminal justice system in dealing with white-collar crime. The emphasis here concerns the fact that white-collar crime control requires more than the criminal justice system's participation. Yet, strategies to control white-collar crime place pressures on and compete for limited resources in a system that currently has difficulty controlling street crime. Specialized requirements of white-collar crime containment complicate the system's pursuit of its goals in prevention, detection, investigation, and prosecution. Therefore, consideration is given to how to effectively develop, marshal, and distribute resources for white-collar crime containment.

The third section, by Frederic A. Morris, reports and comments on the discussion paper prepared and presented by William Morrill of Mathematica Policy Research concerning how a national strategy can best be developed, and how to think about implementing such an effort. This section includes an examination of the issues and insights that are involved in developing a national white-collar crime containment strategy. Problems are highlighted to explain the trade-offs and wide range of policy alternatives that must be considered. Included is an example considering the implications of the criminal justice system assuming exclusive responsibility for white-collar crime control.

WHITE-COLLAR CRIME SYMPOSIUM - SESSION I

"The Institutional Challenge of White-Collar Crime"

Dr. Marilyn E. Walsh, Rapporteur

The stated purpose of the opening session of the symposium was to explore the breadth of the social challenge presented by the problem of white-collar crime. This purpose was adopted in recognition of the fact that the criminal justice system, standing alone, is neither uniquely challenged by white-collar crime nor uniquely responsible for its containment. Instead white-collar crime tears at the fabric of a broad range of social, political, and economic institutions; and all these must share in some measure the responsibility and the burden of coping with it.

Dr. Mark Moore, who authored and presented the opening paper, began by stating an intriguing premise consistent with the session theme. Increasingly, suggested Moore, the automatic response to victimization within and through basic institutions in society (his definition of white-collar crime) has been a monolithic one: that of extending criminal liability to such victimizing conduct. And all too often, continued Moore, the criminal justice system has either fostered or acquiesced in this approach.

Such criminal justice system support or acceptance of a containment model dominated by criminal sanctions has been in apparent disregard, noted Moore, of two important implications of adopting this approach. First, use of the criminal sanction to control and preserve the benevolence of basic institutions shifts entirely the resource burden for such efforts to the public sector. Second, extensions of criminal liability into more and more areas of organizational and institutional miscon-

duct only sharpens the symbolic significance of having such "white-collar crime" cases vigorously investigated and prosecuted. This heightened symbolic need for action thereby increases the resource requirements for white-collar crime control efforts to a point where the burden on the public sector is neither economically feasible nor politically likely. The criminal justice system, then, by an unquestioning encouragement and/or acceptance of a criminal containment policy for white-collar crime has set itself up to fail. It has accepted a challenge and raised expectations that it can in no way meet.

Of particular interest in all of this, continued Moore, is the fact that the criminal justice system has doomed itself to failure by neglecting to take proper cognizance of the one critical aspect of the white-collar crime challenge it best understands, that is the fact that a widely varied range of conduct is subsumed under the white-collar crime rubric. Had the criminal justice system properly recognized this aspect of the white-collar crime challenge, noted Moore, then it would have realized as well that the different types of white-collar crime of concern to society call for a more varied and in some cases less dominant set of roles for enforcement authorities than the monolithic one envisioned by a criminal containment model.

Moore presented his own typology of white-collar crime, illustrative of the varied roles in which the criminal justice

system might be cast with respect to white-collar crime containment. At the one end of the white-collar crime spectrum, noted Moore, are the acts of individual fraud operators victimizing other individuals. Here the criminal justice system is cast in its traditional enforcement role of responding to victim complaints. Note, however, that this role envisions a partnership between the criminal justice system and victims in controlling white-collar crime -- it does not expect the criminal justice system to have the full burden of responsibility for containing such acts.

A second type of white-collar crime, conceptually midway in the spectrum, consists of individual actors either within or outside of institutional structures victimizing those structures. Here, noted Moore, the role of the criminal justice system is at best a minor one. For while there may be some symbolic stakes involved in having the criminal justice system handle a few such cases, it is also clear that the substantive job of controlling this type of white-collar crime conduct must be left to those organizations and institutions who are victimized. For this part of the white-collar crime problem, then, no dominant or exclusive role for the criminal justice system should be expected.

Finally, according to Moore's typology, there are white-collar crimes in which organizations and institutions, through conscious policies, are the offenders. Here, from Moore's perspective, is found the greatest challenge to the criminal

justice system. Here, both the symbolic and the substantive stakes in criminal justice system effectiveness are the highest. And here, society has no real alternative but the criminal justice system to take responsibility for controlling such conduct. If there is any aspect of the white-collar crime problem where the criminal justice system should be expected to play an exclusive, dominant role, it is where organizational mal- and misfeasance are concerned.

As might be expected, Dr. Moore's presentation provoked a long and lively discussion. Central to this discussion were three issues of debate. To begin with, symposium participants generally took issue with Moore's contention that the criminal justice system was on a collision course with failure in its white-collar crime control efforts and in particular that the system had put itself on such a course. With respect to the first of these contentions, some participants found such statements gratuitous and productive only of defeatism -- something not needed given the large challenge presented by white-collar crime. Others, unsatisfied by the notion of unavoidable failure, felt that such a perspective resulted from a misinterpretation of the apparent dominance of the criminal justice system. The criminal justice system is "out front" in white-collar crime control efforts, it was noted, in much the same way it can be viewed as dominating efforts to contain other crime problems. But this dominance translates to a leadership role which the criminal justice system is expected to play and should play -- not an attempt to preempt

others or to exert exclusive intervention. Society looks to the criminal justice system to provide leadership and to set the tone for crime control programs. By assuming that role, the system does not claim exclusive responsibility nor should it be expected to behave that way.

On the other hand, given the importance of the leadership function, participants questioned whether the criminal justice system could walk away from certain areas of white-collar crime, leaving the responsibility to others, as Moore's typology suggested. Thus, while Moore's model, if accepted, would carve out a smaller area of responsibility for white-collar crime control within which the criminal justice system might expect to be more effective, participants were doubtful that the system could really take such a position, given not only social and political expectations, but also the realities of self-policing in public and private institutions without criminal justice system involvement. Is it at all socially responsible, participants queried, for the criminal justice system to walk away from areas of widespread abuse knowing that the slack is not likely to be picked up by others?

Also of concern to participants was the second part of Moore's "failure" contention, i.e., that the criminal justice system had through direct action or acquiescense, put itself on a destructive course. This notion was widely disputed. To begin with, participants noted, the criminal justice system is

and has been for some time, open to non-criminal sanctioning alternatives. Similarly, many in the criminal justice system have for some time been leery of and argued against expansions of criminal liability into new areas of white-collar crime conduct. Still, the power and the deterrent potential of the criminal sanction in white-collar crime areas must be recognized and reckoned with as an effective containment mechanism. Congress knows this as do many state legislatures. Much expansion of criminal liability into new areas, then, has been in recognition of the fact that this mechanism is probably the most efficient tool available for containing abusive conduct.

The problem, however, is not the expansion of criminal liability, participants argued, but rather the failure on the part of legislative authorities to provide the criminal justice system with adequate resources to successfully police new areas of responsibility. Thus, enabling legislation in areas of social regulation such as environmental pollution may establish criminal penalties, but rarely provide mechanisms such as special reporting or certification requirements, that would surface violations and make policing more effective and efficient. Any failures here cannot be laid at the doorstep of the criminal justice system which recognizes these needs, but rather must be laid at the feet of legislative authorities. The criminal justice system, however, if given adequate resources and procedural requirements, could absorb new areas of responsibility was the general consensus.

A second major area of debate emerged from Moore's suggestion that responsibility for controlling abuses of institutions by individuals could be shifted entirely to those institutions, with the criminal justice system acting only when called upon by institutional victims themselves -- as in the case of individual victimization. In general participants expressed serious reservations about such a proposition. Of particular concern to most participants was the traditional reluctance -- indeed resistance -- of private sector institutions to report instances of abuse. Often, participants noted, there was little incentive to do so, but even where economic incentives to ferret out and report abuses do exist, there are other motiviations -- fear of embarrassment, loss of business, or a desire to cover up problems -- which generally impede institutional victims from coming forward. Reliance on self-reporting by those within institutions, then, would be tantamount to ignoring this whole portion of the white-collar crime problem. Some participants even questioned the viability of this posture with respect to individual victims, many of whom fail to report abuses because they remain unaware of their victimization or are impeded out of embarrassment or guilt. But if individual victims suffering direct personal losses cannot be relied upon to seek official assistance, how confident can one be that those in organizational positions will report abuses when it is the organization that is victimized?

One could of course take the position that victims unwilling to come forward cannot and should not expect redress. This position has not, it was noted, been well-accepted with respect to individual victims and should not be adopted regarding institutional victims. With respect to individual victims the view is not well-accepted because such victims are often not in the best position to determine what has happened to them or how they should proceed. With respect to institutional victims, however, the situation is more complex and the implications of relying only on self-policing and reporting are more serious. This is because those within institutions (i.e., managers, administrators) who must decide whether or not to report abuses may not have a personal stake in doing so; while those who do have a personal stake in discovering and reporting abuses (i.e., stockholders, customers, competitors, etc.) are unlikely to be in a position or have the information necessary to do so. Thus since the interests of those within institutions who have the ability to surface and report abuses are not identical -- or even similar in some cases -- to those who may suffer the consequences of such abuses, a posture of responding only to reported institutional victimization was considered unsatisfactory to most participants.

But if participants found the prospects for self-reports of institutional victimization unrealistic, and a posture of benign neglect of institutional victimization, unacceptable;

they were even more concerned about the other obvious alternative that would achieve control of abuse and still keep responsibility for that control within institutions: this alternative consists of creating legal or extra-legal obligations on the part of individuals within institutions to surface and report abuses. For some participants, the spectre of a society of informants raised by this alternative was quite disturbing. Those expressing such concerns pointed out the distinction to be made between imposing reporting requirements on institutions, thereby creating organizational obligations, and imposing them on individuals within institutions, creating individual obligations. In this latter instance one could well imagine, it was noted, the situation in which concerns over personal liability might prevent individuals from performing normal organizational functions.

Given each of these questions about Moore's premise, participants generally concluded that the criminal justice system could not abandon responsibility for oversight and control of institutional victimization. This conclusion did not, however, adequately address the issue giving rise to Moore's premise, i.e., the freely acknowledged fact that the criminal justice system must (in order to do its job) rely for enforcement assistance on institutional structures that are presently somewhat unmotivated to provide needed assistance. While disputing Moore's solution, then, participants were

nearly unanimous in agreeing that the issue of institutional support of and assistance to official white-collar crime containment efforts is indeed a serious one. The formulation of a solution alternative to that presented by Moore remained, however, beyond the grasp of participants. Instead, the following suggestions were made. First, that expanded and more imaginative use of compliance procedures (in particular such measures as S.E.C. registration filings) could provide enforcement authorities, whether criminal, civil or administrative, with monitoring information that could serve as a basis for control efforts. Second, that extensions of the affirmative duties of officials in institutions and organizations be explored. (It was reemphasized here that such duties should be institutional rather than individual in character) and, finally, that private, extra-legal sanctioning accomplished by institutions and professional groups might be better publicized by enforcement authorities as part of a broader social program to control white-collar crime. A corollary to this latter point would urge enforcement authorities to work more closely with professional groups to help structure and support their sanctioning activities and with institutions and organizations to improve and strengthen internal control procedures.

A final area of debate raised by Moore's presentation concerned the segment of the white-collar crime problem involving

conscious acts of misfeasance or malfeasance by whole institutions or organizations and which Moore suggested should be a major responsibility of the criminal justice system. Here participants expressed grave concern that such a policy would place enforcement authorities in the position of making decisions outside their area of knowledge and expertise. Currently, noted several participants, the justice system is called upon to make enforcement decisions (in such areas as pollution control, for example) that have widespread economic implications. Those put in that position expressed great discomfort and concern at being asked to be economic policy-makers. "Should I as an enforcement official be empowered to decide that 8,000 will be put out of work?" was an example of the type of question raised. Similar examples were given where enforcement actions are closely connected to foreign policy or other considerations beyond the scope of expertise of criminal justice system personnel. Participants generally rejected the notion that enforcement authorities could act in isolation without taking account of such considerations; and generally questioned the idea that the criminal justice system should be expected to make decisions having such widespread ramifications.

When asked who should make such decisions, the consensus seemed to be that legislative authorities should bear this burden. It was suggested, for example, that legislative authorities be asked to enunciate policy guidelines within

which enforcement personnel could then appropriately exert their authority. But to lodge major decisions of an economic or foreign policy nature in the criminal justice system seemed, to most participants, both unwise and inappropriate.

To this point of the session most of the discussion aroused by the Moore paper had concentrated on private sector institutions and organizations. It was suggested that after a lunch break some parallel discussion of the public sector was in order. Returning from lunch, then, participants began grappling with the Moore typology as it applied to government institutions. It was here that the valiant attempt to avoid definitional arguments -- an attempt which had been surprisingly successful to that point -- started to be eroded.

For most of the morning session, participants had quite successfully discussed individual and institutional white-collar crime abuses and their control without resorting to appeals for definition of the problem. It was as if there existed among participants a shared and common understanding of the abuses being considered. This, it should be noted, had been the hope of symposium planners. Too often and for too long, it was felt, definitional debates about what is or isn't white-collar crime have become stumbling blocks to more substantive discussions about how the problem can be controlled. If the search for a universal definition could be successfully sidestepped, then, it was felt that more could be accomplished.

While discussion focused on the private sector, the hope of avoiding definitional disputes was fulfilled. When, however, Dr. Moore suggested that application of his typology to the public sector would result in including extortion by public officials and general abuses of power by government under the white-collar crime rubric, participants loudly protested. Such acts, they noted, were not appropriately white-collar crime and such behavior should not even be a subject for discussion under the charter of the symposium. Attempts to resolve the issue resulted finally in a restatement of the Sutherland definition and of the later refinements by Edelhertz and others. As might be expected -- and indeed as has become tradition -- there was little resolution of the definitional issue. Instead, it was resolved to consciously avoid further discussion of the matter.

When participants did focus on abuses in the public sector that it was felt could properly be called white-collar crime, there was surprisingly little concern about the capacity of public sector institutions to surface and adequately control such abuse. This was in marked contrast to the widespread concerns expressed earlier about a similar capacity on the part of private sector organizations and institutions. Pointed toward as contributing to this greater confidence in public institutions were: (1) positions in government agencies such as that of an inspector general -- a functionary which participants suggested had no parallel

privately; (2) the fishbowl environment in which public officials operate (which is much less common for officials in private organizations); and (3) the higher standards of conduct expected of public officials and insured by either specific legislation or the elction process.

For most participants, then, the public sector was viewed as possessing check and balance mechanisms more suited to containing white-collar crime than those to be found in the private sector. Indeed participants expressed some impatience with discussions of the public sector which to many seemed (relatively) to be under control. The larger problem with respect to organizational wrongdoing, as most participants saw it, is not the public sector per se, but in the interaction between the complex array of public institutions (civil, administrative, and criminal) and the private sector. It is in this interaction that the varied -- and often conflicting -- goals of administrative versus criminal enforcement agencies, for example, may give the appearance that uneven and unequal justice is being rendered.

The symbolic stakes attached to better coordination of the policy guidelines of public agencies therefore has been crucial. Too often, however, the competing or conflicting objectives of various public agencies are not easily conformed to each other. Nor are moves to coordinate policy always readily or voluntarily accepted. Rather public agencies are often quite sensitive to having their internal policies dictated by others, even in the name of accommodating a broader set of policy guidelines. A key hurdle to be overcome in developing a national strategy for white-collar crime containment, then, is the effective balancing

of the need for coherent policy coordination among public agencies against the need to maintain the integrity and independence of the varied agencies with their separable charters, objectives, and jurisdictions that may be involved.

Participants were able to provide many examples of instances in which the decisions of administrative regulatory bodies resulted in enforcement outcomes that fell short of criminal sanctions, though such sanctions could have been invoked. Here, it was noted, the actual outcomes may give the appearance that certain "offenders" have received unequal favored treatment at the hands of government when, in fact, the outcomes represent thoroughly proper exercises of regulatory discretion. Conference participants from criminal justice agencies did not express the decisions of regulatory authorities or desire to second-guess the decisions of regulatory authorities or to dictate policy for others. They did feel, however, that clearer policy guidelines cutting across agencies would result in more consistent and coherent enforcement responses to the white-collar crime problem, and would minimize those situations where significantly different outcomes occur in similar cases. This was consistent with a more general consensus, reflective of the view which become stronger throughout the meeting, that the operations and activities of all the institutional actors in this enforcement arena should respond to overall societal objectives rather than to those of any particular agency.

SESSION II

THE CRIMINAL JUSTICE SYSTEM CHALLENGE OF WHITE-COLLAR CRIME

by Dr. Mary V. McGuire, Rapporteur

The second session of the N.D.A.A. Symposium on the Development of a National Strategy for White-Collar Crime Enforcement focussed primarily on the role that has been played by the criminal justice system in its efforts to contain white-collar crime. As Daniel Skoler (and other conferees) pointed out, the approach taken by the criminal justice system has involved all too little policy and reflects the decentralized nature of the criminal justice system which focuses the vast majority of its energies at state and local levels. Furthermore, the treatment of white-collar crime has suffered from being placed in a position of relatively low priority within the system, which, of course, must divide its limited resources among the gamut of criminal activity.

Any discussion of white-collar crime and the criminal justice system necessarily includes consideration of (1) communication and coordination within the various levels of the criminal justice system, (2) links between the criminal justice system and other systems of justice, and (3) the utilization by the criminal justice system of all available resources in its efforts to enforce white-collar crime. Accordingly, attention was given in this conference to intra-system, inter-system, and extra-system functioning and capabilities.

1. The Nature of the Criminal Justice System Challenge of White-Collar Crime

It is difficult, if not impossible, at the present time to ascertain the scope of white-collar crime in the United States. Although law enforcement has the technology for extensive data collection and compilation, the technology has not yet been applied to the area of white-collar crime. Hence, though definitions of white-collar crime have been proposed, the precise nature and extent of the crime area remain somewhat amorphous. It is apparently easier to define white-collar crime than it is to characterize it.

Despite the difficulties of clearly detailing the nature of white-collar crime, it presents challenges and problems to all levels of the criminal justice system -- white-collar crime is not a problem confined to the federal level, contrary to some popular notions of the problem. All levels of the criminal justice system (federal, state, local) have the authority to engage in the enforcement of white-collar crime, and as Skoler so clearly illustrates in his paper, the vast majority of criminal justice system activity is carried on at state and local levels. While there may be a trend toward greater centralization within the criminal justice system, no sound policy for white-collar crime enforcement has been articulated at the federal level or elsewhere. Hence, the state and local levels of the criminal justice system address their white-collar crime enforcement responsibilities armed with the bulk of the system's resources but without a comprehensive strategy. Just as the criminal justice system has been

termed a "non-system," the approach taken in white-collar crime enforcement may be considered a "non-approach."

2. White-Collar Crime Enforcement at the Federal Level

The flaw of the criminal justice system's approach to white-collar crime enforcement at the federal level, as seen by the conference participants, is that of having failed to articulate either a policy for white-collar crime enforcement or a policy for communication and effective coordination within the criminal justice system, with other systems of justice (civil or administrative) and with the private sector.* While there is no question that the federal level is not presently equipped to handle great increases in direct detection, investigation, and prosecution of white-collar crimes, the federal level can assume increased back-up and leadership responsibilities by articulating a system-wide policy for white-collar crime enforcement. This would almost certainly increase the effectiveness of white-collar crime enforcement.

In the absence of a solid federal policy for white-collar crime enforcement, it is not surprising that the separation of jurisdictions at the federal level, as well as the vertical separation of powers within the criminal justice system, have created serious problems for white-collar crime containment. At the federal level, criminal, civil, and administrative jurisdictions may be asserted to enforce white-collar crime. The nature of the offender, or the nature of the offense, may

*The conference participants recognized and were aware that current U.S. Department of Justice objectives now include priority attention to the development of such policies.

well suggest that the maximally effective jurisdiction for enforcement lies outside the criminal justice system, however, only rarely has effective exchange occurred between the criminal justice system and either the civil justice system or administrative agencies. Not only is the question of the most appropriate place to assert jurisdiction relevant here, but also the question of the effective use of resources arises. Often, valuable expertise lies within a particular governmental agency, or even within the private sector; when the criminal justice system fails to work effectively with such experts, an unfortunate underutilization of available resources results. An effective policy for inter-system coordination could greatly alleviate such problems.

Just as questions arise concerning the appropriate place to assert jurisdiction and the effective utilization of skills and resources between the criminal justice system and other systems of justice, comparable questions arise within the criminal justice system itself. Since it is, currently at any rate, not feasible for the federal government to handle all criminal justice system activity related to the enforcement of white-collar crime, and since the majority of criminal justice system activity is carried out at state and local levels, a system-wide policy for white-collar crime enforcement and for intra-system coordination is badly needed. This policy should include guidelines for allocating responsibilities where there is concurrent jurisdiction, and for sharing resources. While the most appropriate criteria for determining the level at which

jurisdiction should be asserted could only be determined through careful policy analysis, several issues may well come into play here. For example, geographical considerations suggest one natural means for guiding the assertion of jurisdiction and, hence, the direct involvement of different levels of the criminal justice system in white-collar crime enforcement; the federal level of the criminal justice system may be in a better position to handle multi-state white-collar crime cases than is either the state or local level. Type of offense, the offender, the victim, or the scope of the impact of a particular white-collar crime might also dictate the appropriate level within the criminal justice system at which jurisdiction should be asserted. Additionally, consideration of the means by which all resources available to the criminal justice system may be most effectively brought to bear may well suggest guidelines for asserting jurisdiction. State and local levels of the criminal justice system may be in better positions to utilize some private-sector resources than the federal level. Thus, a system-wide policy is called for that creates effective mechanisms for coordination of activities within the criminal justice system and for utilization of all available resources.

Implicit in this federal role of policy setting is a federal role of leadership and back-up for other levels of the criminal justice system. This indirect support provided by the federal level for the entire criminal justice system can and should be supplemented with technical training, information dissemination,

and record-keeping. Additionally, the statement of federal policy for white-collar crime enforcement should include a clear statement of the extent to which the federal level is and will be directly involved in white-collar crime enforcement and should provide guidelines for federal subsidization (actual monetary support) for activities and specialized programs at state and local levels.

3. White-Collar Crime Enforcement at State and Local Levels

Many state attorneys general have no criminal jurisdiction, while many local prosecutors and district attorneys have no authority to assert civil jurisdiction in investigating, prosecuting, or enforcing laws against white-collar crime-type offenses. Thus, cooperation within the criminal justice system often requires cooperation between different justice systems. As such, the importance of effective federal-state-local cooperation within the criminal justice system and cooperation between criminal, civil, and administrative systems of justice are underscored at state and local levels.

In several instances, effective communication and cooperation has been established within the criminal justice system and between different justice systems. For example, a council was established and effectively implemented in Texas to facilitate federal-state cooperation in the enforcement of white-collar crime. Federal-local cooperation has been successfully accomplished through the cross-deputization of assistant district attorneys and U.S. attorneys in New Jersey and through cooperation on individual cases between the SEC

and the King County Prosecutor's Office in Seattle, Washington. Such instances of cooperation serve as evidence of the availability and feasibility of sharing resources and increasing the effectiveness of white-collar crime enforcement. Unfortunately, this sort of cooperation too often occurs in isolation. It lacks solid underpinnings in that it has not really been institutionalized in any way, but has an ad hoc character. Illustrations of unhappy failures in attempts to coordinate activities are found along with illustrations of successes.

4. Comments on Session II: The Criminal Justice System Challenge of White-Collar Crime

The second session of this conference did not directly address the task of constructing a national strategy for white-collar crime enforcement, though it did make a start on analyzing, prospectively, the strategies, tactics, and barriers involved in the development of a national strategy. In focussing on the role of the criminal justice system in containing white-collar crime, this conference session provided an opportunity for conferees to discuss current and past approaches to white-collar crime. It succeeded, however, in raising a number of issues, procedural and substantive, that are relevant and perhaps essential to mapping a strategy for white-collar crime enforcement.

First, this conference session aptly illustrated the difficulty of the task of strategy development. As with the development of any strategy, it is easy to fall prey to the desire, and need, to criticize or praise existing programs

while losing sight of the ultimate goal of strategy development. This conference session was yet another illustration of the tendency to slip into discussions that involve defending one's own turf when faced with the complex task of projecting future strategy. Thus, the conference session pointed to the procedural difficulties of strategy development and the urgency of transcending individual agency jurisdictional considerations in order to achieve the goal of developing an effective, efficient, prospective strategy.

This process of analyzing the pitfalls and virtues of the present system, and of the state-of-the-art, focused attention on several substantive factors and considerations that should be included in such a strategy. These factors are, for the most part, discussed above, and they may be summarized as follows:

- Need for articulation of federal policy. There is great need for the development of an explicit federal policy for white-collar crime enforcement. This policy must detail the position and responsibilities of the federal level of the criminal justice system and provide for federal back-up, leadership, information dissemination, and training for all elements of the criminal justice system. Guidelines should be provided for effective detection, investigation, prosecution, and treatment of offenders.

- Need for federal-state-local coordination within the criminal justice system. In order to develop an effective approach for containing white-collar crime, all facets of the criminal justice system must be able to coordinate activities, share resources, and cooperate in every way possible. Such system-wide coordination calls for strong federal back-up and leadership, but not dominance. State and local agencies must be full partners in the process, and allocations of responsibility must reflect rational and objective criteria rather than relative power and resources.
- Need for criminal, civil, and administrative justice systems coordination. In order to develop a maximally effective policy for white-collar crime enforcement, the criminal justice system must not work in isolation, but should establish effective links with other justice systems at federal, state, and local levels in order to facilitate efficient and appropriate assertion of jurisdiction, imposition of sanctions, and utilization of available remedies and resources. Again, strong back-up and leadership functions at the federal level could greatly enhance such functioning.

- Need for facilitating community relations. A national strategy for white-collar crime enforcement should also provide for links between public and private sectors in order to insure that all resources and support available to the criminal justice system are effectively utilized. All levels of the criminal justice system stand to benefit from the expertise and interest of the private sector. Appropriate, effective links to the private sector not only enables the criminal justice system to utilize valuable resources, but may also facilitate and create incentives for further cooperation between the private and public sectors in efforts to contain white-collar crime.

SESSION III

MEETING THE CHALLENGE OF WHITE COLLAR CRIME: EVOLVING A NATIONAL STRATEGY

by Frederic A. Morris, Rapporteur

Obviously, a two-day symposium could not purport actually to develop a comprehensive national strategy for white collar crime containment, even in broad outline. Indeed, each session of the conference served to drive home the extraordinarily complex analytic, institutional, and political issues posed by white collar crime. Against this backdrop, Session III addressed the limited preliminary problem: How to go about evolving such a strategy. This problem raises two basic questions: What sort of effort is required? and, who should manage and perform it?

Background: The Morrill Paper

William A. Morrill grappled with the first question in his paper "Developing a Strategy to Contain White Collar Crime" and in his opening remarks. In Morrill's view, government may respond to social problems such as white collar crime in four distinct ways: by imposing regulations, by establishing incentives, by conferring benefits, or by providing information and education. Of course, these responses are not mutually exclusive. The most effective social strategies often employ an imaginative combination of responses from several categories. Any effort to evolve a national strategy for containing white collar crime should

consider this full range of response in devising alternatives. Overlooking major response categories could represent a significant loss of opportunity.

The task of devising responses within each category and choosing an appropriate mix of the options thus generated involves five basic elements: a substantive analytic element, an institutional and process assessment, an experiment or demonstration, an education and consensus-building element, and an evaluation element. If these elements are to be mutually supporting, they cannot be tackled in a simple once-through sequence. Evolution of a well-developed strategy will require repeated consideration of all the elements in an iterative process.

Morrill drew several implications from the nature of the white collar crime problem for use of his "recipe" in developing a national strategy. First, criminal proscriptions are especially difficult to apply to specific fact patterns in the white collar crime area. The relevant statute or regulation frequently provides little help in distinguishing illegal activities from practices that are merely shrewd. To the extent the public is unconvinced that certain kinds of conduct are or should be illegal, reaching a consensus about what abuses a national strategy should target is apt to be difficult. In coping with this dilemma, those involved in developing a national strategy must therefore exploit the analytic element to support the consensus-building element: i.e., they must develop coherent

and convincing rationales for concentrating on particular areas of abuse. Second, white collar crime encompasses a disconcertingly complex mix of motives, offenders, and victims. Hence the strategy that emerges will likely have to be "multitiered." Despite the natural desire for consistency, a single "logic" may be incapable of supporting a strategy that deals with the full array of white collar crimes. Third, there exists great uncertainty about the scope of white collar crime activity and its economic and social consequences. Better information would serve two purposes. It would help indicate the level of social resources appropriate for combatting white collar crime. And it would help enlist support for the enterprise. People probably now underestimate the scope of white collar crime. In all likelihood, the relative invisibility of white collar crime accounts for its low public and official priority. But there is enough uncertainty that it would be imprudent simply to assert that white collar crime is a "big problem." Overestimating the scope of white collar crime could be as self-defeating as underestimating it: both by improperly draining resources away from other important social problems and by insuring that public support would turn to apathy or even hostility when the "real figures" became known. Accordingly, any national strategy should strive to narrow this range of uncertainty. Fourth, a large number of institutions with conflicting goals already participate in the task of containing white collar crime. A national

strategy must therefore address the fact without arbitrarily equating the inadequacy of institutional arrangements with the totality of the problem. In the face of substantive ignorance there is a great temptation simply to reorganize. This temptation should be vigorously resisted. Unless careful analysis precedes reorganization, the immediate results are inevitably meager and the possibility of useful reform postponed.

Finally, Morrill advanced several features of a white collar crime strategy that are tentatively suggested by his preliminary analysis. First, the issues are so complicated and the need for widespread support and cooperation so great that the analytic element (especially as applied to conflicting institutional goals) and the consensus-building element merit particular emphasis. Second, a workable strategy probably cannot rely on the criminal justice system alone. This conclusion rests partly on the observation that the criminal justice system is poorly positioned to detect white collar abuses at acceptable cost and with tolerable intrusions on day-to-day business and governmental activities. Since participants in the criminal justice system are likely to exert a strong influence in the formulation of a national strategy, they must prepare themselves to assign key roles to others in implementing the strategy. Imaginatively engaging a variety of institutions is more important than worrying about who will get the credit. Third, in distributing the responsibility of white collar

crime control, the criminal justice system can make a major contribution by helping the victims of white collar crime become less vulnerable to abuse. In particular, its members can help institutional victims design internal procedures and social programs that are more resistant to abuse and more capable of detecting illicit activities when they nonetheless occur. Fourth, the criminal justice system should explore making analogous contributions to the investigation and "prosecution" of white collar abuses by victims and other institutions outside the criminal justice system.

The discussion that followed Morrill's presentation explored the two questions presented at the outset: (1) What sort of effort is needed (in the form of several subquestions), and (2) Who should manage and perform the analysis?

What are the Possible Goals of a "White Collar Crime Containment Strategy"?

A primary consideration in setting goals for a national strategy stems from the recognition that containing white collar crime conflicts with other important and legitimate social goals. For example, the fundamental goal of a guaranteed student loan program--getting money into the hands of needy students--may conflict with the goal of limiting fraud by ineligible recipients. Other social welfare programs pose analogous dilemmas. Perhaps the first objective of a national strategy should be to identify the major categories of such conflicts and attempt to achieve consensus as to the appropriate balance between white collar

crime containment and the other social goals represented by each category.

The task of establishing substantive goals for white collar crime containment quickly runs up against the fact that "white collar crime" encompasses a bewildering variety of white collar crimes, many bearing only a superficial resemblance. One approach to establishing goals for a national strategy in light of this complexity is to set goals according to the character of the offender and victim, as in Mark Moore's typology discussed in Session I. Unfortunately, it is easier to agree on this general principle than on its application. Suppose, for example, one orders priorities according to the economic or political power of the offender relative to the victim. Thus one assigns highest priority to offenses by organizations against outsiders, second priority to offenses by insiders against their organization, and third priority to offenses by individuals without organizational position against organizations or other individuals. This ordering raises the objection that it may result in the neglect of certain white collar crimes with important social consequences. For example, small frauds by a proportionately small number of otherwise powerless offenders against a social welfare program could conceivably gut the program, thus victimizing large numbers of equally powerless people who depend on it. Moreover, ordering priorities according to the apparent power of the offender may be inconsistent with developing a consensus on

the need for containing white collar crime. Enlisting popular support may call for focusing significant attention on the crimes of seemingly petty offenders who victimize the middle classes through such activities as charity frauds, home improvement frauds, and the like.

Perhaps as important as the substance of the goals is the form in which they are set. Ideally, some objectives should be stated in measurable form so that the success of the strategy can be gauged as it is implemented. However, there is a danger in exclusive reliance on this form of goal. It lies in the resulting tendency to focus on narrow pieces of the problem (such as "convictions") to the exclusion of other important social concerns whose achievement is more difficult to measure. Maintaining the integrity of basic economic and governmental processes is an example of such a goal. At all events, goals whose achievement can be measured should probably not be tied to a specific number, especially an overly optimistic number (e.g., "increase charity fraud convictions by 50%"). This approach could result in abandonment of a moderately successful strategy as a failure when it does not live up to unattainable expectations.

What is the Role of Evaluation in Developing a National Strategy?

Morrill's presentation stressed the key role of evaluation in building a national strategy, observing that the best social strategies build in evaluation mechanisms at

the outset. Heavy emphasis on the evaluation element, including ample provision for demonstration programs, can make many valuable contributions: in helping gather support for a strategy that is working, in identifying approaches that are not working, in allocating resources to the most effective mechanisms, and in modifying approaches that are performing imperfectly. The value of such evaluation must, however, be balanced against the problems which may stem from its implementation. This would include cost, possible disruption of the efforts being evaluated, and--last but not least--the difficulties of assessing results within comparatively short time frames.

Are Current Institutional Structures and Relationships Adequate for Containing White Collar Crime?

As previously suggested, there is an intimidating variety of institutions actually or potentially involved in white collar crime deterrence, prevention, detection, consequence reduction, and prosecution. The symposium, therefore, was able to touch but the tip of the iceberg in assessing institutional performance.

Perhaps the most serious current defect in institutional arrangements to contain white collar crime is the absence of adequate mechanisms for detecting criminal activity. Like all other crimes, white collar crimes cannot be contained unless they can be detected. Unfortunately, white collar crimes are unusually difficult to detect. Partially, this problem inheres in the guileful nature of white collar crimes.

Partially, it lies in poorly developed institutional capabilities for detection. This inadequacy is felt most acutely in the inability of governmental and business organizations to discover abuses by clients and insiders. The organizations' regular accountants lack the skills and other resources to detect carefully planned frauds. And specialists from the criminal justice system lack the entree and manpower to act before some indication of wrongdoing arises.

The question becomes what workable alternatives are available. The movement to beef up inspector general offices in the federal departments is one approach that might be more broadly applicable to a national strategy. Similar offices could be installed in state and local governments. Accounting firms with analogous capabilities could serve the audit committees of private corporations. Such extensive use of public and private inspectors for detection purposes might seem to require an unacceptable commitment in dollar costs and in training the requisite accountants, computer specialists, statisticians, and economists. However, such operations perhaps need not be so comprehensive as to detect <u>all</u> abuses. Detection of sufficient abuses to deter most offenders and serve society's symbolic goals might be adequate. That level of activity could entail more manageable drains on social resources. A still more limited alternative might involve encouraging such operations on a smaller scale than would be required for even this modest

level of detection and have them instead concentrate on assessing the fraud resistance of the organization's operating procedures, especially those installed for new programs. (Of course, the merits of such alternatives will require careful analysis.)

To What Extent are Educative or Consensus-Building Programs Essential to the Development of a National Strategy?

"Consensus-building" has scarcely fewer supporters than motherhood. The harder questions are: Whose consensus? And, what consensus? The preliminary answers to these questions are not difficult to state. The consensus should be held by the victims of white collar crimes, by others actually and potentially involved in its containment, and by the public. The need for engaging criminal justice officials representing diverse geographic and functional jurisdictions, officials representing the business and governmental organizations that are the victims and potential containers of white collar crime, together with a substantial segment of public opinion is obvious. Such support is necessary to tap the ideas, cooperation, and resources necessary to develop and implement a national strategy.

While the base of the consensus should be broad, however, its focus should be relatively narrow. The consensus need encompass no more than agreement on the importance of doing the analysis necessary for development of a national strategy. The utility of limiting the substance of consensus stems from the need to sustain the credibility of the

undertaking. The efforts should not be sold on the basis of currently soft data on the scope of the white collar crime problem, which may be exaggerated. Nor should it be sold on the promise that the white collar crime problem can be completely solved. If either the problem or government's ability to cope with it turn out to be more modest than advertised, the enterprise could lose the credibility required for a realistic effort.

How and By Whom Should the Development of a National Strategy be Managed and Performed?

As stated at the outset, the symposium served mainly to highlight the important issues involved in evolving a national strategy. It also served to emphasize the urgency of the task. Congressional committees, executive departments, and state and local governments are about to take major initiatives in the white collar crime area. The time to develop a national strategy is now--while momentum can be tapped and before major options are foreclosed. The actual development of such a strategy will require a sizeable and sustained effort by three sets of actors: (1) sponsors, (2) a "senior circle," and (3) a staff.

The sponsors' function is to give the effort sufficient legitimacy and visibility to enlist necessary cooperation and support. Such sponsors could be the federal government through the Justice Department, LEAA, or a presidential commission, state and local law enforcement agencies, or private groups such as the U.S. Chamber of Commerce, the Council on

Economic Development, or a foundation, or any combination of these. They must, in essence, provide the call for action and promise the presence of a serious and receptive audience for the outcome of the development effort.

The "senior circle" would serve to give the project its basic direction, monitor research and analysis, reach conclusions and recommendations for governmental and private action, and sell the conclusions and recommendations to those who will have to implement them. Those sitting around the table should probably include representatives of the following groups: the criminal justice system at all levels, including the judiciary; business and governmental organizations who are the victims of white collar crime; nongovernmental complements to the criminal justice system such as private security forces and private investigative auditors; legislators; the civil service commission; and labor unions. The form of the senior circle could vary along the spectrum from presidential commission to an ad hoc group. Something toward the latter end is probably preferable in terms of actually getting the work done.

The staff would include professionals and research assistants to provide the senior circle the necessary research and analysis.

APPENDIX A

SYMPOSIUM

ON THE DEVELOPMENT OF A NATIONAL STRATEGY

FOR

WHITE-COLLAR CRIME ENFORCEMENT

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7-19-78

SYMPOSIUM

ON THE DEVELOPMENT OF A NATIONAL STRATEGY

FOR

WHITE-COLLAR CRIME ENFORCEMENT

SESSION RATIONALES AND DISCUSSION QUESTIONS

To aid in symposium deliberations, below are found statements of the rationales for each session, together with a brief list of questions to stimulate discussion. These questions are merely suggestive and are not intended to limit in any way our discussion.

SESSION I: THE INSTITUTIONAL CHALLENGE OF WHITE-COLLAR CRIME

Session Rationale

Fully exploring the challenge of white-collar crime requires the identification of major social institutions outside the criminal justice system which may not only contribute to the white-collar crime problem, but also may play a part in its definition and containment. There are clearly alternative conceptualizations of the white-collar crime problem with broad implications for institutions and institutional arrangements. Exploration of the barriers to as well as the potential for the interaction of such institutions with the criminal justice system may identify key elements of a coherent white-collar crime containment effort.

Discussion Issues and Questions

(1) How, and in what ways, can or should institutions outside the criminal justice system be redirected or their responsibilities redefined toward effective participation in a national white-collar crime containment effort?

- Enlisting supportive and cooperative knowledge to identify and respond to the needs of existing criminal justice and non-criminal justice white-collar crime containment policies.

- Centralizing and sharing the various types of information and the methods of collection to measure the impact and control of white-collar crime.

(2) What are the implications of social policies (e.g., government benefit programs, tax formulas, protection of privacy, environmental protection, etc.) which affect participation of non-criminal justice institutions in white-collar crime control efforts?

(3) How can incentives or disincentives be created to assure compliance in major social programs?

(4) What can the government, the business and professional communities do to redesign management practices, auditing systems, and personnel supervision to lessen the tolerance of white-collar crime and facilitate law enforcement efforts?

- Business ethics and professional standards with enforceability, e.g., self-regulation supervised or unsupervised by government.
- Screening employees.
- Separation of functions and job rotation.
- Routinely performing pre- and post-investigative audits.
- Conducting investigations and compiling evidence that requires expertise which law enforcement agencies have difficulty providing.

SESSION II: THE CRIMINAL JUSTICE SYSTEM CHALLENGE OF WHITE-COLLAR CRIME

Session Rationale

White-collar crime challenges more than the criminal justice system. Its control depends upon more than criminal justice system participation. Nevertheless, strategies to control white-collar crime will place pressures on and compete for limited resources in a system that currently has difficulty controlling street crime. Specialized requirements of white-collar crime containment will undoubtedly complicate the system's pursuit of its goals in prevention, detection, investigation, and prosecution. Therefore, to effectively develop, marshal, and distribute resources to balance the demands for white-collar crime containment, concentration on a broad perspective is required.

Discussion Issues and Questions

(1) What strategies and tactics are available to achieve more effective and efficient enforcement responses?

- Reallocating jurisdictional responsibilities (e.g., federal versus non-federal/regulatory versus criminal) for white-collar crime containment based on characteristics of offense, of offender, and of victims.
- Creating mechanisms for case screening that optimize the use of agency resources.
- Redefining relationships among existing jurisdictions: area-wide modus operandi systems, liaison personnel, routinized inter-agency interaction and shared specialized personnel.
- Supporting white-collar crime containment efforts in non-federal jurisdictions through provision of federal resources and/or subsidies.

(2) What barriers (constitutional, financial, legal) impede the adoption and implementation of strategic and tactical alternatives?

- The reluctance of business and governmental institutions to report white-collar crime to law enforcement officials.
- The conflict between stated and political objectives.
- Differing organizational objectives, measures of performance, and incentive systems.
- Resistance to cede current enforcement authority or to assume new enforcement responsibilities.

(3) What mix of criminal, civil, administrative, and private remedies will:

- Provide the greatest deterrence;
- Maximize protection and benefits for victims;
- Satisfy the public need to perceive that justice is being done;
- Address current enforcement gaps;
- Eliminate unnecessary duplication of efforts; and
- Overcome the externalities problem, e.g., many crimes victimize people in a number of jurisdictions, and no one jurisdiction can or is willing to assume the burden on behalf of all those affected?

SESSION III: MEETING THE CHALLENGE OF WHITE-COLLAR CRIME: EVOLVING A NATIONAL STRATEGY

Session Rationale

Evolving a national strategy to contain white-collar crime will involve many trade-offs and cut across many organizational boundaries. To develop, analyze and implement white-collar crime containment policies, a wide range of policy alternatives must be considered. Reposing exclusive responsibility for white-collar crime control in the criminal justice system, for example, would foreclose such consideration and necessarily limit the range of achievable objectives.

Discussion Issues and Questions

(1) What are the possible goals of a national white-collar crime containment strategy?

(2) Are current institutional structures and relationships adequate for containing white-collar crime?

(3) To what extent are educative or consensus building programs essential to the development of a national strategy?

(4) What current strategic or tactical program activities and ideas merit resources for experiment or demonstration?

(5) How and by whom should such questions as these be addressed?

APPENDIX B

SYMPOSIUM

ON THE DEVELOPMENT OF A NATIONAL STRATEGY

FOR

WHITE-COLLAR CRIME ENFORCEMENT

DISCUSSION PAPER - SESSION I

"White-Collar Crime as Fraud, Abuses of Organizational Position, and Organizational Malfeasance: A Preliminary Analysis"

by

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PREFACE AND ACKNOWLEDGEMENTS

This paper was written in response to a short-term assignment to produce a "provocative" analysis of the White-Collar Crime problem. It does not reflect an enormous research or analytical effort. Still, it has had the benefit of having been reviewed and discussed by a group of people much more knowledgeable about White-Collar Crime than I -- namely, the group that was assembled by the N.D.A.A. at Battelle Research Center on July 20 and 21. I have substantially revised the paper originally presented at the conference to respond to some extremely useful conversations and criticisms. I think particularly of comments by Herbert Edelhertz, Charles Rogovin, Nathaniel E. Kossack, Edward Stier, Dale Tooley and Mark Richard. I am grateful for their generosity in giving me the benefit of their expertise.

1. Introduction: Problems in the Definition of White Collar Crime

Despite serious attention, a suitable definition of the "White Collar Crime" problem has remained problematic. Two seperate traditions exist. One tradition focusses on "theft through deception." It is concerned primarily with fraud, embezzlement, and general "chiselling" in economic transactions. The claim is that the aggregate economic losses associated with these offenses are large enough (relative to losses suffered in burglaries, larcenies, armed robberies, etc.) to make these offenses a matter of some urgency in planning efforts to reduce crime and victimization.

A second somewhat older tradition suggests a broader concept - that individuals who occupy powerful institutional positions in the society, acting on behalf of their own or their institution's interest, can "victimize" the rest of us in ways that are every bit as offensive as the acts of "street criminals," but escape punishment by hiding their offenses within complex institutional processes or relying on their apparent respectability to ward off prosecution and sentencing. The initial focus of this older tradition is on the ability of well positioned people to steal large sums of money with relative impunity while similar sums stolen by less well positioned people would be treated as spectacular crimes deserving the most aggressive prosecution. This older tradition joins the newer definition, then, in its concern about embezzlement and abuses of trust.

The difference, however, is that by suggesting a fairly broad notion of victimization, and by invoking powerful ideological themes associated

with "institutional power" and "unfairness" in the criminal justice system, this older sociological definition taps a quite general worry about the capacity of institutions (and the people who represent them) to exploit us and thumb their noses at the criminal justice system that is supposed to restrain them. Soon one is talking about price fixing, willful violations of environmental and safety regulations, the production and marketing of dangerous or shoddy merchandise, illegal campaign contributions to maintain favorable tax rulings, and so on. Moreover, once one includes abuses of corporate power in his definition of white collar crime, it is a little difficult to find a basis for excluding abuses of governmental and political power as well. Thus, illegal wiretapping by government agencies, election fraud managed by dominant political parties, and the solicitation of bribes or other favors by government officials might all be included in the definition of White Collar Crime. The common element of these offenses is that they are all committed with relative impunity by people in powerful institutional positions - sometimes for their own purposes, and sometimes to further the interests of their institutions.

Clearly, there are significant differences between these two definitions of white collar crime. One emphasizes economic gains to individuals as a result of deception or abuses of trust. The other emphasizes the power of institutions and individuals in institutional positions to victimize others and successfully resist criminal prosecution. While there are significant overlaps, the enormous divergence in their orientations is striking.

Of course, we could treat this problem of defining White Collar Crime with impatience - a matter of mere semantics, far divorced from pressing substantive choices about the design of a national strategy towards White Collar Crime. My own view, however, is that the definition of the problem is of the essence. How we think about the problem will at least partly determine our response - both the relative importance we give to it, and the particular way we decide to organize it. So a great deal more than words is at stake in defining the problem of White Collar Crime.

In fact, there is a special problem and temptation in defining the White Collar Crime problem. As we have seen, the concept is capable of sustaining a broad definition that taps fundamental ideological themes and widespread concerns. As such, the concept is potent in mobilizing and sustaining a broad and interested constituency. On the other hand, when it comes to directing specific programmatic efforts, the broad concept is a little too diffuse and, even worse, seems to point us towards objectives that we know will be extremely difficult to accomplish. Hence, in designing programs to deal with White Collar Crime, we tend to adopt a narrower definition more consistent with our current institutional inclinations and capabilities. This situation tempts us into committing a kind of "policy fraud." We use the broad definition of the problem when we want to attract interest, authority and resources; and we use the narrower definition when we plan programmatic action. The predictable

result is disillusionment among those who lent their support to a broad objective only to discover that the actual programmatic activity occurs along a narrower and less important front. Of course, by this time we may all be relatively inured to "policy fraud." But one might expect a group of people concerned about White Collar Crime to be more chary than most about promising effective action in a broader area than they can in fact achieve.

At the outset, then, we probably owe it to the constituency we expect to be concerned about "White Collar Crime" to define the problem in a way that loyally captures their major substantive and symbolic concerns. We should resist the temptation to define the problem in a way that is merely convenient, or consistent with emergent institutional interests and capabilities. If, after having looked at the broader social concerns at stake in this area, we decide that we want to define the problem more narrowly or more pragmatically, that will be fine. We will then at least be in a position to describe what has been left out and why. And we will not be guilty of deluding ourselves about how much of what might be considered the White Collar Crime problem is, in fact, being addressed by our policies.

2. A Broad Perspective on White Collar Crime

As individual citizens pursuing the good life, we seek to protect our property, health, freedom and sense of security against a variety of external threats - some from natural forces, and some from human agencies. To control <u>some</u> of the potential threats from human agencies, we pass laws prohibiting certain acts under penalty of criminal sanctions. In doing

so, we immediately enhance the citizen's sense of security by allowing him to have expectations that he will ordinarily be free from the threats represented by the prohibited acts. As a corollary, we also entitle the citizen to feel "victimized" when a human agency injures him by an act which is prohibited by law, and to call on the government for help in recouping his losses and restoring his sense of security.

Of course, existing laws invoking criminal sanctions fall way short of protecting us from all threats under human control. We can still fail to be hired, lose our job, buy shoddy merchandise, or be injured in an automobile accident without any crime being committed. Moreover, even in areas where we are protected by the existence of laws and the availability of enforcement resources, we still expect to shoulder a large share of the burden of defending ourselves. At a minimum, we are expected to complain to enforcement agencies when we have been victimized and to assist them in their investigation and prosecution efforts. More often, we are expected to assume some responsibility for preventing our victimization through a combination of vigilence, caution and vigorous self-defense. So, the protection afforded by laws and publicly supported enforcement agencies is far from comprehensive with respect to the capacity of human agencies to inflict losses on others. But, still, in a variety of areas we feel entitled to expect government protection, and to feel "victimized" when that protection fails.

Historically, our laws and enforcement efforts have been designed to protect us primarily from physical attacks and thefts by other individuals in the society. We have acted as if the capacity of other individuals to threaten us physically, or to steal our possessions when we weren't looking

were the most significant human threats to our individual sense of well being. To a great extent, our continued pre-occupation with "street crime" is a legacy of this common-law tradition - now buttressed by the existence of professional police forces who are organized primarily to protect us from these kinds of offenses and offenders.

Recently, however, we seem to have recognized that our property, health, freedom, and sense of security are vulnerable to measures other than physical attack and surreptitious entry, and to offenders who differ from violent or stealthy individuals. Specifically, we have noticed that we are vulnerable through deception and exploitation of an unequal position as well as through physical attack and stealth. Moreover, we sense that the increasing complexity of the society and the emergence of large institutions that have discretionary control over many valued resources and opportunities have dramatically increased our vulnerability to deception and exploitation. Partly in response to new, real dangers and partly in response to increased demands for government protection in areas where we used to rely only on vigorous self-defense, we have passed a great many laws (with criminal sanctions attached) that are targeted on these "new" offenses and offenders. It is this subtle but potent methods of "victimization", new social conditions that provide a substantially enlarged scope for these methods to come into play, and increased demands for governmental protection that yields the White Collar Crime problem. The relationships here are sufficiently complicated and important to merit some elaboration.

When one thinks about the methods through which an individual might be forced to give up something that he values and has a right to possess, one is surprised to discover how few there are. The obvious methods are

those associated with "street crime:" stealth and physical attack. Both methods will allow an aggressive offender to extract something he values from a surprised and reluctant victim. The victim will suffer not only material losses, but also psychological losses such as shame about his inability to defend himself, and a heightened sense of his vulnerability to other similar attacks in the future.

But beyond the measures typical of "street crime," there are two other methods which seem to me to be characteristic of "White Collar Crimes." One of these is deception. A person is tricked into giving up something he values in exchange for something he expects to be of roughly equivalent value and finds that the thing he receives is worth much less than he expected. This is the classic definition of a fraud.

A second method characteristic of White Collar offenses resembles extortion, but does not depend on a threat of physical force. It occurs when an offender has discretionary control over some resource or opportunity whose disposition is of enormous importance to the victim, and a matter of relative indifference to the offender. Moreover, there is some rule or expectation governing the disposition of the valued resource or opportunity - known to both offender and victim - which would entitle the victim to his preferred disposition. Instead of simply making the preferred disposition on the appropriate terms, however, the offender insists on some special remuneration. Depending on the value of the resource or opportunity to the victim, and the strength of the victim's claim on the resource even without the special contribution, the amount "extorted" by the offender and the sensation of "victimization" may be more or less

severe. This is the classic situation of exploiting an unequal bargaining advantage despite the fact that the terms of the exchange were supposed to have been set in advance. Perhaps "exploitation" is a good, simple word to use for this method of victimization.

These methods of victimization are characteristically associated with White Collar offenses for two different reasons. First, they occur within the context of exchanges that are part and parcel of our daily lives. There is nothing exotic about the events surrounding the offense. It is only the outcome that is unexpected and unpleasant. In fact, the offenses could probably not occur without there being exchange systems which, for the most part, involved exchanges that were reliable and fair. Second, to be successful, the offender must either appear to, or actually occupy some relatively powerful institutional position within the society. Deception works best if the offender can surround himself with the credentials and trappings that make him part of our ordinary exchange economy. He must have "bonafides." The need to occupy an institutional position is even more obvious in the case of exploitation. It is precisely the control over the resources and opportunities that institutions have to distribute that gives their representatives such enormous bargaining power vis-a-vis individuals and other organizations who have a stake in the disposition of those institutional resources and opportunities. Thus, these methods of victimization depend crucially on the existence of an organized society and the existence of institutional positions that can be occupied, or appear to be occupied, by individual offenders.

Note, also, that while the <u>methods</u> of victimization differ from those used in street crimes, the subjective experience of victimization may

be quite similar. The victim can take physical and economic losses - though economic losses are probably much more common that physical losses. In addition, the victim may experience the same embarassing sense of impotence, and the same anxieties about his vulnerability in the future. In fact, in the case of "exploitation," the sense of degradation and anxiety about the future are likely to be particularly intense. The reason is that there may be nothing the victim can do to alter the conditions that originally led to his victimization: he will continue to need whatever the institution (or its representative) has to offer; they will continue to be able to extract more from him than he expected to have to pay. Since there seems to be no way out for the victim, the sense of powerlessness may be particularly acute. Thus, while methods of white collar victimization may seem subtler and less direct than the methods of street crime, they are equally cruel.

Of course, these methods of victimization have always been available to potential offenders. It is likely, however, that recent changes in both the organization of the society, and our determination to control the behavior of people within large institutions have vastly increased the extent of what is now perceived to be the White Collar Crime problem.

One significant change is the continuing elaboration of the network of exchange relationships in which individuals find themselves enmeshed. It used to be true that important economic transactions were conducted within a family and between the family and a small number of institutions with whom the family had relatively long term, stable relationships. The transactions were relatively few, relatively simple and conducted by people who had expectations of relatively long term relationships. Now, partly as a result of the continuing process of differentation and specialization that occurs with the growth of an exchange economy, partly as a result of

increased wealth that allows us to buy larger quantities of more complicated products, and partly as a result of a vast expansion of government activities and functions parallelling the growth of the market economy, individuals find themselves dealing episodically in complicated transactions with many institutions. Moreover, many of these transactions are necessarily based implicitly on trust - at least voluntary exchanges of information, and and on some occasions, even extensions of credit. In the sheer number, the complexity and the inevitable looseness of these transactions, there are enormous opportunities for fraud and deception - sometimes by the supplier, and sometimes by the customer or client. Forged or phony checks, credit card fraud, welfare fraud by clients, medicare fraud by clients, insurance fraud, income tax evasion, and even false customs declarations are all examples of consumers, clients, or people with financial obligations to an institution taking advantage of the looseness of the economic transactions that connect them to the institution to victimize the institution. Real estate fraud, home repair frauds, deceptive advertising and credit practices, and shoddy or fraudulent auto repairs are all examples of stealing by institutions who take advantage of the confusion marking these transactions. In effect, the facts that we make many more transactions; that the transactions involve relatively complex products, opportunities, and obligations; and that long term reciprocal relationships among individuals have been shattered by the complexity of the market; have dramatically reduced the capacity of agents on either side of the transaction to police the transaction and defend their interests: it is hard to know exactly what is happening in the transaction, tempting to take advantage of the ignorance, and precious little incentive to resist the temptation to protect a long term personal relationship.

A second significant change related to, but different than the elaboration of the exchange economy is the emergence of large institutions

with discretionary control over resources and activities which are extremely valuable to other individuals. The emergence of these large institutions affects the opportunities to commit white collar offenses in three important and different ways.

First, these institutions lend credibility and distribute authority among individual representatives. In doing so, they increase the opportunities for individuals who represent the institutions to deceive and exploit other individuals who do business with or have an interest in the activities of the institution. An auto repair man working for a nationally recognized company can get away with a shoddy repair more easily than an unaffiliated mechanic simply by relying on the reputation of the larger institution. A welfare case-worker may get away with under estimating the benefits for which an applicant is eligible by virtue of his official position and apparent expertise. Similarly, hiring and contracting officials in both public and private agencies may abuse their discretionary authority over these crucial decisions by extracting special favors from people or firms who could reasonably expect to be chosen by merit alone. And government officials with the discretionary authority to distribute a subsidy, grant a privilege, or enforce a costly obligation may "extort" some payment or service from individuals even when the citizens have a clear right under current policies to receive the subsidy, be granted the privilege, or escape the obligation. As the reach of these institutions has grown, so have the opportunities of people who represent these institutions to deceive and exploit over individuals who do business with them.

Second, the institutions have become relatively vulnerable <u>victims</u> of white collar offenses as well as potential offenders. The reason is simply that the institutions distribute control over their resources and

influence over their operations and policies to a large number of individuals who man positions throughout the organization. These "insiders" may take advantage of their position to steal the organization's assets, depart from an operational policy in exchange for a fee from outsiders who have an interest in changing current policies, or simply sell "inside" information about the organization's plans, interests or capabilities. Thus, bank tellers embezzle money, payroll clerks collude with line supervisors to create false payroll records, contracting officers arrange for kickbacks in making procurement decisions, real estate owners collude with government housing officials to guarantee a mortgage that is far above the real value of a property, and high government officials promise to "do what they can" for companies that have tax, anti-trust, or regulatory problems. These cases differ from those described above in that it is the institution itself that is victimized by its own employees and agents, not its clients or customers.

Third, the institutions can become offenders themselves. Or, somewhat more precisely, the institutions can motivate their representatives to take actions which serve the interests of the organizations (and may even have been implicitly or explicitly authorized by higher level officials), but are also in violation of criminal statutes. This situation has developed because we have decided to regulate the conduct of many of our institutions, and have relied (at least partly) on criminal sanctions to do so.

Now, part of our determination to regulate these institutions comes simply from a recognition that the institutions sometimes have interests that differ from those of the society at large. Hence, their pursuit of their interests may injure the rest of us. Among economic institutions, the pursuit of profits may lead to production processes that are more dangerous or dirty than they should be, or to efforts to fix prices substantially above levels to which they would be driven if free competition were allowed to

prevail. Among governmental institutions, an enforcement agency's interest in making cases, a regulatory agency's interest in reaching an accomodation with a powerful, regulated industry, or a political party's interest in retaining local power may lead to decisions and actions that inflect substantial losses on the rest of us. Part of our determination to regulate the institutions, then, arises from our desire to prevent the harm they might do if left to the unrestrained pursuit of their own interests.

A second part of our motivation to regulate the institutions, however, springs from a recognition that since these institutions incorporate and organize much of the society's activity, we have no choice but to turn to them when we want to accomplish large public purposes. Thus, to affect the supply of "suitable jobs" we pass minimum wage laws; to guarantee income to retired workers, we insist on minimum standards for pension plans; to guarantee equality of educational opportunity, we require the integration of public schools; and to reduce discrimination throughout the society, we mandate "affirmative action" plans. In all of these cases we are drawn to the regulation of major institutions not because of their capacity to do harm if left alone, but simply because they have the capacity to help us with broad social goals.

The motivation to regulate the conduct of large institutions does not always result in the passage of criminal statutes for non-compliance. We are apt to rely on the mechanisms of private civil suits, and regulatory agencies that set rules and enforce compliance through civil sanctions much more frequently than on criminal statutes and criminal prosecution. Still, in a surprising number of cases, we have been willing to establish criminal sanctions to buttress the mechanisms of civil suits and governmental regulatory action. As a result, major

officials, acting on behalf of large institutions (even with their explicit authorization) are exposed to criminal liability.

The net effect of all this is that we live in a society where the opportunity for individuals to commit white collar offenses have increased dramatically. Part of the increase reflects changes in the organization of society that hold real dangers of victimization. Part reflects an increase in our demand for government assistance in defending our interests. And part reflects an increased determination to control the behavior of large institutions that have significant potential for both good and ill. The combination leads to a potentially vast agenda for enforcement programs against White Collar offenses.

Arrayed against this vast agenda is a very small criminal justice system currently overwhelmed and pre-occupied by the problem of "street crime." Given the disappointments and frustrations in our efforts to deal with "street crime," one is tempted to counsel against asking the criminal justice system to take on any new burdens, particularly one as large and knotty as "White Collar Crime." But it is partly our current desperate efforts to deal with "street crime" that makes it seem important that we do something about White Collar Crime as well. It is clear that we fear "street crime." Moreover, in recent years we have become less sanguine about the prospects of dealing with this problem through the "rehabilitation" of offenders. Hence, we are increasingly inclined to "crack down" on muggers, armed robbers, rapists, murderers and burglars. The commitment to harshness in handling "street criminals" combines without traditional idealogic commitment to "fairness" in the criminal justice system to make the issue of the criminal justice system's response to White Collar Crime of acute importance. We admit the possibility of significant "victimization" through methods and offenders that look much different than ordinary street offenses. In fact we have already

established criminal sanctions for some of the offenses. So "fairness" requires us to strike out at White Collar offenders as well as the street criminal. In fact, given the intensity of our attack on "street crime," there seems to be a special obligation to prosecute "respectable" people who use their position and reputation to steal through deception and exploitation. Until such attacks are visible, we worry about the fundamental fairness and rationality of the criminal justice system.

Thus, in my view, some rather fundamental symbolic and substantive issues are evoked by the concept of "White Collar Crime." We are as worried about stealing, hurting and frightening people when it is done through deception and exploitation by people who occupy institutional positions (or, indeed, by the institutions themselves), as when it is done by people who rely on assaults and stealth. In fact, we are particularly worried when these things are done on a wholesale basis by institutions that simply ignore the legal obligations that are supposed to restrain them. Moreover, throughout the entire area, we are concerned about "fairness" in the criminal justice system. We think it is outrageous that people with institutional positions would find it relatively easy to steal large sums of money with impunity. And we want to be reassured that we are as eager to prosecute powerful people who commit crimes for themselves. In my view, it is in terms of these broad issues that we must design and evaluate any national strategy to respond to the problem of White Collar Crime.

3. Distinct Components of the White Collar Crime Problem

Any reasonable person who has a vivid sense of the limited capabilities of the criminal justice system and who has followed the argument this far should, by now, be shaking his head with worry. Arrayed against the vast agenda of white collar offenses, the criminal justice system seems too small, too clumsy, and too fragile. It is inconceivable that the criminal justice system could deal with any substantial portion of the individual incidents of fraud, embezzlement, graft and abuses of authority that would occur in a society as large and complex and as wedded to the principle of "cavent emptor" as ours. Part of the problem is the sheer number of offenses that are likely to occur. But another part of the problem comes in the enormous expense of preparing cases of this type for prosecution.

Moreover, while we like to think that we are a government of laws and not men, and that the law stands above everything, one doesn't need too much experience with the actual operations of the criminal justice system to understand that the men who work that system face acute personal dilemmas and risks in attacking institutions that represent significant economic, governmental or political power. In enforcing environmental laws against a firm that threatens to close down if they are prosecuted, the criminal justice official feels that he is dealing with larger policy choices than he would like to be responsible for. Similarly, in attacking governmental and political institutions, the officials often feel they are attacking their peers, and that their own motives will inevitably be suspect. The blade of the criminal law is apt to simply shatter when it is brought against powerful political and economic institutions.

I am inclined to agree with this assessment and to worry that the criminal justice system has bitten off much more than it can chew in taking on the problem of White Collar Crime. But I would like to emphasize that we are already in this mess. We have already distributed criminal liability rather liberally among the activities and personnel of major social institutions. We have done so because we wanted to check the power we saw in those institutions and grasped the criminal law as one of society's mightiest weapons. But having done so, fairness forces us to enforce the laws. And we find that the actual resources of the criminal justice system make it seem more like a frail reed than a mighty whip.

So it is hard to decide to do nothing or go back to square one. We are compelled forward by the trends described above. In moving forward, however, we can already see that we will have to be guided by several major principles. These include attacking the problem on a front that is broad enough to capture the major substantive and symbolic concerns evoked by the concept of White Collar Crime, but narrow enough to be within the capabilities of the criminal justice system; organizing our response to the substantive problem in a way that invites assistance from institutions other than the criminal justice system; and generally protecting the criminal justice system from either a significant overload or obvious unfairness. In the end we are likely to discover that the criminal justice system plays a relatively minor role in a national strategy to control White Collar Crime, and that its role will be to punctuate or complement the actions of other institutions rather than the main offensive.

A useful start in thinking more operationally about a national strategy towards White Collar Crime is to divide the problem into several

distinct components. To be useful, the components should be defined in a way that allows us to make rough estimates about their relative importance, and to make some broad judgments about how the problem can be approached - how the criminal justice system's response could be organized and how much help will be forthcoming from actors outside the criminal justice system. Based on some reflection and discussion, it seems useful to divide the problem of White Collar Crime into seven major components. Table 1 describes the different components. Each component will be discussed in greater detail below.

3.1. "Stings and Swindles"

The first component can be described as the problem of "stings and swindles." This component involves stealing through deception by individuals (or "rings") who have no continuing institutional position, and whose major purpose from the outset was nothing more than to bilk people out of their money. Now the "cons" and frauds that are included within this category vary in size and in targets. At one extreme is an offender who makes a few fraudulent door to door sales of pans, encyclopedias, or burial insurance. At another extreme are relatively sophisticated stock swindles where worthless or forged stock certificates are sold to large financial institutions. This category might even include large counterfeiting operations. What ties these varied offenses together is that individuals amd institutions are tricked into giving up money to individuals who had no intention other than stealing, and who are likely to disappear once the deception occurs.

Table 1:

General Characteristics of Different Components of White Collar Crime

Component of White Collar Crime / Defining Characteristics	Nature of Offender	Nature of Victim	Mode of Mechanism	Losses	Agencies Involved in: Detecting	Prosecuting	Punishing
1. "Stings and Swindles"	Non-Institutional Position: Individuals or "Rings"	Individuals and Organizations	Deception	Primarily Economic	Primarily Victims	Primarily CJS	Primarily CJS
2. "Chiselling"	Individuals with Institutional Positions	Clients or Consumers of Institution	Deception	Primarily Economic	Institution (?) Victims (?)	Primarily Institutions	Primarily Institutions
3. "Individual Abuses of Institutional Position	"	"	Exploitation	Primarily Economic, But Also Psychological	Institutions; Victims	Primarily Institutions	Primarily Institutions
4. Embezzlement & Employer Fraud	"	"	Deception	Distributed Economic Losses	Exclusively Institutions	Primarily Institutions	Primarily Institutions
5. Client Fraud	Clients of Financial Institutions	"	Deception	"	"	"	"
6. Influence Peddling/Bribery	Individuals with Institutional Positions	"	Collusion Between Outsiders & Insiders	Primarily Economic	Victims (?) Institutions (?)	Institutions (?) CJS (?)	Institutions (?) CJS (?)
7. Willful Institutional Non-Compliance	Institutions Themselves	Society at Large	Exploitation of Bargaining Position	Economic; Physical; Psychological	Regulatory Agencies	Regulatory Agencies	Regulatory Agencies

For purposes of gauging the relative seriousness of the problem and thinking of effective responses, it is useful to compare this kind of offense to burglary. The experience of victimization is likely to be similar. The losses will be primarily economic, rather than physical. And while the victim is apt to feel a little humiliated by the fact that he was deceived, he is not likely to have the same sensations of trespass and anxiety about the future that a victim of burglary would. In gauging the seriousness of any given offense like this, then, we are likely to look at the total amount that was stolen, the capacity of the victims to absorb the loss, and the relative innocence and frailness of the victim. We are likely to feel angrier about a man who bilks 10-20 elderly poor of $500 a piece in a burial insurance fraud than a second man who sells fake stock certificates alleged to be "hot" to a shady stock broker for $50,000. We would analyze the social costs of specific burglaries in about the same terms. While the social costs of these offenses in aggregate are not clear, I would be surprised if the problem of stings and swindles was more serious than that of burglary.

The analogy with burglary also helps in thinking about effective responses. A little reflection suggests that while we are fundamentally dependent on potential victims in preventing burglaries we will be even more dependent on self defense in preventing cons. After all, burglaries produce some signs that are visible to patrolling police. Cons do not. Hence, the victims will be much more on their own in defending against offenders. Once the offense has been committed, though, it may be easier to identify and prosecute the offender in a con game than in a burglary. The reason is simply that the victim is likely to have seen and come to know a little about the offender. The major obstacle to successful detection and prosecution may be nothing more than a limited jurisdiction which is easily escaped by the offender. Thus,

as in handling burglaries, an effective response to "stings and swindles" will depend a great deal on individual self-defense and the willingness of victims to submit complaints and assist in the investigation. The criminal justice role is likely to be deciding how serious a complaint is, and how much resources to devote to the investigation. There doesn't seem to be any opportunity for a more aggressive or pro-active enforcement strategy.

3.2. "Chiselling"

The second component of the problem is "chiselling:" i.e., giving a customer or client less than he has a right to expect on the basis of an institution's announced policies. This component resembles the offenses above in that it involves stealing (on an ad hoc basis) through deception. It differs from the category above in that the offenders are people who occupy continuing institutional positions, and the deception is not complete. In effect, somebody who expects to be in business for a while decides on an ad hoc basis to give only "half a loaf." Typical offenses are auto repair frauds, "short-weighting" in super markets and gas stations, or refusing to grant some privilege or provide some service that a client is entitled to in a government bureaucracy. The offender is usually an individual employee (or a relatively small unit of a much larger organization) who decides to cheat on his obligation to his customers, clients and firm by doing something that is contrary to his institution's policies, but saves him some trouble or earns him a small, non-organizationally provided, reward.

In aggregate, the victimization associated with these offenses can be quite large. For example, it has been estimated that the public loses more than $20 billion in fraudulent auto repairs. But even so, the experience of the individual victims may not be all that serious. For the most part, their loss will be nothing but a relatively small economic loss. There will be few physical consequences. And the experience of humiliation and fear (with its lasting effects on one's general sense of security) may not occur at all. In fact, the victim may not even notice that he has been victimized. So, while economic losses to victims in offenses like this may be large in aggregate, the individual experience of victimization may be sufficiently different to make these offenses much less important than other kinds of offenses which inflict smaller aggregate losses, but do so by inflicting very large economic, physical and psychological losses on a few unsuspecting victims.

The fact that victims may not even notice they have been victimized creates a major problem in controlling the offenses. There is no one either to resist the offenses or to identify the offenders. (This is probably part of the reason that the aggregate losses can get so large.) Still, in trying to control offenses of this kind, the criminal justice system does have a crucial ally - the institutions themselves. To the extent that the institutions have policies which are important for them to follow (for either marketing or legal reasons), they will make enormous efforts to "police" their employees' conduct. In doing so, they will, of course, prevent some of the possible offenses in this category. Similarly, to the extent that trade associations and professional associations exist to protect the reputation of their particular service or industry, they might be enlisted in efforts to control "chiselling"

Of course, these associations have much smaller capacities to detect and deal with specific instances of chiselling, but it would be an error to ignore their possible contribution.

Since institutions and professional associations have some capacity to prevent chiselling, and since much of the chiselling that does occur will either go unnoticed (or be handled informally in complaints by clients and consumers to the institutions and associations), it is probably safe to say that only a tiny piece of this problem will ever end up in the lap of the government, and even less in the formal machinery of the criminal justice system. The government becomes involved primarily through two kinds of agencies: licensing boards that are designed to guarantee quality in the provision of certain kinds of services, and (more recently) consumer advocacy organizations which are often set up to receive and process complaints from consumers. Usually these agencies have only civil powers. The criminal justice system becomes involved only when these regulatory agencies want to press criminal cases, or where State Attorneys-General or local District Attorneys have set up aggressive consumer protection bureaus designed to make criminal cases against merchants who "bilk the public."

If one wanted to increase the level of government effort in this area, the right strategy would probably involve some combination of: 1) increasing the volume of complaints made to the government by widely advertising the rights of consumers in and establishing a convenient procedure for lodging the complaint; and 2) some pro-active investigations of firms, bureaus or industries that seem to generate a large volume of complaints. In setting up such a system, however, the government would, in fact, be going after institutions that <u>systematically</u> violated clear obligations rather than going after the occasional, ad hoc chiseller. Ad hoc chiselling

as defined in this section is probably beyond the reach of anyone but the institutions who employ the chisellers.

3.3. Individual Abuses of Institutional Position

A third component of the White Collar Crime problem involves an individual exploiting the power of an institutional position that confers control over valued privileges or resources to take advantage of another individual who has a strong interest in how that power gets used. Typical offenses might include a contracting or hiring official in government or industry extorting a kickback from a contractor or potential employee for a favorable contracting or hiring decision, or a fire inspector extorting a payment from the owner of a building to give him his license.

In actual cases, it may be difficult to distinguish these abuses of institutional power from "bribery" which is discussed below. Analytically, however, the difference is quite clear. In offenses involving "abuses of institutional position" the victim has a clear right to something the official controls, and the official asks for an additional payment to make the proper decision. The individual confronting the institution is the victim. The representative of the institution is the offender. In cases involving "bribery," the situation is reversed. The individual confronting the institutional representative would not ordinarily be entitled to favorable treatment. In this situation it is the organization that is the victim. Both the representative and the outsider profit from the offense.

Note that the experience of victimization is likely to be much different for "abuses of institutional position" than for other offenses we have discussed so far. The reason is simply that power rather than

deception is the vehicle used to victimize. An individual with significant power confronts another individual with less power and forces him to accept less (or pay more) than he has a right to expect. Because power is being used, the experience of victims is likely to be quite different. They can involve physical abuse and humiliation as well as economic losses. Moreover, it is likely that the long term effects on the victim's sense of security will be more devastating. Encountering power that is ruthlessly used to exploit a victim is a much different experience than simply being tricked or deceived.

In thinking about an effective response to such offenses, one sees quickly that these offenses may be much easier to handle than "chiselling." We have the same important ally - namely the institutions themselves who are likely to have some interest and capability for detecting and punishing such offenses themselves. In addition, we are likely to get more help from victims who are more likely to notice that they have been victimized and to be indignant about their victimization. As a result, many of these cases will be handled administratively within the organizations whose representatives have exploited their position. The general strategy to improve enforcement against such offenses would resemble the strategy against "chiselling:" 1) widespread advertising of rights and the establishment of a convenient complaint procedure; and 2) some pro-active undercover operations by criminal justice agencies in areas where one expects to see a great deal of "official extortion."

Note, finally, that it is likely that most of these offenses will be committed in the governmental sector. The government is generally in the business of distributing subsidies, privileges and burdens to individuals

in the society as a matter of right. Moreover, the government officials typically act in situations where explicit rules are supposed to define fully the nature of the transaction, but where there is, in fact, an enormous amount of de-facto discretion. In the sheer magnitude of the government enterprise, and in the tension between the expectation that the transactions should proceed according to explicit rules and the actual experience of their subjective nature, there are vast opportunities for "victimization" by officials. Thus, while there may be contracting and hiring abuses in both government and private sectors, probably the largest number of these offenses involving abuses of institutional position will occur within governmental institutions.

3.4. Embezzlement and Employee Fraud

A fourth component of the White Collar Crime problem can be called "embezzlement and employee fraud." This component introduces an interesting new relationship among offenders, victims and institutions. So far in examining offenses committed by people with institutional positions, we have looked at their capacity to victimize individuals outside the institution - i.e., consumers, clients and suppliers. Starting with this component of the White Collar Crime problem, we will be interested in a second possibility; that individuals in institutional positons can victimize their own institutions rather than its clients, consumers, or suppliers. Embezzlement is the paradigmatic offense: an individual within an institution exploits his control over the assets of an organization to steal them for himself. It resembles "pilfering" except that the mechanism is deception rather than trespass.

There is a significant conceptual problem in trying to calibrate the seriousness of these offenses, and the magnitude of the "victimization." It is clear, of course, that large amounts of money can be stolen by embezzlers, and people who pad payrolls. But who is the victim in these offenses? The answer seems to be the organization itself. Of course there are individual victims in the form of clients, owners and managers of the organizations. But the losses will be distributed among a large number of such individuals. Moreover, these individuals may never discover that they have been victimized. In effect, the organization serves to diffuse and disguise the losses. In my view, the fact that the losses are distributed over large numbers of individuals and well disguised does mitigate the seriousness of the offense. We care less about an offense that distributes $1,000 in losses among 1,000 relatively well-to-do organizational clients than a different offense that inflicts a $1,000 loss on a single person with limited means. In effect, since the "victimization" here only involves money, is distributed among a large enough group to make the economic loss to each quite small, and neither humiliates nor frightens the victims, these offenses may not merit a great deal of social concern.

I suspect that our real stakes in this area are concerned more with the symbolic issue of equity rather than the substantive problem of victimization. It seems outrageously unfair that the opportunities to steal efficiently should be as unequally distributed as everything else in the society. It seems wrong that people in privileged positions should be able to steal thousands of dollars with a stroke of a pen that distributes these losses over large numbers of unseeing, uncaring people while a person with a less advantaged position must rely on the much less efficient procedure of going from individual to individual and either sneaking their property away or threatening them physically. Since it seems so unfair, we should show some zeal

in attacking these offenses even though the substantive stakes associated with victimization are not all that significant.

Moreover, in thinking about effective methods of control and the role of the criminal justice system, it becomes apparent that the criminal justice system may not have to play a very large role. On the one hand, we realize that it is virtually impossible for the criminal justice system to detect these offenses. The vast area in which these offenses could occur, and the difficulty of seeing the offense in the enormous volume of transactions recorded by an institution, make it hopeless for the criminal justice system to "patrol" for these offenses. On the other hand, we realize that the institutions themselves have both a strong interest and a capability in preventing and detecting the offenses themselves. After all, the problem of employee theft is an old one, and accounting has become a very sophisticated mechanism in response. It is likely, then, that our ability to control these kinds of offenses will depend almost entirely on the strength of the internal control mechanisms of the institutions themselves: organizations with strong internal controls will rarely be victimized; those with weaker controls will suffer often.

This simple observation about what kinds of institutions will be victimized may imply that government agencies will be usually vulnerable. They handle large amounts of money and for the most part, have relatively weak accounting and auditing procedures. Thus, the development of stronger accounting and auditing procedures within governmental institutions should probably be a high priority matter in dealing with this component of the White Collar Crime Problem. (It is for this reason that current legislation creating new offices of Inspector Generals in various federal departments should probably be approved.)

Note that our dependence on the interests and capabilities of the organizations themselves to deter and identify these kinds of white collar crimes is not necessarily bad in terms of our substantive objectives.

The organizations may do an excellent job of controlling these kinds of offenses. It may be bad, however, with respect to our symbolic objectives. The reason is simply that the victimized organizations may prefer to deal with the offenses privately and discreetly. This would be true if the organization wished to avoid punishing a valued colleague too harshly, or if it would prove embarassing to the organization to reveal its vulnerability. Regardless of the motives, however, if victimized organizations deal with offenders through firing, demotions or other economic and personal humiliations, the criminal justice system is cheated of its opportunity to show its willingness to punish such offenders in ways that are similar to our punishment of street criminals.

Thus, to reassure ourselves that our criminal justice system is prepared to punish people who use powerful organizational positions to steal as well as people who use force or stealth, we must find some way of dealing with the kinds of white collar offenses that involve the victimization of organizations (and indirectly, their clients, owners, contributors, employees or subjects) by people who occupy significant positions within them. Our ability to cope substantively with offenses of this type is particularly dependent on the internal control systems of the governmental and economic organizations of our society. Our ability to cope symbolically with these offenses will depend on the willingness of the organizations to turn some of the cases they discover over to the criminal justice system for prosecution. It is very difficult for the criminal justice system itself to take any initiative in this area.

3.5. "Client Frauds"

A fifth component of the White Collar Crime problem involves stealing by economic clients of organizations that at least in some sense advance credit to their clients. Included in this component of the problem could be credit card fraud, insurance fraud, fraud by individual clients of welfare and medicare programs, and tax evasion. These offenses belong together in that they involve an organization that distributes liabilities overs its resources to a large number of individual clients or debtors who may take advantage of their control over that liability to steal resources from the institution.

This component of the problem turns out to be a close analogue to the problem of embezzlement and employee theft. There is the same difficulty in identifying who has been victimized and the same sense that the victimization is not so serious. Moreover, one is tempted to conclude that the major portion of the responsibility for controlling these offenses ought to lie with the institutions themselves. Their business involves distributing their resources and credit to individual clients. If they are vulnerable to client fraud, they are not performing their fundamental tasks effectively. Hence, they shouldn't be able to rely on the criminal justice system to do a major part of their job. Finally, it is likely that if we should use criminal justice resources anywhere in this system, we should begin with protecting public and governmental institutions. In fact it is likely that tax evasion is overwhelmingly the most important offense in this area of White Collar Crime. So, the analysis of employee fraud is almost exactly duplicated for the problem of "client fraud."

3.6. "Influence Peddling/Bribery"

A sixth component of the White Collar Crime problem involves individuals with institutional positions selling their power, influence and information to outsiders who have an interest in influencing or predicting the activities of the institution. Paradigm offenses here include kickbacks from contracts, SEC officials who sell information about planned SEC actions, and so forth. In offenses like these, it is the organization that is victimized because its internal processes (which are presumably designed to allow it to perform its functions effectively and efficiently) are sabotaged by its own employees for their own interests. Unlike the case of embezzlement, it is not so much the institution's assets that are stolen, as its capacity to operate efficiently and fairly.

The victims of offenses of this type are the people who were competing with the interests that managed to achieve "undue influence" through their use of "bribery." It is less aggressive contractors who failed to buy off the contracting official, or less aggressive lobbyists who were reluctant to pay crooked congressmen. Chances are, these people may suspect they have been victimized, but be unable to produce any evidence. In fact, these offenses will probably be extremely difficult to root out because no one who participates in the offense will have any incentive to come forward. Both the bribe and the bribe receiver like things the way they are. Consequently, our response will depend crucially on the institutions themselves, perhaps aided on occasion by competitors who suspect they were victimized and an aggressive investigative press that thrives on stories of scandal. Were all these to act together, the criminal justice system might have an opportunity to intervene.

Note that these offenses are likely to be most serious where they occur within governmental institutions. The reasons are both substantive and symbolic. Where the government makes policy decisions governing the use of its enormous resources and authority to accomplish public purposes, a great many people are affected. Losses and gains in individual well being are registered throughout the society. For those who lose (and sometimes even those who win) it is crucial to their sense of well being that they believe that these decisions were made fairly and equitably. When these processes are manipulated by corrupt practice such as influence peddling and bribery, it is likely that our citizens will suffer unnecessary substantive losses, and that their faith in the fairness at our governmental system will be eroded.

3.7. Willful Non-Compliance With Rules Regulating the Conduct of Economic, Political and Governmental Institutions

The last component of the White Collar Crime is probably the most challenging. It involves situations where powerful institutions (or individuals acting on behalf of powerful institutions) willfully violate laws that are designed either to keep the institutions from doing social harm, or to require them to do social good.

This area, too, is potentially vast. We now have a great many laws designed to guarantee the ultimate benignity of our economic, political and governmental processes. For example, in the economic arena we have laws to promote competition, to require various products to meet rigorous standards of safety and efficacy, to restrain false advertising, to obligate firms to use safe and clean production processes, and so on. In the political arena we have laws regulating the registration of voters, the accessibility of candidates to the media, the use of public employees

in politics, and the financing of political campaigns. In the governmental arena, we have laws designed to assure widespread participation in major public policy decisions (e.g. the Administrative Procedures Act and the Freedom of Information Act), to protect the privacy of individual citizens, and to prevent obvious conflicts of interest among governmental officials. Moreover, cutting across both governmental and economic institutions, we have laws designed to achieve broad social purposes such as those that mandate minimum wages, insist on non-discrimination in hiring and selling, and protect long term pension rights of employees. While most of the enforcement activity under these laws occurs through regulatory agencies relying on civil procedures, many of the laws do impose criminal sanctions for some kinds of violations.

The number and variety of these laws make it difficult to say much in general about the magnitude and character of the "victimization" that occurs as a result of criminal violations of these statutes. Clearly, there is a lot to be concerned about in this area of White Collar Crime. Price-fixing is alleged to cost the consumer billions of dollars each year. Negligence in the production of lawnmowers, drugs, canned foods, cars and airplanes, or willful disregard of environmental laws can result in substantial physical harm. And civil rights violations have struck at the very heart of our freedom, personal dignity and sense of security.

Moreover, a special kind of terror is associated with being abused and victimized by a large institution. One may find himself surrounded by others who are also victimized, and peer into a future where no one comes to the rescue and the institution continues its abuse indefinitely. In fact, the influence of the institution may become so pervasive and persistent that one ceases to experience his losses as "victimization" and accepts them

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as an unfortunate but inevitable feature of the world. Of course, things don't often get this bad. But when they do, the experience of the "victimization" is very severe. (Ironically, the experience may be so severe that it will be difficult to find anyone who will complain).

Larded among spectacular offenses committed by negligent, clumsy or willfully malevolent institutions, however, are a great many offenses that are less spectacular. The losses occur on a smaller scale with fewer portenses for the future. For these offenses, our stakes are likely to be more symbolic than substantive. Our symbolic stakes in these relatively insignificant cases arise from three different sources. One source is simply our desire to show our determination to regulate institutions in the areas in which we have passed criminal statutes. We want to show that we were serious in imposing the new obligations and that the society as the will and the capacity to control its various institutions. A second source is indignation about the bad moral character of leaders of institutions who authorize cheating on their clearly mandated social responsibilities. We simply hate to believe that we are led and organized by people who will not accept their broad social responsibilities. A third source is a desire to reassure ourselves about the fairness of the criminal justice system. We want violations of criminal statutes to be punished regardless of the status of the offender or the seriousness of the offense. For all of these reasons, we may sometimes want criminal prosecutions even in relatively trivial offenses.

In organizing a response to willful (or negligent) violations of socially mandated responsibilities, the criminal justice system is again likely to play only a minor role. Much of the effective control over these offenses will depend on "voluntary compliance" by the affected

institutions, and regulatory efforts managed largely through non-criminal investigations, and sanctions. These mechanisms will act on a much larger scale than the criminal justice system could ever hope to. In fact, the criminal justice system will find it difficult both to identify offenses and offenders in this area.

The offenses may be relatively invisible for the same reason that embezzlement and client fraud are hard to see. The organization distributes the losses over a large enough group of individuals so that no individual has a strong incentive to complain. Even if individuals notice that they have been victimized, they may weigh the strength of their individual complaint against the power of the institution and quickly decide that it isn't worth it to complain. In fact, this situation is worse than the case of embezzlement and client fraud because in those cases we could at least rely on the institution itself to help us do the policing. In this case, the organization is no longer the victim, but the offender! So it has no incentive to help us locate the offenses. The only actor in a position to help the criminal justice system identify offenses are the regulatory agencies who will occasionally encounter criminal misconduct in the course of their investigations. Given historically difficult relationships between regulatory agencies and criminal justice agencies, and given the general reluctance of regulatory agencies to threaten carefully nurtured relations with the regulated industries by referring cases for criminal prosecution, however, the regulatory agencies are unlikely to provide a great many cases to the criminal justice system.

The offenders are likely to be relatively invisible because it will ordinarily be unclear who within the organization is responsible for the violations. Who, after all, are the guilty individuals if an organization's policy is to violate the laws? How will we know when officers of

the organization were merely following explicit or implicit orders from supervisors, and when they are assuming responsibility for their actions themselves? These problems are central to cases such as the price fixing case in the electrical industry, the "black-bag" cases now being prosecuted within the FBI, and even the war trials at Nuremburg. The fact of the matter is that we do not now have a sensible, widely understood, easily applied rule that distributes legal and moral responsibility for organizationally sanctioned or motivated action among individuals within the organization. Without such rules, it is as hard to locate the offender as offenses in this area of white collar crime.

Thus, this last component of white collar crime presents some of the knottiest problems in the entire area. I suspect that our substantive and symbolic stakes are greater in this area than in any other component of white collar crime. The material and psychological losses to victims are significant when viewed on both individual and aggregate terms. Moreover, these losses occur against the backdrop of a widespread social concern about our ability to control the behavior of large institutions. We have tried to indicate our determination in this area by establishing criminal sanctions and lashing out at leaders of institutions who violated those statutes. Unfortunately, our actions in this area may come to be seen as capricious partly because it is difficult to detect the offenses; partly because trivial, technical offenses are included among the more serious; and partly because it is difficult to assign guilt to individuals. I suspect progress in designing policy to deal with this component of white collar crime depends on: 1) deciding which few among the rapidly proliferating regulatory programs involve the most important social concerns; 2) figuring out how the regulatory processes should be co-ordinated with

the criminal processes to maximize our ability to guide institutions in the regulated area; and 3) developing a reasonable principle for assigning guilt to individuals in cases where we go to criminal prosecution. Despite the importance of this component of White Collar Crime, no one appears to be working on this agenda.

4.0. Conclusion: Some Policy Guidelines in Designing a Strategy Towards White Collar Crime

This broad survey of the social concerns and diverse problems associated with the idea of White Collar Crime is far from sufficient to support the detailed design of a national strategy towards White Collar Crime. Still, a few strategic principles emerge.

One principle is that we should understand that we have both substantive and symbolic objectives in this area. The substantive objectives involve reducing the "victimization" associated with White Collar offenses. We want to reduce the number of people who are injured, frightened or lose money as a result of deception and exploitation or a superior bargaining positon. The symbolic objectives involve reassuring ourselves about the "fairness" and consistency of the criminal justice system. We want to see evidence that the criminal justice system will treat deception and abuses of institutional position as harshly as stealth and physical attack, and that it is willing to punish privileged and powerful offenders as well as those who are relatively powerless. To some extent, of course, the concept of deterrence relates the two different kinds of objectives: cases prosecuted largely for symbolic purposes may produce real substantive results. Analytically, however, the two objectives are distinct. A relatively greater commitment to one objective or the other would shift our White Collar Crime strategy significantly. A commitment to substantive objectives would focus

our attention on individual abuses of institutional positions, and major offenses involving willful institutional non-compliance with socially established obligations. A commitment to symbolic objectives might leave more room for efforts directed against embezzlement and employee fraud. Thus, the two different kinds of concerns can powerfully influence the focus of a national strategy towards White Collar Crime.

The distinction between the two different kinds of objectives is important not only because it raises the crucial issue of which offenses are relatively more important to attack, but also because it raises a second crucial issue in the design of a national strategy: namely, a calculation about the appropriate division of labor between the criminal justice system and all other mechanisms of social control in coping with white collar offenses. To the extent we want to achieve substantive results, we may want to keep as much responsibility for the control of white collar offenses within larger and less formal mechanisms of control rather than in the criminal justice system. To the extent we want to achieve symbolic goals, we will be tempted to bring some portion of these cases into the criminal justice system. Figuring out a suitable number of cases to handle in the criminal justice system that is large enough to achieve symbolic and deterrence objectives, and small enough to guarantee that other agencies and systems continue to feel responsible for substantive control is a key part of our policy design problem. My hunch is that the right number of cases will be a very small number of cases in the criminal justice system. Given the vastness of the area, and the comparative advantage of other institutions in detecting and controlling the offenses, the interest of the criminal justice system may turn out to be almost entirely symbolic.

A third principle that emerges from the analysis is that exploitation of a superior bargaining position is as important a mechanism of White Collar Crime as deception. The experience of victimization is likely to be extremely unpleasant. Moreover, the mechanism seems to be at the heart of many of the resentments and fears we have about people who exploit an institutional position to injure us. Finally, I would expect this problem to grow as the society becomes increasingly organized and regulated. For all these reasons, I would urge that we pay attention to exploitation as well as deception.

A fourth principle developed in the discussion above is that governmental and political institutions are scarcely immune from white collar offenses. They clearly are vulnerable embezzlement, employee fraud and client fraud just as private economic institutions are. And, in the crucial areas of individual abuses of authority, bribery, and willful, institutional non-compliance, the problems within governmental institutions are likely to be particularly significant. At a substantive level, then, governmental and political institutions house a major part of the problem.

At a symbolic level, I think offenses within governmental and political institutions are even more important. The government has always had a slightly different moral status than private enterprise. We give it this status because we want the officials and institutions to feel more than ordinarily responsible. After all, they are dealing in two very abuseable commoditiss -- power and other peoples' hard-earned money. Hence, we insist on higher standards and ought to be more concerned when fraud, theft and extortion appear in governmental processes, than when the appear in economic processes. Moreover, it is more than a little hypocritical for government agencies to attack private economic institutions for offenses that they ignore when they occur in governmental agencies. In

sum, far from being outside the scope of White Collar Crime, offenses committed with governmental and political institutions are at the very core of the problem.

A fifth "principle" (more in the nature of a worry than an established "principle") is that our current planning efforts and organizational development efforts may be targeted on the wrong piece of the problem. Our current efforts in this area are designed primarily to deal with fraud and embezzlement in both private and governmental sectors. I am worried that we will work hard in this area and ignore what appear to me to be the crucial problems of abuses of institutional position, bribery, and institutional non-compliance with social obligations. If I am right about the relative importance of these offenses in the general area of White Collar Crime, it seems crucial to me that we begin thinking about the problem of criminal enforcement of existing social regulations as well as fraud and embezzlement. It is in this area that I think the most important programmatic challenges to a White Collar Crime strategy lie.

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SYMPOSIUM

ON THE DEVELOPMENT OF A NATIONAL STRATEGY

FOR

WHITE-COLLAR CRIME ENFORCEMENT

DISCUSSION PAPER - SESSION II

"White-Collar Crime and the Criminal Justice System: Problems and Challenges"

by

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Our experts in white-collar crime have a habit--a laudable one--of stressing that white-collar crime is indeed crime, pure and unadulterated. This is, of course, true; and thus, despite special linkages with, and options of, regulatory enforcement and a variety of civil sanction measures and techniques, the major arena and front stage for addressing white-collar deviancy must be the nation's official apparatus for dealing with criminal behavior--our criminal justice system* (or "non-system" depending on one's intellectual inclinations).

In the United States the criminal justice system is a huge, multi-faceted, many tiered, decentralized goliath, most of it--in dollar and manpower terms--focused and operating at state, county and municipal levels. Precious little attention has been lavished on the roles, responsibilities and priorities of these "line actors" with respect to white-collar crime, in no small part due to an overriding (and quite legitimate) preoccupation with street crime, organized crime and violent acts. That is why contributions like the Justice Department's new white-collar crime investigation

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*The term "criminal justice system," as used in this paper, refers to the complete complex of criminal administration components (police, prosecution, courts, corrections, criminal defense) at all government levels (federal, state, county, municipal) with special emphasis on enforcement and prosecution functions.

manual* with its explicit guidance for the "bread and butter" components of law enforcement in their day-to-day operations are so critical and so needed (patrol, investigation, business and community relations, internal organization and specialization, etc.).

The purpose of this paper is to examine white-collar crime containment in terms of system-wide approaches, issues, coordination and impacts. The discussion will be initially descriptive and thereafter analytical and speculative, recognizing that only surfaces can be scratched with this important subject and that the special influence of federal legislation and regulation, and the special responsibilities vested in administrative departments and agencies not primarily engaged in criminal justice or law enforcement endeavors in this field, create almost unique interface and coordination problems for criminal justice systems.

The White-Collar Crime Problem

White-collar crime pervades American society, imposes enormous social and economic costs, impacts on the "disadvantaged" and the "many" as deeply and destructively as on the "affluent" and the "few," and, yet, it seems fair to say, attracts a disproportionately small share of criminal justice resources, manpower, attention and coordination.

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*Law Enforcement Assistance Administration, The Investigation of White-Collar Crime: A Manual for Law Enforcement Agencies (Edelhertz, Stotland, Walsh & Weinberg, April 1977).

The literature is neither wanting nor less-than-persuasive on this proposition and the definitional parameters of this species of criminal activity, thoughtfully examined, almost make a self-evident case. Ignoring the old Sutherland "character of the offender" definition (the high status and respectable actor) in favor of the Justice Department-endorsed, now widely accepted, and more functional "character of the act" formulation, i.e.,

> . . . an illegal act or series of illegal acts committed by non-physical means and by concealment or guile, to obtain money or property, to avoid the payment or loss of money or property, or to obtain business or personal advantage . . .

we can play out the common varieties of white-collar crime and then begin to examine their treatment at the hands of the system. As sorted out by Herbert Edelhertz, these crimes fall into four general categories:

1. Ad Hoc Violations -- committed for personal benefit on an episodic basis. (Examples would be tax fraud or welfare frauds.)

2. Abuses of Trust -- committed by a fiduciary, or trusted agent or employee. (Examples would be embezzlement, or the receipt of a bribe, kickback or favor to confer a benefit.)

3. Collateral Business Crimes -- committed by businesses to further their legitimate primary purposes. (Examples would be anti-trust violations, bribery of customers' agents, use of false weights and measures, concealment of adverse environmental and drug test findings, and sales misrepresentations.)

4. Con Games -- committed for the sole purpose of cheating customers. (Examples would be

charity frauds, land sale frauds, and sale of worthless securities or business opportunities.]*

Perhaps symptomatic of the collateral status accorded white-collar crime in our criminal justice system "thinking" is the fact that current national reporting and statistical systems on crime and criminal justice, despite considerable growth and refinement in the past decade, offer few breakdowns on incidence, arrests, prosecutions and other dispositions of white-collar offenses. Our most thorough and comprehensive crime reporting system, the FBI Uniform Crime Reports, collects no data on reported white-collar offenses, focusing instead on the seven "index offenses" (homicide, aggravated assault, rape, robbery, burglary, auto theft and larceny-theft). The largest of these numerically, i.e., larceny-theft (6.3 million of 1976's 11.3 million reported index offenses) probably includes some white-collar crimes but by FBI definition "fraud, embezzlement, con games, forgery and worthless checks" are specifically excluded so that the number is probably not great. Indeed, no statistics are collected on these white-collar crimes although the Uniform Crime Reports do include tabulations of arrests for non-index crimes, including the categories of "Forgery and Counterfeiting," "Fraud," and "Embezzlement," and the quasi-categories of "Buying, Receiving, Possessing Stolen Property" and "Arson" (the latter, along with several other crimes,

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*Herbert Edelhertz, The Nature, Impact and Prosecution of White-Collar Crime, U.S. Department of Justice, LEAA (Washington, D.C.: G.P.O., 1970), pp. 73-75.

involving frequent concealment or fraud dimensions). Reported arrests for these offenses in 1976 slightly exceeded 400,000 or 4.2% of the 9.5 million arrests classified by types of offense in the 1976 reports. While federal investigation, prosecution and conviction statistics seem somewhat better, they are often diffused among a variety of reports and agency tabulations.*

Reliable and aggregated conviction data are even harder to come by, and only the federal prison system and a few states seem to maintain breakdowns of sentenced prisoners by type of crime identifiable for white-collar definitional purposes. For example, in 1975, some 1,200 federal prisoners of the 20,700 classified by offense in Bureau of Prison statistics (total universe of 22,500) as of June 30, 1975, were serving time for essentially white-collar offenses.** This amounted to less than 6% of the federal prisoner population, probably

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*In terms of conviction data, the American Bar Association examines some federal statistics, e.g., tax evasion, economic crime (FBI-investigated) and SEC violation convictions (1,220, 3,750, and 115 respectively in 1975). See ABA, 1978 Economic Crime Committee Informational Report; also U.S. Attorney General, 1976 Annual Report, pp. 20-21, 164-66, which indicates filings of 6,192 white-collar crime cases under 12 primary categories in FY 1976, approximately 15.1% of all federal criminal filings. These probably would be augmented substantially if we were able to thoroughly look behind statistics in more general offense categories.

**U.S. Bureau of Prisons Statistical Report - 1975, Tables A-9 and A-10. These white-collar breakdowns include only embezzlement, fraud, income tax, and transporting false or forged securities. It is not at all clear whether all of the last category involve white-collar offenses under the definition used here; nor is it to be doubted that numerous white-collar violations are to be found in gross statistics covering larceny, counterfeiting, and forgery.

a much higher figure than most states because of the greater state and local government focus on street crime.

The Criminal Justice System

Although well known to professionals and students of the American criminal justice system, a few facts about that system's size, shape and character may help fix perspectives.

Today, public crime control expenditures aggregate approximately $20 billion annually, divided among the major functions into about 55% for police services, 25% for corrections, and 20% for courts (the latter including prosecution and defense). Most of these, over 85%, are state and local outlays; and the largest cost component, more than 85%, is personnel. In all areas of activity except corrections, and despite increasing federal and state roles, local government outlays substantially exceed those at federal and state levels (e.g., more than twice as much for police protection as federal and state expenditures combined, about twice as much for judicial operation, and one and three-quarters as much for prosecution).

More than 1.1 million governmental employees are involved in operation of our law enforcement apparatus; about 650,000 in police service; 240,000 in corrections; 140,000 in courts; 60,000 in prosecution and governmental legal services; and 7,000 in public defense. They deal with approximately 20 million reported crimes annually--about 11 million within the FBI's seven major "index crime" categories--some eight million

police arrests annually, 1.5 million offenders in institutions or under supervision and 4.5 to six million criminal and juvenile court cases. The evidence suggests that total crime, reported and unreported, should be two or three times larger than the known offense figures and that beyond public expenditure, crime costs the nation in personal injury, stolen or damaged property, and concomitant economic loss more than $50 billion annually. Organized crime revenues and white-collar crime loss alone have been estimated (at least per "high range" estimates) at close to that annual figure.

Reported major crime in the United States rose some 140% during the decade of the sixties and topped 200% in the span from 1960 to 1975. This represents an increase from 1,880 to 5,280 per 100,000 population. Of the 11.2 million index crimes reported in 1975, about one million or roughly 9% were violent crimes (murder, assault, rape and robbery) and 10.2 million were crimes of property (burglary, auto theft, and larceny). Crime continues to have an urban emphasis (a metropolitan area rate of more than 6,100 per 100,000 compared with a national average of 5,200 and a rural rate of less than 2,000) and a big-city emphasis (25 cities account for more than 25% of all reported major crimes and 40% of violent crimes, with 20 cities producing nearly half the robberies in the United States in 1975).

Despite the high volume of total arrests, the actual rate of major offenses cleared by arrest of an offender

whether or not ultimately convicted, has been consistently less than 25% (21% in 1976) with somewhat better experience on violent crimes (45%). Thus, not much more than two million of 1976's eleven million major reported crimes were cleared by arrest. Although national statistics on prosecution and conviction are somewhat spotty beyond this point, evidence suggests, as has been the case for many years, that not more than two out of ten major offenders are brought to justice for serious crime in this nation and less than one out of ten is ever convicted of a criminal offense.

In terms of structure, the picture is awesome. Our nation has close to 20,000 separate and independent police forces, about 2,700 prosecutorial units and some 15,600 criminal courts (200 appellate, 3,400 general jurisdiction trial courts, and 12,000 trial courts of special jurisdiction). As might be supposed, most of this organizational multiplicity is accounted for by units serving rural or low population areas and most manpower and workload is concentrated in larger units serving populous areas. For example, the majority of police departments have less than ten personnel (about 90%) but 150 of the largest police forces account for more than half of all police officers in the nation. Federal and state criminal justice agencies are much less prolific than their county and municipal counterparts. The President's Reorganization Project identified some 112 federal agencies engaged in "police, law enforcement and investigative activities," only twelve of which were deemed to have primary law enforcement missions

(concluding, nevertheless, that too much overlap and fragmentation still existed).* We know, moreover, that there are only 50 state attorneys general, almost 50 state police forces (Hawaii doesn't have one and several states have separate investigative bureaus) and 50 state supreme courts (with intermediate appellate courts expanding rapidly and court unification legislation gathering thousands of local courts into hierarchically ordered, state-administered structures).

This, then, is the broad setting in which white-collar crime containment strategies, resource allocation choices, and enforcement priorities must operate and compete--perhaps more than a match for any order of national "special focus" crime control programming.

Federal Level Structure, Activities and Dilemmas

On the federal level, as might be expected, there is a great deal of activity directed against white-collar crime.** This effort, however, has been impeded and probably diluted by structural and resource problems. White-collar crime enforcement is structured as follows:

(a) Detection. Detection of white-collar crime is primarily in the hands of administrative departments and

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*This material on federal white-collar crime enforcement draws heavily on descriptions, conclusions and actual text offered by Herbert Edelhertz in recent Congressional testimony (House Subcommittee on Crime, 1978).

**Office of Management and Budget, Federal Organizations Involved in Law Enforcement, Police and Investigative Activities: Descriptive Report and Profiles, Ch. I (April 1978).

agencies. Thus, prima facie evidence of any crime must be reported by federal agencies to the U.S. Department of Justice, or to its Federal Bureau of Investigation for investigation. In some instances, however (e.g., the Securities Exchange Commission or the Postal Service), federal agencies have their own investigative branches which refer cases directly to the prosecutive arms of the Department of Justice in Washington or to U.S. Attorneys in the field.

Most detection is reactive, i.e., generated in response to complaints. Some is proactive, as in the case of those S.E.C. activities which involve monitoring market activity or corporate filings for signs of violations. Other government personnel conduct audits (defense contractors, research grantees, businessmen qualifying for federal subsidies or credits, taxpayers, etc.) which have a high potential for identifying white-collar misconduct. However, except in a few rare instances (usually found in I.R.S. or S.E.C. operations), agency enforcement officials are hesitant to consider cases for criminal prosecution. Agents or auditors alert to criminal issues lose their zeal in continued confrontation with discouragement and delay, or in the protracted course and "politics" of administrative and civil settlement negotiation.

(b) Investigation. Investigation of white-collar violations is conducted administratively within federal agencies and departments, and by the Federal Bureau of Investigation. While levels of capability vary, they are often quite high.

Nevertheless, the arena for investigation is limited by lack of funds, the restricted scope of some investigative authorizations, heavy caseloads, red tape, and concerns about how investigators' work products will be received and used by prosecutors who have discretion to prosecute or to decline prosecution. While it is true that federal criminal justice expenditures have increased in greater proportion than those of state and local government since the turn of the seventies (and even more markedly for police and law enforcement functions), the continuing "explosion" in federal regulation and consumer protection measures has probably more than neutralized any resource advantages accruing to the federal white-collar crime initiative.

(c) Prosecution. Criminal prosecution is invariably conducted by U.S. Attorneys and Department of Justice attorneys from the Criminal, Tax, Anti-trust and Civil Rights Divisions. Where a case is not strong enough, or where discretion has been exercised against criminal prosecution for a valid or less justified reason, the same kind of case may often be prosecuted civilly or administratively by other federal departments and agencies.

Federal detection, investigation, and prosecution operate under substantial constraints which derive from problems of legal jurisdiction, lack of resources, and enforcement policies. For example, consumer protection is relatively uncoordinated at the federal level, with responsibilities

placed in a host of agencies and departments. Many of these offices have simultaneous responsibility for policing, stimulating and assuring the economic health and public confidence in the enterprises being monitored, and, in so doing, often become vulnerable to the conflicts posed by such dual responsibility.

Anti-trust enforcement is divided between the U.S. Department of Justice and the Federal Trade Commission with each alternately assuming the lead. Sheer chance may determine whether a merchandising fraud operator will be dealt with by the F.T.C. (where a cease and desist order is likely to issue only after a period of several years) or will be criminally indicted and exposed to heavy fines or a possible prison sentence as a result of prosecution by the Department of Justice. While the F.T.C. has shown great ingenuity in using tools at its disposal, disparities of this kind often flow from the uncoordinated response to the white-collar crime problem and generate justified concern.

Enforcement policies are of key importance. Not enough, for example, is done by the federal government in contract renegotiation procedures to recapture excessive profits, or to utilize renegotiation audit procedures to unearth indications of procurement fraud. Audit and compliance activities within government programs unfortunately often require that numerous review and administrative hurdles be overcome before a case is referred for criminal prosecution or civil recovery. Broad

"inward looks" and policy formulations on criminal prosecution such as that recently announced for the Justice Department's environmental enforcement program can offer guidance and have salutory impacts on internal staff, officials of concerned regulatory agencies and potential violators.*

How resources are made available will often determine whether the federal government means what it says about fighting white-collar crime. Audit operations of I.R.S. and the Enforcement Division of the S.E.C., as well as the Anti-trust Division of Justice are customarily "strapped" for funds, a situation which must convey undesired messages not only to taxpayers, the securities industry, and potential anti-trust violators--but also to the attorneys and accountants who represent and advise them.

It is not unusual to hear the judiciary, federal or otherwise, criticized for applying different punishment yardsticks to white-collar offenders, as compared to those who commit common crimes. The criticism is valid, but the responsibility must be shared. Courts do no more than reflect

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*See Asst. Attorney General James M. Moorman, DOJ Land and Natural Resources Division, Criminal Enforcement of the Pollution Control Laws (ALI-ABA Institute on Environmental Law, Feb. 1978) (i) announcing a policy of firm criminal prosecution of willful, substantial violations of pollution control laws, (ii) referring to stringent criminal penalties in federal environmental legislation and use of general false statement and mail fraud laws, (iii) focusing on false reporting, concealment and non-reporting in situations of substantial harm or danger, and (iv) viewing criminal enforcement as a conscious tool to put teeth into self-policing programs.

the existing overall climate of tolerance toward white-collar crime, as evidenced by legislative, executive, and private policies in this area.

The issue of private enforcement is rarely addressed in considering white-collar crime and yet this area offers a powerful resource for federal white-collar crime. Large corporations and smaller businesses spend hundreds of millions of dollars each year on internal audits which could do more (as our courts have recognized) to deter and unearth white-collar crimes. The U.S. Chamber of Commerce, the insurance industry, and other sectors of the business community have mounted investigative and educational programs directed against white-collar crime. The enforcement value of all this is often limited by the reluctance of business to refer cases for criminal prosecution, except in instances where no insider is culpably or negligently involved. This kind of consideration can never be completely countered by enforcement policy but clear signals as to severe treatment of foot-dragging where knowledge is clear can make a contribution.

Since the federal government is always sounding the trumpet of coordination and planning in its state-local assistance programs, a little bit of "religion" in its own white-collar crime planning and legislation would seem in order. Given the problems of lack of resources and "externalities" (benefits and costs beyond the interests and citizens meant to be affected), our lawmakers would do well

to heed Deputy Attorney General Benjamin Civiletti's recent advice on new planning initiatives and internal policing of regulators as well as regulatees:

> We are concerned in the Executive Branch that the Congress can do more to prevent fraud. When a social welfare program is designed, too little emphasis is placed on beginning the flow of federal dollars. The Department of Justice is developing a concept in which Congress will consider the Law Enforcement Impact before adopting new social programs. Additionally, there is now pending in Congress legislation to establish Inspectors General in eleven different agencies. This will give a new thrust and vitality to actively seeking out fraud and corruption as well as abuse and waste (Grand Rapids Economic Club, May 1978).

One final aspect of the federal effort offers a natural transition to the state and local enforcement arena. That involves the federal "backup" role to the criminal justice heartland--technical assistance, training, and grants-in-aid to enhance capabilities and stimulate priorities and attention for white-collar offenses. The primary impetus for this kind of federal endeavor has been the Omnibus Crime Control and Safe Streets Act of 1968, as amended, now operating a variety of subsidy, demonstration, research, technical assistance and educational programs at the $700 million level. Administered by the Justice Department's Law Enforcement Assistance Administration (LEAA) for which crime on the streets has always been the major priority, limited funds and projects for white-collar crime containment did begin to flow in 1973 after the

"consciousness raising" ordeal of Watergate.* However, such initiatives and funds have been altogether too modest and could be readily doubled or tripled without even rippling the waters of LEAA's street crime priorities. Any such increased effort, if properly structured, could offer enormous return in multiplying state and local effectiveness in white-collar crime enforcement. This, of course, would require sensitivity to the potentials, limitations, and realities of the state-local contribution.

State and Local Structure, Activities and Dilemmas

As has been observed, the state and local criminal justice apparatus is much larger than that of the federal government. White-collar crime enforcement activities, however, are probably at a much lower level and that is understandable. Besides the obvious competition with street crime and organized crime, it is in the nature of a large segment of white-collar crime to victimize people in many jurisdictions, to be less viewed as a purely local problem (especially with the role played by federal legislation and programs in defining violations) and to be beyond the enforcement resources, capabilities and special expertise (accountants, technical experts, program analysts and monitors, investigative specialists, etc.) of

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*See, eg., LEAA funding of the NDAA's Economic Crime Project aggregating over $3 million from 1973 through 1978 to assist local prosecutors' offices in launching special units, increasing general white-collar crime enforcement capabilities, and enhancing public and community awareness; other examples include the LEAA-supported development of a manual, The Investigation of White-Collar Crime and the establishing of The National Center on White-Collar Crime at Battelle.

local jurisdictions and even state enforcement apparatus. It is within this special context, then, that state and local criminal justice systems will be scrutinized.

(a) Comprehensive Planning and Coordination. Since the advent of the Omnibus Crime Control and Safe Streets Act almost a decade ago, comprehensive criminal justice planning, analysis, and resource allocation, organized at the state level, has been an "official" technique and policy for addressing the crime problem and a key to federal "block grants" to state and local jurisdictions for criminal justice improvement. A massive planning superstructure has evolved (enjoying some $50 to $70 million in federal financing in the past few years) under which state planning agencies (aided by regional and local counterparts--Regional Planning Units and Criminal Justice Coordinating Councils) have annually produced sizeable comprehensive plans, submitted them for federal approval, and distrubuted federal funds in accordance with their priorities. The experience (and experiment) has not been altogether rewarding or successful. Now, in mid-1978, the Congress and the nation are on the verge of a major Crime Control Act overhaul which would place less emphasis on comprehensive written plans, probably eliminate or substantially diminish the regional and local planning superstructures, and generally place fewer federal funds into planning and more into formula and "incentive" grants to states and major local jurisdictions. The important thing, however, is that the state planning agencies and apparatus will survive, probably under a new name, with

greater state investment of dollars, and with a goal of serving more as a total coordinator, rationalizer, and monitor of state criminal justice endeavors rather than as just a conduit for federal funds.

From the very beginning, white-collar and economic crime occupied a small place in the comprehensive plans and in federal block grant distribution priorities. Some state plans devoted special attention to efforts in this area but they were few. Because of the larger geographical scope and special enforcement expertise required for white-collar crime containment, it is important that white-collar crime efforts win a place in the planning and coordination efforts to be conducted by the states under the new legislation.* The state planning agencies were one of the few forums where court, police, prosecution and correctional needs and concerns were brought together, identified, ordered and forged into a total crime control agenda (whether viewed as a true "comprehensive plan" or a "shopping list" for federal dollars). State leadership will, it seems, be essential for effective white-collar crime programming and while much can be supplied from and by the major state enforcement units (attorneys general, state police, bureaus of investigation), a void in the central planning/coordinating agencies which will continue to report

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*See S.3270, Justice System Improvement Act of 1978. The proposed new agencies are "Criminal Justice Councils" at the state level, and "Criminal Justice Advisory Boards" for major local units.

primarily to the state governor (and his/her crime control policy apparatus) would inevitably hurt the cause of white-collar crime containment.

(b) Prosecution--State and Local. The area of prosecution raises peculiar and difficult problems of coordination, leadership and role in white-collar crime containment. Prosecution of crimes is dominantly in the hands of the independent local (and usually elected) prosecutor. Reform groups and study commissions have for years suggested a stronger role in criminal enforcement on the part of the nation's attorneys general but in only a few states is the attorney general the direct "boss" of the prosecution system and organizational supervisor of local prosecutors; and this situation shows no signs of changing. Indeed, in many states even legislative powers of attorneys general to initiate local prosecutions, intervene in local cases, or supersede local prosecutors have fallen into disuse, created much uneasiness and distrust on the part of prosecutors, and generally contributed to a gulf and lack of coordination between the state and local prosecution levels. This is unfortunate because the state attorney general often has a crucial enforcement role (albeit frequently non-criminal) in such special areas as organized crime, official corruption, consumer fraud, securities and environmental offenses (much of this either squarely within or closely linked to white-collar crime). Thus, there exists a major challenge in the proper organization and coordination of

white-collar crime prosecutions below the federal level--and perhaps one of the great hurdles is the old attorney general-local prosecutor "estrangement."*

Nevertheless, positive forces are at work which seem to lay a groundwork for coordinated, well-orchestrated, adequately equipped efforts (even apart from Federal technical aid and leadership):

(i) Eight years ago, at the turn of the decade, the attorneys general singled out the area of consumer protection as a top priority concern and one that should be primarily under their jurisdiction.** A continuing growth of staff resources, special offices, and increasing appropriations--necessary preconditions of effective white-collar crime enforcement--has followed. The will is there, the precedent has been established, and the superstructure is in place, varying of course among the states, but with a reasonable measure of leadership in most.

(ii) While the course of criminal justice organization

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*One positive side of attorney general-local prosecutor separateness is the "check and balance" impact this provides over local government corruption. Neither state nor local officials are immune from white-collar criminal behavior, including enforcement personnel. Indeed, if U.S. Justice Department reports are correct, enforcement in this area is a "growth industry." See 1976 Annual Report of the Attorney General of the U.S., pp. 7-8.

**National Association of Attorneys General, The Office of the Attorney General, Part 6.6 (1971), and Powers, Duties and Operations of State Attorneys General, Parts II.10 and V.26 (Oct. 1977).

has not displayed any significant increase in attorney general supervisory or policy authority over local prosecutors, a clear movement toward funded state-level "technical assistance" offices to help local prosecutors perform optimally (e.g., laboratory assistance, clearinghouse help; special investigators, accountants and trial counsel; training and manual aids; appellate research and case law/statutory bulletins) has emerged and attracted universal acceptance. According to a 1976 survey by the National District Attorneys Association, over 40 states now have such offices, most with full-time staff. Some are operated by state associations of prosecutors and some by attorney generals' offices, but even where local prosecutors sponsor broad technical assistance programs, state attorneys general provide additional help and training in areas close to their primary responsibilities (securities frauds, consumer fraud, environmental violations, illegal insurance practices, etc.).*

(iii) As state level criminal justice information systems expand and strengthen their capacities, a vehicle for adding white-collar crime-specific data emerges. The notable effort in this area has been the LEAA-funded Project SEARCH, initiated in 1969 as a six-state prototype effort for development

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*Another area of state attorney general responsibility is the growing and explicit role of attorneys general in enforcing federal regulatory legislation, e.g., "parens patriae" authorization to recover civil damages for state consumers injured by Sherman Act anti-trust violations. This seems to be a growing trend in areas other than anti-trust.

of offender-based criminal statistics and retrieval of criminal history data. SEARCH now operates as a non-profit corporation with membership composed of gubernatorial designees from all 50 states, an expanding range of operational capabilities, and an imaginative portfolio of cooperative research and demonstration projects in criminal information system technology.

(iv) Local prosecution seems to be accepting a need for at least guidelines and principles to govern the broad discretionary scope of the independent local prosecutor. The issuance of prosecutive policies, standards, and principles enjoying some kind of uniformity among local prosecutors, even if largely consensual, will be terribly important to a maximum, coordinated and "equal justice" response to white-collar offenses. Just as important would be the facilitating of local enforcement and prosecution of matters involving concurrent federal-state jurisdiction. The criminal proscription and financial losses may be predominantly federal but the impacts and harm are felt equally and often more dramatically at the local level. Until recently there has been too little attention given to enlisting local prosecutors for the invaluable on-site knowledge and assistance they can provide.

(c) Police and Enforcement Structures and Issues. Police work at the state level is a "mixed bag." Nearly half of the nation's state police agencies do not have general criminal enforcement and investigation authority but operate

essentially as highway patrols. Many states have separate bureaus of investigation, with broad "FBI"-type investigative authority over state law infractions. Some are within attorneys general offices, others within departments of public safety (sometimes as co-equal units with uniformed state police and highway patrols) and others operate within the new (and as yet relatively rare) integrated state departments of justice. Then, too, in most states the attorney general holds a constitutionally independent and elected office, outside the governor's line authority. Thus, with few exceptions, there is no common structural bond between state police and investigative units (under the Governor) and state prosecution (under the Attorney General).

This situation adds up to a tenuous police and law enforcement leadership structure at the state level for white-collar crime enforcement, at least in most states. Major reliance will have to be placed on local (county and municipal) authorities except for investigative units directly within attorneys general offices or state-wide "bureaus of investigation" well oriented to and integrated with attorney general consumer protection regulatory enforcement, and white-collar crime programs.

At the local level, a considerable reorientation and restructuring effort will be required for appropriate police support to white-collar crime enforcement. Special

investigative units focusing on white-collar crime, at least within larger police agencies, are a desirable goal (and probably a necessary technique for achieving adequate enforcement attention to white-collar crime offenses). Also, better training and orientation of line detectives and patrolmen in white-collar crime detection and investigative roles appropriate to their day-to-day functions will be needed. With metropolitan police activity now moving toward "team policing" configurations oriented to the generalist rather than the specialist and to geographical rather than substantive jurisdiction, it is important that "sensitivity" to the white-collar and consumer violations that threaten community and citizen safety become a part of the line officer's psyche and value system. This can only be done through agency commitment, well-conceived training programs (recruit and refresher) and auxiliary and specialist services either from within the department (for large forces) or federal and state technical assistance programs (for smaller police units and, in many respects, large forces as well).

(d) The Federal Connection. The foregoing raises a legitimate and important question, already touched upon, as to the appropriate federal role in stimulation of more effective state and local responses to white-collar crime. Large-scale subsidies and formula grants seem out of the question with the existing Crime Control Act levels of investment in such aid and the mounting special interest demands (courts,

corrections, community crime prevention, etc.). Moreover, it would be difficult to target such funds, both politically and program-wide, into white-collar enforcement; and even if made available, such monies might well be diffused and diluted for general support of police, prosecution and other enforcement operations. Yet, the federal government copes daily with a broad compass of white-collar crime problems, both geographically and in terms of kinds of offenses. Local jurisdictions (even with the state technical assistance units) will rarely be able to support needed banks of expertise, e.g., accountants, technical experts, health care program analysts, and investigative specialists required for the broad range of violations which nevertheless affect them locally. They often lack the investigative and prosecutive manpower to devote to complex cases without injuring capabilities for coping with common crimes.

Perhaps the best federal policy direction, in most areas, would be to develop criteria and resources for provision of more support services to local enforcement agencies dealing with white-collar crime. Provision of services, especially in this complex and specialized area, is less likely to be wasteful of dollars than general financial subsidies. There are ample precedents for this in the FBI crime laboratory services and on-line wanted person and stolen property (NCIC) computer files, in Postal Inspection Service assistance to local fraud prosecutors, and in the broad range of investigative,

analytic, and advisory services provided by the SEC to local agencies enforcing state securities laws.

These federal initiatives have heretofore been a matter of federal policy option, implemented by husbanding already limited resources for this purpose. It would not be difficult by appropriate legislation, executive order and budgetary action, to clarify the commitment and make such programs applicable to all federal agencies. This would include institutionalizing these kinds of services as line items in department and agency budgets. At relatively low cost, then, broad and overlapping state and federal policy objectives could be better advanced, the resulting coordination would minimize the impact of "escapes" or transfer of operations from one jurisdiction to another to further victimize the public, and the message would be meaningfully conveyed that the national white-collar crime effort is a common federal-state-local problem.

Such a stance need not preclude targetted "seed money" or "matching" grants (i) to state technical assistance agencies to add white-collar crime oriented services, or (ii) to larger local enforcement or prosecutorial units to help establish, staff and equip special white-collar crime units. It also suggests that existing national training, auxiliary and information services be re-examined to see if their white-collar crime contributions can be enhanced. For example, now that the FBI's National Crime Information Center

(NCIC) is fully operational with terminals in all states and over 6.5 million active files (wanted persons, stolen vehicles, boats and firearms, stolen securities, computerized criminal histories, missing persons, etc.), it may be time to scrutinize this valuable service and determine what new capabilities and adjustments (perhaps minor) might increase its effectiveness as a white-collar crime investigative tool.

(e) The Courts. In the white-collar crime area, courts of necessity must be "reactive" rather than "proactive" or "initiators." They must await the fruits of enforcement, investigative and prosecutorial activities to get their "piece of the action." If prosecutions were to increase materially, the relatively complex nature of many white-collar cases might create resource stresses and trial calendar strains. The current trend toward "flat" or "presumptive" sentences will tend to reduce sentencing disparities in this field but perhaps at the cost of severity of sanction that might offer a real deterrent effect. (White-collar crimes will tend to carry light penalties in any flat sentencing scheme that allows little discretionary leeway for the egregious offender.)

(f) Corrections. This component of the criminal justice system (encompassing jails, prisons, parole, probation supervision, and varied community programs) seems to have a relatively modest mission in any reshuffling of white-collar crime enforcement priorities. Correctional systems are

executors of sentences and keepers and watchers of offenders. Because of the middle-class background of many white-collar offenders, the challenge here may be assuring safety to offenders who may be least able to cope with the predatory and dangerous offender subculture of many of our jails and prisons (and, indeed, may provide "balance" to the increasingly younger and violent offender institutional populations). For offenders under probation or parole supervision, the challenge will be different, i.e., one of assuring no return to former white-collar misbehavior (which may be somewhat harder to detect in incipient stages than street criminal activity). In short, the corrections system has little more to look forward to and plan for than a step-up in white-collar offender personnel and this should present few special custodial problems. Appropriately severe and effective sanctions for corporate entities also require rethinking (beyond vastly increased money fines, e.g., loss of permits, blacklisting, restitution to aggrieved consumers, and supervision or monitoring of post-conviction behavior) but this seems more a challenge for legislatures and sentencing courts than correctional systems.*

(g) State Legislative Action. The state is the basic lawgiver and orderer of criminal administration in the United

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*See, in this regard, enhanced money fines, stronger collection authority, and provisions for restitution and notice of conviction to victims under the proposed new Federal Criminal Code (S.1437 and H.R.6869).

States, even at local levels. State codes define criminal activity, often regulate the basic qualifications for criminal justice personnel, and, as we have seen, are increasingly involved in authorization of supportive and back-up roles for criminal justice units at local levels. Since so many white-collar offenses derive from regulated activities, state codes must also see that adequate criminal sanctions are created for the various types of regulatory defaults. All this suggests that despite the heavy federal influence in deferring fraudulent and deceptive activity--whether against government, consumers or business--an important "orchestration" role on the part of state legislatures is required for a concerted criminal justice system response. There is no harm (and often there can be enforcement benefit) in state duplication of or analogs to federal white-collar crimes, if these are carefully considered and not permitted to further complicate coordinated enforcement.

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What, then, does the foregoing suggest in terms of criminal justice system adjustments and accommodations required to effectively develop, marshal and distribute resources for white-collar crime containment?

The system is basically "in place" and one can expect few radical changes or re-prioritizations to be effected for the sake of or, perhaps more accurately, to

reflect public concern with, the containment of white-collar crime. Rather, the need and the reality seem to point to more sophisticated coordination, leadership, role definition, and policy clarification in this field. As some of the manifestations of such a thrust, we can hopefully look forward to:

(i) Greater federal technical assistance to state and federal components of the criminal justice system, provided as a matter of official policy and categorized budget allocation.

(ii) Greater federal government coordination and rationalization of its white-collar crime enforcement activities, particularly in criminal proceedings, possibly emerging from the proposals of the President's Reorganization Project for restructuring of federal law enforcement activities and attorney legal representation.*

(iii) Assumption of a stronger state coordinative role over the white-collar crime efforts of state, county and municipal prosecution authorities.

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* As of mid-July 1978, reorganization options for the President's Federal Law Enforcement Study remained to be released. Initial option papers of the President's Federal Legal Representation Study (June 1978) seemed to lean toward more centralization of federal litigation authority in the Justice Department (except for regulatory litigation of the independent regulatory commissions and EEOC litigation), better coordination techniques (litigation notice system, joint or shared field office facilities), and negotiated delegation of selected Justice litigation work to other departments and agencies.

(iv) Special focus training of local police and investigative units from both federal and state agencies to better handle white-collar crime responsibilities and community and business relationships relative to enforcement efforts.

(v) The creation of special white-collar crime units, where not presently existent, in larger prosecution and police offices at both state and local levels.

(vi) Continuing research and technology utilization efforts, backed by federal crime-control funds and occasional demonstration and seed money grant programs to validate, launch and "prove out" promising state and local innovations.

(vii) State legislative backup of the foregoing arsenal of technical support, attorney general leadership, and local capabilities enhancement along with clear and forceful criminal enforcement policies.

(viii) Development of effective information and coordination networks among state and local agencies to improve white-collar crime enforcement, and particularly to meet the complex challenge of multi-state schemes.

The national sense of justice has decreed, in an era of profound governmental and business corruption, of danger to public "health and welfare," of acute sensitivity to minority and class equity, and of special susceptibility to "crime by deception," that white-collar crime take its place in our

hierarchy of justice system values as a hazard comparable to common crime--perhaps a junior partner, but one worthy of a major system response. Room for such an adjustment is narrowly confined, and the system's ability to expand is equally constricted. However, the task ahead is clear, the partnership must be recognized, and the balance must be struck. Let us hope that a decade hence, some twenty years after rediscovery of the "criminal justice system" as a system, that the white-collar crime priority has won its place and become a meaningful part of that system's thrust.

B-75

SYMPOSIUM

ON THE DEVELOPMENT OF A NATIONAL STRATEGY

FOR

WHITE-COLLAR CRIME ENFORCEMENT

DISCUSSION PAPER - SESSION III

"Developing A Strategy to Contain White-Collar Crime"

by

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This paper[1/] has been prepared to provoke discussion on developing a white-collar crime strategy not from the perspective of expertise in the substance of the subject matter, but rather from the more general perspective of developing strategies about social problems and issues which appear to dictate collective action by the society. While the expertise in white-collar crime is indispensable to the evolution of a strategy, the more general perspective may contribute both insight and experience to the development of a strategy through shared characteristics.

The common ground shared by a large number of social problems and issues in the United States which calls forth a societal response--usually through governmental institutions--can be expressed as follows: when the behavior of some in the society imposes heavy costs expressed in dollar or other terms, denies deserved opportunities, confers unwarranted benefits, and such behavior cannot be appropriately dealt with by individuals, then collective action by the society is often undertaken through governments to relieve such imposition of costs, equalize opportunity or rearrange the conferring of benefits. Such societal action may take the form of:

- regulation, used here in its broadest meaning to include statutes, rulemaking, mandatory professional standards, and other promulgations which establish enforceable affirmative duties or prohibit behavior or both (specifically including the criminal justice system);

[1/]The author would like to acknowledge the helpful contribution of ideas and comments of his MPR colleague, Christy Schmidt, in the preparation of this paper.

- establishment of incentives such as tax credits for certain actions;
- conferring of benefits through public expenditures such as programs for the disadvantaged; or
- provision of information and education such as some consumer protection laws.

The selection of one or some combination of these forms of societal action is often dictated by the nature of the issue, though it is sometimes surprising how little thought or discussion is given to the selection of the four or even recognition that there may be a choice to be made. The traditions of this country have been to limit societal intervention through government to those clearly public goods and services or circumstances where individual or private sector transactions produce unacceptable results, and then only to the extent needed to correct the perceived problem. Though this tradition has been subject to stress and strain in the face of an increasingly complex and inter-dependent society, we are still very much a mixed public-private economy and nation with continuing skepticism of government.

The development of strategy for societal action about social issues and problems--or at least successful ones--likewise appears to have some desirable common elements independent of particulars of the issue involved. While these elements may vary in shape, duration, and importance, they may be useful as at least a model from which one can depart. These elements in a logical order, though not necessarily in precise sequence of occurrence, would include the following:

- A substantive analytic element designed: to illuminate the nature of the problem being addressed; to identify and examine the possible courses of societal action including non-action; and to select or establish a process for selecting the best available course of action.

While this all seems straightforward enough, it, in fact, is not that easy as witnessed by a landscape populated with an uncomfortable number of misdiagnosed problems, dysfunctional programs and instances where we employed an elephant gun to slay a gnat or a gnat to slay an elephant (e.g., a direct Federal program to supervise youth camp safety on the one hand, and only 150 Federal people assigned in 1975 to supervise the Medicaid program of about $14 billion in 1975 on the other). This element is closely coupled to the next.

- An institutional and process assessment element designed: to evaluate the adequacy of existing institutions and processes for carrying out the societal action selected; to determine whether new institutions and new or revised processes may be needed to carry out the strategy; and to devise some plan for insuring that there are effective institutions and processes through which the conclusions reached in the substantive analytic element can be implemented.

If the United States has been periodically haphazard in its coping with the substantive analytic effort, its performance on the institutional and process assessment element reflects a much

larger calamity. In our zeal to solve substantive social problems, we have all too often varied between glorious indifference to the importance of institutional and process considerations and the continual creation of new and untried institutions and processes with equally bad results. One need not be an expert in institutional behavior to know that institutions--particularly complex ones--in which people work and processes through which things happen can make a powerful if not overwhelming impact on outcomes--for good or ill. If one does not arrange effectively for how and through whom an effort is going to be made, not much is likely to happen given institutional inertia.

- A relatively rigorous experiment or demonstration element designed: to test in the "real world" the conclusions reached in the preceding elements; to remove or narrow the remaining uncertainties; and to develop convincing evidence of the probable effectiveness, replicability and indirect outcomes of the one or more substantive, institutional and process measures selected.

This element is not always appropriate or possible for technical or timing reasons, but it does commend itself on several grounds. Experience suggests that even the best of plans concocted in offices may produce unanticipated and unintended consequences when implemented in the messy real world. Experiments or demonstrations, if carefully done, narrow the potential for future operational failure, and sometimes produce unexpected knowledge and benefits. In addition, when the analytic results suggest a course of action that is counter-intuitive or that touches deeply rooted values and emotions, the

experiment or demonstration--indeed a number of them on related topics--may be useful and necessary to help quell fears (e.g., the role of the income maintenance experiments in reducing the fear that support of two-parent families would cause massive withdrawal from the labor force). Finally, the rigorous experiment or demonstration produces not only a useful body of empirical evidence, it also develops a group of knowledgeable people who will in turn help generate public discussion and support.

A few words of caution are in order about the use of this element. If it is to be useful at all, it must be done with enough care and precision so that the consequences of the new action are separated from all other effects and that effects are properly measured. This dictum is sometimes methodologically impossible, and usually not easy. Such efforts are also relatively expensive due to design, data-collection and analysis costs and relatively long-term due to the time required to observe results. As such, this element may not always be practical or appropriate and should be undertaken only where important issues cannot be resolved (objectively or politically) with available evidence, and where the potential pay-off is high. While this element in developing a strategy may be optional, the next one is not.

- An <u>education and consensus-building</u> element designed to: consult <u>all</u> important actors and constituencies <u>during</u> the construction of the strategy and before decisions are made; bring important evidence and ideas to the attention of expert, special and general publics; and be open to ideas, compromise and alternative views throughout the process.

The notion of consensus building is hardly novel; however, it now has a new dimension. In a post-Watergate environment which heightened an already deepening suspicion of large institutions of all kinds, the days in which a relatively few well-placed people could devise, establish and implement a strategy on a major social issue and then worry about consensus building are about gone. A new approach is needed.

In the past, it was common in the development of a national strategy to consult experts, friends and a few key leaders in the Executive branch, Congress and powerful private individuals and usually avoid individuals or constituencies suspected of being or actually in opposition; information supporting the desired strategy would be arrayed and contra evidence and views buried. Experience suggests that this approach won't work much any more, whereas an open, inclusive process--albeit somewhat frustrating--will. For example, after 18 months of rancor and impasse among the Executive branch, Congress, the States and more than 100 different interest groups, the Congress in the fall of 1975 enacted a major new title to the Social Security Act prescribing a multi-billion dollar social services program. The final hearings and debate for this bill, however, were measured in hours. This somewhat unusual event occurred only because of a laborious, but productive, six months of open consultation with all interested parties to hammer out a consensus statute. By contrast, one can find many strategies developed through closed processes which came apart in the legislature or in implementation for lack of adequate consensus building. Although usually not considered a part of the development of a strategy, the final element, evaluation, is, in fact, an important part of the picture.

- An evaluation element designed to: articulate in advance the measures by which the strategy can be judged to be progressing satisfactorily or have succeeded; set up the system to collect the information needed to apply the measures; and force decision-making when the results achieved vary from the intended.

While it is often thought that this uncomfortable element can be delayed until after the strategy is launched, such delay can be fatal to both useful evaluation and effective results later. If collection of information about measures of success occurs after the strategy is in progress, it may be impossible to reconstruct the place from which one started (the baseline). Further, thinking through the measures by which the strategy should be judged in advance tends to sharpen the objectives of the strategy and add a healthy dose of realism to the expectations. While strategies with panacea promises are politically appealing, they unfortunately have a day of reckoning in subsequent disillusionment, faltering support and inadequate results.

It is obvious that these elements of developing a successful strategy are somewhat idealized since those who are concerned with strategy development rarely find themselves starting with a clean slate and must enter the "play" somewhere in "Act II" after a good many events about the issue have already occurred. Nonetheless, these general notions about societal action and the desirable elements of strategy development may provide a useful framework within which to consider the evolution of a white-collar crime strategy--to see how these general concepts might or might not apply.

This application necessarily starts with consideration of the special characteristics of the white-collar crime issue which distinguish it from other problems or present important issues in strategy development (other papers have dealt more comprehensively with the white-collar crime problem). To the non-expert eye, some of the special or important characteristics of significance to the development of a white-collar crime strategy would include the following:

1. <u>There is fuzziness in the definition of white-collar crime</u>. By this, I do not mean the effort and debate to establish a mutually exclusive category of activities or persons which constitute white-collar crime or criminals. That debate--however interesting and important--has progressed at least far enough to provide a working definition for strategy development, and this kind of definitional fuzziness is not uncommon in other social issues, e.g., the definition of poverty. The fuzziness that is striking in this context is the thin line between what is illegal, what is unethical but legal, and what is considered legitimate "beating" or taking advantage of the "system." Further, recent history and current trends would suggest that activities now not illegal, but merely unethical or legitimate "game" playing may be made illegal by statute or other regulatory action.

   This fuzziness has very large implications for strategy, particularly in the substantive and consensus-building elements. For example, the public may remain unaroused by and unsupportive

of enforcement programs designed to contain behavior that they have difficulty perceiving as improper and which may only recently have been declared illegal.

2. A second characteristic of white-collar crime of apparent signficance to a containment strategy is the heterogeneity of the motivations for and perpetrators of such acts, further complicated by differing knowledge and motives among victims. As Jameson Doig and Douglas Phillips have noted,[2/] the motivations for white-collar crimes are not only for personal advantage, but also for furtherance of organizational goals where personal reward may be seen as indirect at most. Likewise, the perpetrators of white-collar crimes may be single or a small group of individuals, large numbers of officials in otherwise legitimate organizations, or organizations whose primary purposes are the conduct of illegal activities. To make matters yet worse, the victims of the crime may be wholly unaware of their victimization (e.g., collusive price fixing) or if they are aware, may have strong incentives not to report their victimization.

This kind of heterogeneity has enormous implications for the substance of a strategy and the institutional and process mechanisms employed to pursue it. A desired and sought-after characteristic of a strategy is conceptual consistency throughout; our sense of logic and neatness tends to demand it. Yet, the heterogeneity of the problem may dictate otherwise. In the quite different field of welfare policy, the logic of equitable

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[2/] "Deterring Illegal Behavior by Officials of Complex Organizations," a draft by Jameson W. Doig and Douglas E. Phillips (1978).

treatment of individuals and families with little or no income and the desirable goal of a simple and manageable system drive one in the direction of a common set of cash grants based on income and family size. But the heterogeneity of the special income needs of some individuals (e.g., the roof blows off in a wind storm and there are no savings to pay for a new one) forces one to a sub-set strategy (i.e., an emergency needs program) which is conceptually inconsistent with the basic program.

In white-collar crime, one can visualize a part of the strategy in the prevention and detection area as including measures to strengthen internal organizational monitoring and control to deter such activity. While this step could be beneficial in most cases, it obviously won't work where the entire ogranization is involved in the perpetration of the crime.

3. A third striking characteristic of white-collar crime is the uncertainty of its scope and the potential for the future. As in the case of the definition, the wide range of the estimated incidence is not a problem per se since the lower bound of the estimates is still large enough to warrant societal action (though it is always somewhat unnerving when the range between the lower and upper bounds is a great deal larger than the absolute value of the lower bound).

What is important about the uncertainty are two strong implications for strategy development. First, the uncertainty points to the great importance of detection activities in a white-collar crime strategy. Second, a wide range of estimates

strongly implies a strategy which seeks to probe and narrow that range. By this is not meant more general data collection, but perhaps a sequential set of experimental steps in some of the better targets of opportunity designed to detect, prevent or prosecute white-collar crimes. Said differently, one might structure some selected efforts to figure out how much is going on and how to get at it, refining the estimates of the total universe as a by-product as well as limiting resource commitments until after the approach proved workable. With respect to the future prospects of white-collar crime, it would appear that the trends toward an increasingly complex, technological and specialized society have widened the opportunities for and increased the problems in detecting white-collar crime. Further, there is little reason to expect this trend to abate in the foreseeable future.

Computer crimes provide a lively example. The already existing complexity and specialization and the potential for future growth also have strong implications for the substantive, institutional and process dimensions of a white-collar crime strategy. For example, if the nature of the detection issue alone did not drive the strategy to inclusion of non-criminal justice as well as criminal justice agencies as substantial actors in the implementation of substantive actions, the specialization, complexity and technological dimension of the society and the probable growth therein surely would. It would seem wholly unrealistic to expect that either the resources for or ability to recruit the skilled expertise

could reasonably keep pace with the expanded potential for white-collar crime; and indeed, the mindless addition of investigative and prosecutorial resources to the criminal justice system--even if possible--appears unlikely to be cost effective.

4. A fourth and related characteristic of the white-collar crime problem of apparent importance to the development of a strategy is the very large number of organizations and institutions already involved in the issue which have conflicting goals, motivations, traditions and limitations. Further this universe is likely to grow rather than diminish. In explicating this point, it should be emphasized and understood that the conflict among goals is not conflict among some goals with merit and others without, but rather a conflict of goals, all of which have merit.

It is or should be increasingly recognized that one has to trade-off between desirable goals. The Federal student loan and grant programs which have been the subject of recent attention because of substantial fraud and abuse provide a convenient example. It is quite possible to conceive of a guaranteed student loan program which would severely limit the potential for abuse by substantially tightening the rules by which banks can make guaranteed loans. While such actions would, without doubt, reduce default rates, it would with equal certainty reduce the chances that the lower income students which the program is most trying to help would get loans at all. This is not to suggest that efforts to reduce abuse of student aid programs are inappropriate, but that there are clear trade-

offs to be made between a valid abuse reduction objective and an equally valid objective to improve the access of low income persons to post-secondary education.

Motivational conflict among concerned institutions is of a similar variety. To extend the previous example, the Department of Justice sees itself as an investigator and prosecutor of those who defraud government programs, while the Department of Health, Education, and Welfare generally perceives itself to be in the business of helping poor people. Conflicting traditions present some exceedingly troublesome issues. Legal theory, if not its practice, and the traditional notions of accountability for public funds assume an absolute standard--either you have committed an illegal act or you have not, or you have spent a public dollar properly or you have not. By contrast, any administrator of a complex program such as the Federal social insurance and welfare program knows that the very complexity of the undertaking makes 100 percent accountability and zero percent error, abuse and fraud an impossible dream. This situation raises an uncomfortable trade-off concerning how much abuse and fraud is tolerable.

Finally, institutions face all sorts of limitations which increase institutional conflicts including lack of resources, inability to recruit talented persons for what may be seen as secondary missions and inability to share information under privacy legislation. The large number of organizations together with understandable conflict have, of course, a huge impact on

the development of strategy, particularly the institutional and process element. While one might wish otherwise, there appears to be no magic solution to these issues. Under these circumstances, the impulse to "reorganize" in some fashion is often overwhelming. Experience suggests, however, that "reorganizations," while a potentially useful tool, rarely make underlying substantive and process problems "go away." What is likely to be a more productive approach in the longer run is to deal candidly and sensitively with these conflicts and attempt to evolve one or more successful and innovative models of effective institutional interaction and cooperation which can then be more widely adopted.

5. A fifth and also interconnected characteristic of the white-collar crime problem of importance to a strategy is a special problem of societal reaction to large organizations. The public frustration or anger with being ripped off or man-handled by large organizations of all kinds is apparent, and efforts to limit the knowledge and power of such institutions has taken tangible expression in the form of privacy and freedom-of-information legislation of various kinds. In the process of curing one problem, however, such legislation greatly complicates the detection and prosecution of white-collar crimes. To return to a prior example, the detection of abuse and fraud in the Federal student aid programs could be strengthened by HEW access to individual Federal tax returns; however, such access raises serious issues under the Federal Privacy Act. It seems

both unlikely and undesirable that privacy legislation will or should be eliminated or seriously eroded; therefore, a white-collar crime strategy will need to be fashioned with great sensitivity and creativeness to these issues if needed public support is to be maintained.

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Having described important characteristics of the white-collar crime problem to the development of a containment strategy and drawn at least some of the implications of those characteristics for the desirable elements of any strategy, it is perhaps useful to advance some of the general and specific features of a white-collar crime strategy which this analysis suggests. After advancing a few general points, it seems convenient and probably more familiar to do so within the more usual categorizations used in the criminal justice system--prevention, detection, prosecution and penalties.

General: The analysis suggests one almost overwhelming conclusion--namely, that there is no way to mount an effective strategy to contain white-collar crime within the framework of the criminal justice agencies alone. The problems, issues and needs in prevention, detection and consensus building all dictate a more broadly based strategy and would foredoom a more narrowly based effort to failure. It appears desirable to include not only those public and private institutions whose activities may be most open to white-collar crimes, but also some less obvious organizations who may be able to make a contribution to prevention and detection activities

such as consumer organizations in connection with illegal price fixing. Also, it would seem to go without saying that some careful linking of Federal, state, and local criminal justice agency resources would be an indispensible part of the strategy.

A second general point arising from the analysis would be that some heavy analytic effort is needed in the development of a strategy, particularly with respect to the trade-offs among competing goals and objectives and maintaining the proper incentives and disincentives to discourage illegal acts. A third general conclusion is the size and importance of the consensus building task due to the special characteristics of the problem, which would seem to dictate a very substantial effort throughout the development of the strategy and in implementation. These same characteristics would also seem to dictate that careful distinctions be made in this effort between informing and preaching and between leading and being "way ahead of the pack."

Prevention and detection: Any successful strategy to contain white-collar crime must contain both strong and effective prevention and detection measures in order to limit its spread. It also seems likely that the systems, activities and programs which are inviting targets for white-collar crime may be more vulnerable to such crime than needs to be the case by virtue of lack of expertise, concentration on other goals or just indifference. Some operators of such activities and programs may also lack skills in monitoring their undertakings for possible illegal activity.

This suggests two possible specific components of a strategy. With respect to public programs, a strong effort could be made to reduce to acceptable levels the vulnerability of public programs which might include technical assistance from the criminal justice agencies in ways to limit vulnerabilities and a mandatory review, perhaps again by the criminal justice agencies, of all major programs and systems subject to abuse to insure that unnecessary vulnerabilities have been eliminated. A second component involving both public and private programs or activities might be several experimental and collaborative efforts between criminal justice and non-criminal organizations to explore innovative approaches to improved detection of white-collar crime.

Prosecution and penalties: Much is made in the literature about the effort and difficulty in developing prosecutable cases, the inclination to use non-criminal remedies and the problems for prosecutors created by the complexity and technicalities of the substance of the cases. This set of problems clearly suggests some careful thinking about institutional barriers and roles and perhaps calls for some selected experimental efforts between criminal justice and non-criminal justice agencies starting early in the detection phase to try adjustments to institutional roles in order to determine whether more effective solutions to these problems can be reached.

Much is also made in the literature about the disparity of sanctions for persons convicted of white-collar crime and those convicted of street crimes. Beyond the causalities arising from differing societal views about the seriousness of the two kinds of crime, part of the differential may also arise from perceptions of the culpability of organizational leaders for acts

committed by their employees. In developing an effective sanction component to a strategy, the responsibility of organizational leadership for acts committed by employees for furtherance of organizational goals should be carefully rethought.

These preliminary specific suggestions clearly need further consideration, and there will be -- no doubt -- many other specific ideas meriting examination. Those offered here are illustrative of the kinds of actions which will tend to emerge from the careful development of a national strategy. As noted earlier, the development of a strategy is an iterative process. The elements described in the initial framework for a strategy need to be developed and then re-examined to insure that each part is sensible in relationship to the others. The general framework can provide a "checklist" role as the strategy evolves. It helps to make the development of a strategy manageable. With a problem as heterogeneous and sizeable as white-collar crime, it is tempting to conclude that the problem is too large and complex for any concerted action or to concentrate on a narrow dimension of the problem. This analysis suggests that neither of these choices is necessary or desirable.

END