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A NATIONAL STRATEGY FOR CONTAINING WHITE-COLLAR CRIME

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A National Strategy for Containing White-Collar Crime

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To Amy and Ruth

Preface and Acknowledgments

Crime is dealt with primarily by local law-enforcement agencies. Though major publicity in the national media tends to focus on federal law enforcement, most criminal cases are detected, investigated, and prosecuted at municipal and county levels. One class of cases, "white-collar" or "economic" crime, has been traditionally regarded as a federal area because most attention has been given to major mail frauds, securities frauds, banking violations, and frauds against the federal government. This focus on cases of national interest has served to obscure the day-in, day-out involvement of local prosecutors in efforts to contain white-collar crime—an involvement that has traditionally been low profile but constant in most parts of the United States. Governmental efforts that are low profile, no matter how important, also tend to be low priority for obtaining resources; hence the need for special attention to this area of local law-enforcement responsibility.

Beginning in 1973, a group of local prosecutors moved forcefully to promote local white-collar-crime-enforcement efforts and to move them to the forefront of local prosecutive attention. The Economic Crime Committee was established in the National District Attorneys Association (NDAA) to take the place of a committee that had earlier focused on narrower consumer-protection issues. This move was clearly an unusual one for NDAA, which, like most organizations in the law-enforcement field, was accustomed to addressing more traditional criminal challenges, such as violent crime and property crimes.

Particularly noteworthy about this organizational thrust was that it developed at a time when street crimes were a major public concern, one that was reflected by the priority that political candidates gave to the street-crime issue in federal, state, and local campaigns. In 1973 financial demands for street-crime containment left little in the way of resources for other prosecutive crime-control initiatives.

At the heart of this new prosecutive thrust was the perception that white-collar-criminal behavior was "crime" in the same sense as street crime, that law-enforcement credibility in dealing with street criminals depended on even-handed attention to theft—regardless of the social status or *modus operandi* of the offender. Institutionally, prosecutors had finally recognized that the existing federal effort was necessarily a selective one that by its very nature and organization could not adequately respond to local white-collar-crime-containment requirements. The federal government clearly did not have the prosecutive manpower in U.S. Attorneys'

offices to do so and could not set policies and priorities to meet a multitude of local concerns.

The NDAA Economic Crime Committee persisted in its effort to organize a prosecutors' movement to convince both the national prosecutive community and the public that white-collar-crime containment was an appropriate and necessary operational area for the local prosecutor and to find resources that could help them to do so. This led to discussions among the committee, the Academy for Contemporary Problems in Columbus, Ohio, and the Battelle Law and Justice Study Center in Seattle, Washington, which produced an action plan that gained the support of the Law Enforcement Assistance Administration (LEAA) for the NDAA Economic Crime Project.

This action plan for an Economic Crime Project had two major objectives: to enhance the capabilities of local prosecutors to deal with white-collar crime and to establish white-collar-crime containment within the normative framework of local prosecutors' responsibilities. It was inevitable that efforts in these directions would in turn focus attention on new issues that would go beyond the original objectives of the Economic Crime Project.

Once consciously part of the white-collar-crime-containment network, prosecutors have been forced to consider how our nation's resources, federal and nonfederal, can best be mobilized to deal with white-collar crime and related abuses. As part of this same inquiry, other important and broader issues emerge naturally, involving the roles and utility of criminal, civil, administrative, regulatory, and private-sector processes in white-collar-crime containment.

In the almost five years of its operation, from 1973 to 1978, the NDAA's Economic Crime Project had made substantial progress toward achieving its original objectives, but it felt compelled to address these broader issues, which are strategic rather than tactical in character. At the same time similar concerns were being felt at federal levels, particularly in the Criminal Division of the Department of Justice. In many quarters there was growing perception of the need for a national strategy to deal with white-collar crime. The NDAA Economic Crime Project, with the support and encouragement of the Adjudication Division of the Office of Criminal Justice Programs of the LEAA, therefore commissioned the Battelle Law and Justice Study Center to conduct a small but broadly based symposium to consider the issues involved in developing and implementing a national strategy. The symposium was held at the Battelle Seattle Research Center on 20–21 July 1978.

This book deals primarily with the proceedings of the symposium, but against the backdrop of the issues that were its genesis. It goes on to consider the impact of the symposium in terms of its effect on white-collar-

crime containment. It is rarely possible to see operational improvements or changes clearly flowing from symposium papers and discussion; in this instance, however, that relationship is quite clear. The report of the symposium and its papers were, in a very real sense, a resource and a guide for law enforcement and U.S. Congressional Committee deliberations on how to structure and implement white-collar-crime-containment activities. Finally, the book considers future strategic options and alternatives in the field of white-collar-crime containment.

Many individuals and organizations contributed to this book, directly or through their efforts in support of the symposium that is its core. We hope that we may be forgiven by any contributors we have inadvertently overlooked. First, we recognize the support of NDAA through its former president, Lee C. Falke, prosecuting attorney for Montgomery County (Dayton, Ohio); former-prosecutor Robert F. Leonard of Genesee County (Flint, Michigan), then chairman of the NDAA Economic Crime Committee; Patrick F. Healy, former executive director of NDAA; and James P. Heelan of the NDAA staff. Second, we note the support of the Adjudication Division of the Office of Criminal Justice Programs, LEAA, and the personal participation in the symposium of the division's 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, each of whom prepared the papers that were the starting points for the symposium discussions. Fourth, we owe a very special debt of gratitude to all the participants who joined with us in the symposium as concerned citizens and as representatives of public and private agencies that spanned federal and local prosecution functions, the federal inspector-general function, regulatory agencies, a state attorney general's office, and a consumer-protection organization.

Finally, we are most grateful for the many contributions of the Battelle Human Affairs Research Centers staff. Dr. Marilyn Walsh and Dr. Mary McGuire of the Battelle Law and Justice Study Center were important contributors to the group that planned the symposium and were the rapporteurs for its first and second sessions. Frederic A. Morris of the Science and Government Center served as rapporteur of the third session. Bert H. Hoff of the Battelle Law and Justice Study Center was of particular assistance in tracing and chronicling the activities that followed and were influenced by the symposium. 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 book; Donna Randall, also a research assistant in the Center, unobtrusively but very effectively provided all those elements of support that 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 that is the basis for any successful project and, together with Charleen Duitsman, handled all the typing and technical aspects of preparing the manuscript of this book for publication. Last, we express our appreciation to the staff of the Battelle Conference Center in Seattle for the care they gave to every detail involving the physical setting for the symposium and the accommodations provided for its participants.

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Part I
The Need for a National Strategy to Contain White-Collar Crime

1 Introduction

White-collar crime is a pervasive form of antisocial behavior that must be countered by a broad range of responses and remedies provided by agencies in both the public and the private sectors. In the former these responses include investigation, prosecution, regulation, and administrative measures to prevent and detect such crime. In the private sector, responses are available through certain forms of industry self-regulation (sometimes under the prodding and monitoring of regulatory agencies such as the SEC's monitoring of the securities industry's self-regulation), by internal corporate-security departments, and by the ever-present prospect of stockholders' derivative actions that can be occasioned by high-level corporate mismanagement, negligence, or deliberate wrongdoing.

Much discussion has revolved around the definition of "white-collar crime." The concern about the definition is understandable because the words have no clear meaning. To some the term is inextricably linked to the (high social) status of the offender;[1] to others it is a description of particular behavior or *modi operandi.*[2] For purposes of this book the latter construction is adopted, possibly because of the personal convictions of the authors but more important because this approach is consistent with the approach taken by those in the enforcement community who recognize the need for development and implementation of a national strategy to deal with white-collar crime. Attorney General Benjamin Civiletti, for example, addressed this issue in testimony to the U.S. Congress:

> Our definition markedly departs from the traditional view held by many sociologists who have in the past stressed the social characteristics of the offender or the relationship between offenders and their occupations. That traditional academic approach does not accurately reflect the types of offenses and offenders encountered by the criminal justice system. . . . The traditional approach was further rejected because it implicitly raises the spector [sic] of large enforcement agencies targeting whole segments of society for special enforcement emphases—the innocent along with the guilty—a notion which is repugnant to our sense of fair play and equal protection under the law.[3]

The definition that has been adopted for use by the National District Attorneys Association (NDAA) Economic Crime Project, and characterized by the U.S. Department of Justice as a "good working definition,"[4] is the following:

> [White-collar crime is] . . . 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 loss of money or property, or to obtain business or personal advantage.[5]

The boundaries of this definition necessarily are vague. Clearly, it would cover a conventional con game or outright consumer fraud. Much definitional confusion arises where criminal schemes involve some mixture of white-collar crime and more conventional or traditional crime. For example, the theft of stock certificates from a brokerage house is hardly a white-collar crime in and of itself, but marketing the security through its use as loan collateral would involve a whole range of behavior coming within the preceding definition. The buyer for a department store would not, under this definition, commit a white-collar crime in taking a bribe or kickback for purchasing stolen merchandise on behalf of his employer, but he would be engaging in white-collar-criminal behavior toward his unwitting employer.

The problem of dealing with white-collar crime is further compounded by the fact that there is no clear separation between criminal, civil, and regulatory responses. Precisely the same behavior may be, and often is, subject to the same remedies. For example, the decision to prosecute a securities fraud criminally or a banking violation criminally will depend relatively more on the prosecutor's evaluation of the evidence than on the inherent characteristics of the behavior being assessed. Unlike street crime or conventional property theft where the questions for law-enforcement authorities are what happened and who was responsible, in this area the question is whether there is sufficient proof of wrongful intent to warrant criminal prosecution even where what happened and who caused it to happen are not in dispute. In white-collar cases there are usually noncriminal alternatives available that make it easier to decline criminal prosecution, for example, civil action, regulatory agency action, administrative measures, and private litigation. Such actions can be undertaken by victims if they have personal resources to launch the efforts or can make it attractive for private counsel to enlist in their causes on a contingent-fee basis.

The existence of these alternatives also increases the likelihood that behavior that should be prosecuted will not be if it comes first to the attention of an agency that does not have criminal jurisdiction or that has some other primary objective such as revenue collection, recovery of funds, or promotion of the economic health of an industry being regulated. This is the problem of overlapping authority, to which we now turn.

Overlapping authority is present at all stages of containment efforts: detection, investigation, criminal prosecution, civil litigation, and adjudication. This is clear from examination of any one of a number of classic

white-collar crime schemes such as embezzlement, frauds against government programs, consumer fraud, or securities fraud.

Each of these schemes are proscribed by both federal and state law. They can therefore be investigated and prosecuted by federal, state, or local agencies and can be adjudicated in either federal or state courts. By whom they will be investigated or prosecuted will largely depend on how they are detected and on agency policies rather than on the presence or absence of jurisdiction or legal competence to investigate or prosecute. This can best be illustrated by considering bank embezzlement—a crime under federal and state law. Federal statutes require that all embezzlements detected in federally insured banks be promptly reported to the Federal Bureau of Investigation (FBI). The Department of Justice thus has the first option to investigate or prosecute, but this option does not mean that a local prosecutor is without legal power to order an investigation and then to prosecute. Traditionally, however, local law-enforcement agencies defer to federal agencies in this field because violations are being dealt with by competent (federal) authorities, and there would be no point in duplicating the effort. The system appeared to work over the years, though we have no way of knowing how many cases were not prosecuted because U.S. attorneys inappropriately declined action, and such cases went unaddressed because they were regarded as "federal business."

Overlapping authority in the white-collar-crime field has not stimulated conflict, as might have been expected. Agencies have only rarely competed with each other for jurisdiction over "turf" or classes of violations. On the contrary, overlapping authority has had a soporific effect on agencies that have seen others take responsibility for particular areas of enforcement. This arguably explains the anguish, in 1979, when the Department of Justice and the FBI embarked on their "quality prosecution" program. Attorney General Civiletti described this program as follows:

> The Department of Justice has chosen as a matter of policy to focus our resources primarily on those cases which are perceived to have maximum impact and deterrent value. In furtherance of this approach the FBI has adopted a "quality over quantity" program to ensure that major cases are afforded maximum investigative priority.[6]

The side-effects of this "quality over quantity" approach, however, have been to spotlight problems created by unmonitored patterns of overlapping authority. To implement that new program, the FBI developed guidelines that provided, for example, that it would decline to undertake investigations of bank embezzlements below certain fixed-dollar amounts; U.S. attorneys took parallel and consistent positions. This meant that a massive investigative and prosecutive burden was shifted from federal shoulders to

local police and to local prosecutors and their investigators. The alternative to local assumption of responsibility would be to create an enforcement vacuum with respect to all bank embezzlements under the guideline amounts. Local prosecutors therefore had to shoulder this burden, with no new resources. This one episode initially generated much conflict and hostility between the Department of Justice and local prosecutors, but happily both groups have worked assiduously to resolve this problem. Nevertheless, the episode served to illustrate the fact that white-collar-crime containment poses an exceedingly complex challenge and that the patterns of overlapping authority in any specific enforcement area should be carefully examined before any changes in enforcement policy are initiated. One agency's unilateral priority-setting exercise can play havoc with the carefully structured and budgeted operations of other agencies with overlapping jurisdictions.

In addition to jurisdiction, white-collar-crime-containment efforts are divided along functional lines that constitute another axis along which issues of overlapping authority must be examined. Divisions along jurisdictional lines are created by legal powers to detect, investigate, and prosecute that exist simultaneously at federal, state, and local levels. There is also a de facto power to investigate in the private sector. Divisions along functional lines relate to the simultaneous operations and responsibilities of specific agencies.

The problem of overlapping jurisdiction is further complicated by the fact that many federal, state, and local agencies have a broad range of functions, for example, a prosecutor often directs investigations and in making prosecutive decisions will consider the impact of what he does on deterrence or prevention.

If one examines a typical white-collar scheme such as the fraudulent sale of business franchises, these patterns of overlapping authority along the axes of jurisdiction and function may easily be seen as follows.

1. There are possible violations under a broad range of federal statutes, including those that proscribe mail fraud, wire fraud, securities fraud, the transportation across state lines of monies obtained by fraud, and the Federal Trade Commission (FTC) Act. Investigations can be undertaken by the U.S. Postal Inspection Service, the FBI, the Securities Exchange Commission (SEC), or the FTC, as well as by a U.S. attorney in an investigative grand jury. The SEC or the FTC can seek regulatory adjudication through their own processes or by recourse to courts for injunctive relief to protect investors; the U.S. attorney can initiate criminal prosecution through a presentation to a federal grand jury.

2. There are possible violations under a broad range of state statutes, including those that proscribe securities fraud, false pretenses, and larceny. Investigation could be undertaken by local consumer-protection agencies, by state attorneys general or local prosecutors, by state agencies regulating

the sale of securities, or by local police agencies. Criminal prosecutions could be initiated by county prosecutors and in some instances by state attorneys general. The state attorney general or the state securities administrator can seek cease-and-desist orders or other injunctive relief; civil actions for restitution of funds to victims can sometimes be initiated by state attorneys general and in some jurisdictions by county prosecutors.

3. There are narrower ranges of potential violations under local laws, for example, those that require licensing for sales and business solicitations. These may be investigated by city consumer-protection agencies and then referred for criminal prosecution to the county prosecutor or to a city attorney.

4. Initial investigations may be undertaken by private agencies such as Better Business Bureaus or other trade organizations, or victims' attorneys may make preliminary investigations and then refer their findings to federal, state, or local agencies for further investigation or prosecution.

Overlapping authority or jurisdiction over white-collar crime and related abuses poses a number of very special problems in addition to those already suggested. First, there is the danger that what is everybody's business becomes no one's business; that much criminal behavior will "fall between the cracks." Second, there is potential waste and conflict arising out of duplication of effort when an area of crime is addressed without adequate coordination; duplication of effort can be constructive or destructive. Third, the allocation of resources to cope with particular white-collar-criminal behavior is rarely related to the significance or impact of the crime.

This third point merits special attention in considering the development of a rational and effective national strategy to contain white-collar crime. If one were to develop accurate measures of the impact of white-collar crimes and related abuses and of the resources expended to contain such behavior at all jurisdictional levels by all agencies, any positive correlations between them would probably by accidental. Federal, state, local, and private efforts to deal with white-collar crime are fragmented along agency and departmental lines and responsive to both conceptual and competitive approaches at these jurisdictional levels. Thus at the federal level it is far easier for prosecutors to decide to devote a substantial percentage of their resources to white-collar crime and related abuses than it is for a local prosecutor. Local officials can do the same thing but only in the face of community and voter demands to cope with violent crimes that directly affect the immediate safety of their constituencies. This is not to say that the federal prosecutor does not face competitive demands, albeit of a different character—the inventory of a U.S. attorney's responsibilities is long and must be dealt with by a staff list that is almost invariably uncomfortably short.

When one looks behind the operations of prosecutors' offices, which