The Federalization of Organized Crime: Advantages of Federal Prosecution

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by

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Introduction

Debates about the federalization of crime traditionally have focused on substantive law. New federal crimes are proposed and created as responses to problems the states cannot handle. They are opposed and lamented as unwarranted intrusions into the states' domain.1 Advocates on both sides assume that crime definition is the chief determinant of the respective spheres of state and federal law.

Today, that assumption is largely false. It is true, of course, that federal and state crimes appear to have different coverage. Federal crimes have distinctive jurisdictional components and a characteristic complexity that set them apart from the simpler and broader pronouncements of state law. Considered individually, federal crimes often seem specialized and narrow. Considered collectively, they are not. Even before the recent flurry of situational crime legislation and the passage of the 1994 Crime Bill, federal law reached virtually all robberies,2 most schemes to defraud,3 many firearms offenses,4 all

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1. See William H. Rehnquist, Welcoming Remarks: National Conference on State-Federal Judicial Relations, 78 VA. L. REV. 1657, 1660 (1992) (“[S]imple congressional self-restraint is called for . . . in the federalization of crimes . . . .”); Lorie Hearn, Trying Times Are Ahead: Justice O'Connor Says Federalization of Crime Could Overwhelm the Court, SAN DIEGO UNION-TRIB., Aug. 17, 1994, at A4 (“Congress seems to be moving clearly in the direction of recognizing national problems and deciding that the way to deal with them is to federalize these issues. . . . This is a change that should be of grave concern, in my view, to federal judges.”).

2. The Hobbs Act, 18 U.S.C. § 1951 (1988), punishes anyone who “in any way or degree obstructs, delays or affects commerce or the movement of any article of commodity

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loan sharking,\textsuperscript{5} most illegal gambling operations,\textsuperscript{6} most briberies,\textsuperscript{7} and

in commerce, by robbery or extortion . . . .” Although this statute purports to require an effect on interstate commerce, it has been construed very broadly. \textit{See, e.g.}, United States v. Norris, 792 F.2d 956, 958 (10th Cir. 1986) (“With little general discussion, courts have allowed § 1951 to be used against ordinary robberies.”); United States v. Scaife, 749 F.2d 338, 347-48 (6th Cir. 1984) (requiring only a “de minimis” effect on interstate commerce); United States v. Jarrett, 705 F.2d 198, 201-03 (7th Cir. 1983) (same).

3. 18 U.S.C. § 1341 (1988) (punishing anyone who, “having devised or intending to devise any scheme or artifice to defraud,” uses the mail or “knowingly causes to be delivered by mail . . . any matter or thing”).

The notion that this statute protects only the direct federal interest in the integrity of the mails has been an anachronism for nearly a century. \textit{See generally} Jed S. Rakoff, \textit{The Federal Mail Fraud Statute (Part I)}, \textit{18 DUO. L. REV.} 771 (1980) (arguing that the mailing requirement is nothing more than a jurisdictional element). Today, the statute is construed broadly to prohibit all types of fraudulent schemes, so long as there is some use of the mails. Moreover, although the mailing requirement had generally been construed to require that the defendant cause a mailing to occur before he received the fruits of the scheme, \textit{see, e.g.}, United States v. Maze, 414 U.S. 395 (1974), the Supreme Court apparently relaxed this requirement in \textit{Schmuck v. United States}, 489 U.S. 705 (1989) (in a scheme to sell wholesale cars with rolled-back odometers, the victim retailers’ mailings of title application forms was sufficient to bring the scheme within the mail fraud statute).

The breadth of the mail fraud statute has been further enlarged by the Violent Crime Control and Law Enforcement Act of 1994 that extends its provisions to schemes involving private interstate carriers, such as Federal Express. Title XXV, § 250002. Finally, federal prosecutors’ ability to bring fraud cases is further complemented by 18 U.S.C. §§ 1343 (wire fraud) and 1344 (bank fraud) (1994).

4. 18 U.S.C. § 922(h) (1988) (making it a crime to receive, possess, or transport a firearm or any part of it if it was involved in interstate commerce before coming into defendant’s possession). \textit{See Scarborough v. United States}, 431 U.S. 563 (1977) (holding that proof that the possessed firearm previously traveled in interstate commerce is sufficient to satisfy required nexus between the possession of firearm by the convicted felon and commerce under Omnibus Crime Act); \textit{Barrett v. United States}, 423 U.S. 212 (1976) (holding that statute applies to a convicted felon’s intrastate retail purchase of a firearm when the firearm had been manufactured out of state). Another provision of the statute, § 922(g), punishes firearms possession in schools with no requirement of a federal jurisdictional element. The Fifth Circuit found that provision unconstitutional on that ground. \textit{United States v. Lopez}, 2 F.3d 1342 (5th Cir. 1993), \textit{aff’d}, No. 93-1260, 1995 WL 238424 (U.S., Apr. 26, 1995).


6. 18 U.S.C. § 1955 (1988). This statute prohibits gambling businesses that are illegal under state law and involve at least five persons, if the business continues for 30 days or generates $2,000 in a single day. The statute requires no proof of an effect on interstate commerce and has been upheld as applied to purely intrastate activities. \textit{See United States v. Becker}, 461 F.2d 230 (2d Cir. 1972); \textit{United States v. Riehl}, 460 F.2d 454 (3d Cir. 1972); \textit{United States v. Harris}, 460 F.2d 1041 (5th Cir. 1972); \textit{Schneider v. United States}, 459 F.2d 540 (8th Cir. 1972).

every drug deal, no matter how small, even the simple possession of user-amounts of controlled substances.

Recently, this trend has accelerated. In the past three years, Congress has enacted criminal statutes to deal with a variety of politically high-profile misconduct, including anti-abortion violence, carjacking, failure to pay child support, and even “animal rights terrorism.” The 1994 Crime Bill enacted a long list of additional new offenses, including domestic violence, providing material support to terrorists, telemarketing fraud, interstate computer hacking, misuse of credit cards and ATM cards, possession of handguns by juveniles, and obstructing a lawful hunt.

Even today, federal crimes are not completely comprehensive. There are still gaps in coverage. For example, federal law does not reach murders that do not involve a federal officer, a federal territory, the use of interstate travel or communication facilities, and were not

8. 21 U.S.C. § 841(a) (1988) (making possession of a controlled substance with intent to distribute a crime without regard to quantity). See, e.g., United States v. Schuster, 948 F.2d 313, 315 (7th Cir. 1991) (“This Court has consistently held that the quantity of drugs involved in a narcotics case does not constitute a substantive element of the drug offense.”); United States v. Sotelo-Rivera, 931 F.2d 1317, 1319 (9th Cir. 1991) (“Section 841(a) does not specify drug quantity as an element of the substantive offense of possession with intent to distribute ....”); United States v. Campuzano, 905 F.2d 677, 679 (2d Cir. 1990) (“Section 841(a) ... prohibits the distribution of any amount of cocaine and in no way requires proof of a particular quantity ....”).


17. § 290001, 108 Stat. at 2097-99 (to be codified at 18 U.S.C. § 1030(a)(5)).

18. § 250007, 108 Stat. at 2087-88 (to be codified at 18 U.S.C. § 1029(a)).

19. § 110201, 108 Stat. at 2010-12 (to be codified at 18 U.S.C. § 922(x)).


committed in order to gain entrance into, maintain, or increase the defendant's position in a criminal enterprise. O.J. Simpson, for example, could not have been prosecuted in federal court. Similarly, most assaults not involving federal officers or enclaves and unrelated to enterprise crime are beyond the reach of federal authorities.

Notwithstanding these lacunae, federal criminal jurisdiction is fast becoming the rule rather than the exception. One way or another, federal statutes reach most major malefactions and many minor ones, and there is no realistic prospect of reversing that trend. It is therefore increasingly anachronistic to speak of the federalization of crime as if it were chiefly a function of the substantive law. Today, federal prosecutors have substantive authority to pursue most crimes worth pursuing. It follows that the federalization of crime is increasingly in the hands of federal prosecutors and that informed debate on the respective state and federal roles in law enforcement should focus on the prosecutive function.

We believe that organized crime (broadly defined) is an especially appropriate target for federal prosecution. As we describe below, federal prosecutors enjoy advantages that their state and local counterparts do not possess. Nowhere can the advantages of federal prosecution be employed more productively than in the attack on criminal gangs and enterprises. In our opinion, the prosecution of organized crime should be largely federalized.

I. Constraint and Discretion

The most important constraint on federal prosecution is resources. In 1990 the total budget for federal prosecution and legal services was more than $1.5 billion. Twenty years earlier, that figure was only slightly over $100 million. Even when these figures are adjusted for the effect of inflation, federal prosecution dollars have more than tripled. The corresponding expansion in the effective scope of federal prosecution is obvious—and probably more consequential than any change in the substantive law during that period.

Despite the increase in these funds, federal prosecutors are only a small fraction of the nation's supply. In 1990 the total budgetary commitment to state and local prosecution was nearly $4 billion. The federal government therefore provides slightly more than one-quarter

23. Id. at 4 tbl. 1.4.
of the total national prosecution expenditures, and much of that is
devoted to support services for both federal and state authorities.
Moreover, the number of federal prosecutors is small compared to
their state and local counterparts, comprising roughly ten percent of
the national total. Thus, no matter how widely Congress casts the
net of federal crimes, most criminal activity will continue to be han-
dled by state and local authorities. At the same time, federal prosecu-
tors have a growing share of the nation’s prosecution resources and
may be expected to exercise a growing share of the nation’s
prosecutions.

As a general matter, the selection of targets and defendants by
federal prosecutors is a local function. Rarely are such choices di-
rected centrally by the Attorney General. Of course, federal prosecu-
tors are influenced by broad policy initiatives and specific
enforcement programs emanating from Washington, but United
States Attorneys are explicitly vested with “plenary authority” over
prosecutions in their districts and retain a large freedom to devise
their own strategies.

It is a mistake, however, to assume that prosecutors’ strategies
reflect nothing more than their own preferences. Differences in local
needs sometimes explain variations that otherwise appear anomalous.
For example, in 1992, the Southern District of California successfully
prosecuted two hundred reported cases of simple drug possession,
while the neighboring Central District of California had only two such
cases. The Southern District, however, has something its neighbor
to the north does not: a border with Mexico. In southern California,
the Immigration and Naturalization Service stops more than 500,000

24. NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS EN-
FORCEMENT 8, 12 (2d ed. 1993) (reporting that in 1992 there were 2,748 United States
Attorneys and Assistants, as compared to more than 25,000-30,000 state and local prosecu-
tors); BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS 1992, at 2 (1993)
(of the total workforce of approximately 57,000 in state and local prosecutors’ offices, more
than 1/3, or about 21,000, were assistant prosecuting attorneys).
25. UNITED STATES ATTORNEYS’ BULLETIN, (U.S. Dep’t of Justice), Nov. 15, 1993, at
380-81.
26. See, e.g., United States v. Madkins, 994 F.2d 540, 542 (8th Cir. 1993) (bringing
prosecution for possession of firearm under the Attorney General’s “Triggerlock” project);
United States v. Custis, 988 F.2d 1355, 1357 (4th Cir. 1993) (same); Trace Thompson, Gun
Crimes Targeted by Prosecutors: National Effort Seen as Partly Political, WASH. POST, Apr.
A20.
27. 7 DEPARTMENT OF JUSTICE MANUAL § 9-2.000 (1994).
28. H. Scott Wallace, The Drive to Federalize Is a Road to Ruin, 8 CRIM. JUST. 12
(1993).
illegal aliens at the border each year. Although all of these persons could be prosecuted, most are simply deposited back across the border. Those carrying illegal drugs are treated more severely, and potential felony charges of importation or possession with intent to distribute are routinely bargained into guilty pleas to misdemeanor charges of simple possession. Local law enforcement authorities, who are generally neither inclined nor equipped to handle drug cases in numbers so disproportionate to the size of the local population, regard policing the border as primarily a federal problem. Thus, along the border low-level drug cases that in most jurisdictions routinely are referred to local prosecutors must be processed federally or not at all.

Additionally, many federal prosecutors feel the need to accommodate federal law enforcement agencies in routine matters of federal interest. Postal workers who steal mail, narcotics suppliers, taxpayers who try to bribe revenue agents, and thieves who steal truckloads of airport freight are a few examples of the many cases in which federal law enforcement agencies have such a clear and longstanding mandate that it would be politically infeasible to decline federal prosecution. Besides, given the breadth of federal venue, a failure to service the bread-and-butter of federal law enforcement agencies would only induce them to shop their high-impact cases elsewhere.

Beyond responding to obvious local needs and servicing federal law enforcement, United States Attorneys have substantial discretion to direct their energies where they see fit. Resulting disparities in the treatment of similarly situated criminals may be characterized as unfair, but these disparities are not uniquely federal. It is true that a marijuana smuggler is far better off getting caught by federal authorities in the drug-choked Eastern District of New York, where federal prosecution is declined when less than a ton is involved, than in West Virginia, for example, where apparently no amount is too small to warrant prosecution. But similar disparities arise in and among the states. A defendant in New York state has always been better off committing an assault in Brooklyn, where such offenses are routine and are often plea-bargained down to disorderly conduct, than in a

29. Robert Reinhold, California’s Tide of Illegal Aliens Ebbs, N.Y. TIMES, Jan. 9, 1994, § 1, at 16 (noting that the number of illegal aliens intercepted while trying to cross the border into California dropped by 6% from the preceding year to 531,689).

30. See, e.g., Wallace, supra note 28, at 52 ("The growing federal/state gap also fosters arbitrariness of punishment, which frustrates deterrence and devastates the balance of justice and fairness that citizens have a right to expect in the administration of the law.").

sleepy upstate hamlet, where prosecutors react more harshly. The truth is that disparate treatment exists within any criminal enforcement system—federal or state—in which limited resources are deployed in accord with local priorities.

What is unique about federal prosecutors—and insufficiently remarked—is that their discretionary agendas and enforcement strategies effectively determine the scope of federal law vis-à-vis the states. The limits set by the substantive law are so relaxed as to be almost irrelevant. If, for example, federal prosecutors wanted to stamp out late-night robberies of convenience stores, they would have the authority to try. That such crimes remain the province of state law is not a matter of legislative coercion but of prosecutorial choice. It follows that the right place to locate a debate about the federalization of crime is not the text of federal statutes, whether enacted or proposed, but the resources and priorities of federal prosecutors. Within the constraints imposed by resources, the scope and content of federal criminal law are determined chiefly by prosecutorial selection.

II. Organized Crime

The crucial questions regarding the federalization of crime are therefore: What do federal prosecutors prosecute? What should they prosecute?

One answer is that federal prosecutors should—and probably do—bring cases in which there is a comparative advantage in federal prosecution. This statement is true but hugely uninformative. Such vacuities aside, it is probably not possible to give a global answer. There are too many differences among districts, too many competing perceptions of federal interest, and too many difficulties in assembling data about prosecutorial choice to support sweeping generalizations. In one large and important area, however, we think there is a reasonably clear answer to what federal prosecutors prosecute and—more controversially—to what they should prosecute. They should and do prosecute “organized crime.”

We put the phrase in quotes to signal that we mean to reach beyond the paradigm of La Cosa Nostra families to include the full range of group criminality involving violence. Thus, “organized crime” as we use the phrase (we now drop the quotes) also includes

33. See supra note 2.
drug-dealing street gangs, Jamaican "posses," Chinese tongs, and other criminal organizations. Although some organized crime groups are interstate or even international in character, that feature is not essential to the case for federal prosecution. A gang that sells drugs in an urban housing project may never operate outside that project, yet still be the proper target of federal law enforcement, particularly if it terrorizes the residents with repeated threats or violence. The same is true of many Asian gangs, which typically limit their extortion activities to their own communities.

Nor is federal prosecution of organized crime justified by reluctance on the part of local prosecutors. To the contrary, most district attorneys are elected officials, and there are few events more attractive to elected officials than the press conference following a crime boss's arrest, or the celebration in the streets when a Jamaican "posse" is removed from a neighborhood. Indeed, many urban district attorneys have established elite units within their offices (in New York City they are called Rackets Bureaus) for the sole purpose of investigating and prosecuting such cases.

Moreover, the building blocks of the typical organized crime case are almost always crimes that state and local authorities have traditionally prosecuted. Murder is chief among them, and until the 1980s was rarely prosecuted in federal court. The same is true for armed robberies, arsons, assaults, and other ingredients of organized crime. Thus, the broad category of organized crime includes activities that state and local prosecutors typically wish to prosecute and that historically have been prosecuted by them. Why then, should and do federal prosecutors devote their limited resources to these cases?

34. BUREAU OF JUSTICE STATISTICS, PROSECUTORS IN STATE COURTS 1992, at 2 (1993) (more than 95% of state and local prosecutors are elected).
37. Peg Tyre, DA Declares War on Mob in Queens, NEWSDAY, June 21, 1991, at 3 (reporting that Queens District Attorney establishes Rackets Bureau to investigate and prosecute the Mafia and Asian and Columbian organized crime groups).
The answer is that federal prosecutors do a better job. Several features of federal law combine to give federal prosecutors enormous advantages over their state and local counterparts, especially those in New York. Nowhere are these advantages more pronounced than in the investigation and prosecution of organized crime. For a variety of reasons—many of which seem unconnected to the usual debates about federalism—federal prosecutors can conduct organized crime investigations more quickly, bring more charges, and win more convictions than state and local authorities. The chief purpose of this paper is to describe those advantages.

Additionally, we have a (rather limited) normative aspiration. For the most part, we think the advantages that federal prosecutors enjoy under federal law over their state counterparts are desirable—the chief exception being the severity of the federal Sentencing Guidelines. Full-scale defense of that proposition would require a whole series of law review articles on various features of federal law. Considerations of time and expertise counsel against so ambitious an undertaking. We do mean here, however, to advance for discussion a narrower normative claim: The advantages of federal prosecution under current law can nowhere be so usefully employed as in the attack on organized crime. Given current law, we think organized crime not only is, but should be, largely federalized.

III. The Advantages of Federal Prosecution

What are the advantages of federal prosecution? One, of course, is the main legislative tool for reaching group criminality, the Racketeer Influence Corrupt Organizations Act. A great deal has been written about the role of RICO in combating organized crime. If we slight that topic here, it is not because of its unimportance, but because it has been so well covered elsewhere. Moreover, we think the prominence of RICO has distracted attention from other important features of federal law. After all, many states have enacted provisions

similar to RICO. Yet even in those states, there are important, but little-noticed advantages of federal prosecution. They range from the use of accomplice testimony and federal grand jury practice to the federal Sentencing Guidelines. A survey of these advantages supports the decision of federal prosecutors to direct their resources against organized crime.

A. Accomplice Testimony

One characteristic of organized crime is that the most culpable and dangerous individuals rarely do the dirty work. Although the organization’s leaders are ultimately responsible for its crimes, they typically deal through intermediaries and limit their own participation to behind-the-scenes control and guidance. Consequently, their guilt usually cannot be proved by the testimony of victims or eyewitnesses or by forensic evidence. And they never confess. Generally speaking, successful prosecution of organized crime leaders requires the use of accomplice testimony. It is therefore enormously important to federal prosecutors that a federal defendant can be convicted on the uncorroborated testimony of an accomplice. Although the jury is cautioned to use care in evaluating the testimony of accomplices, it is also told that in an appropriate case it may convict solely on that basis.

In contrast, in New York state courts, "[a] defendant may not be convicted of any offense upon the testimony of an accomplice unsupported by corroborative evidence tending to connect the defendant with the commission of such offense." The requirement is strict. Independent evidence of the defendant’s presence at the scene of the crime does not necessarily suffice, nor does proven falsity of the defendant’s alibi. Most importantly, the corroboration requirement cannot be satisfied by the testimony of other accomplices. Thus, not only is a single accomplice’s testimony insufficient, but the interlocking testimony of several accomplices is also insufficient, no matter


42. N.Y. CRIM. PROC. § 60.22 (McKinney 1989).

how corroborative the accomplices may be of one another. Similar rules are in effect in sixteen other states, including California.

As a result, many strong cases cannot be brought in state court. Organized crime cases tend to be "historical" in focus, involving murders, extortions, narcotics deals, and other criminal acts that occurred long before the indictment. As has been noted, there is often no forensic evidence, no eyewitness linking the defendant and the crime scene, and no confession. Yet many of these cases are nevertheless strong because multiple accomplices testify consistently about the criminal organization and the crime. In such a case, a murder charge may rest solely on consistent description of the details of the murder: the reasons for it, the order to commit it, the way it was done, and the disposition of the body. An important technique in investigating and prosecuting such cases is to keep these accomplices, who are usually in custody, separate from one another and so insulated from the rest of the proof that they can truthfully testify that they are unaware of the other evidence in the case. Then the prosecutor can argue that the defendant is either guilty or the unluckiest person in history because the witnesses who supposedly concocted a story to frame him just so happened to arrive independently at the same facts.

That argument, of course, is not the final battleground. No matter how well accomplices have been quarantined, there is always a link among them—the prosecution team. Defense attorneys frequently are forced to argue, explicitly or implicitly, that the accomplice witnesses have told a conveniently consistent story because the government put them up to it. And therein lies one of the most dramatic


46. See, e.g., United States v. Orena, 32 F.3d 704, 708 (2d Cir. 1994) (noting that the evidence of a crime boss's involvement in a murder was the testimony of two accomplices who helped bury the body).
advantages of the federal system: If the investigating agents and lawyers have been careful, an accomplice-based case can be made to hinge not on the credibility of the inherently unreliable accomplices, but on the jury’s assessment of the integrity of the prosecutors. Federal prosecutors usually win such cases. Because of the corroboration requirement, many state prosecutors cannot even attempt to prosecute them.

The ability to rely solely on accomplice testimony, in conjunction with the RICO statute, also allows federal prosecutors to bring charges in cases that are not so strong. Although federal prosecutions are rarely based solely on the testimony of a single accomplice, component parts of prosecutions frequently rely on accomplice testimony that is wholly uncorroborated, even by the testimony of another accomplice. It is not unusual for a RICO indictment to include several murders as racketeering acts. Three accomplices might be called to testify about one or more of the murders, corroborating each other as described above. If one of those accomplices can testify to a separate murder in which he and a defendant participated, that murder will often be included in the pattern of racketeering activity, and may also be alleged as a separate count under 18 U.S.C. § 1959. The prosecutor can then argue that one of the reasons the jury should believe the sole accomplice on that charge is because the rest of his testimony is so well corroborated on the other charges.

Additionally, the prosecutor can argue that an accomplice who is unaware of the other evidence (or the lack thereof) has a selfish reason not to fabricate testimony. If the accomplice makes things up, his testimony could conflict with other evidence, and the trial judge, who usually will determine the accomplice’s sentence, will see that he is a liar and treat him accordingly. Those arguments have proven effective, and defendants have been convicted of murder in federal court when the only evidence of their participation in the crime was the assertion of an accomplice.

47. See, e.g., United States v. Brady, 26 F.3d 282 (2d Cir. 1994); United States v. Amuso, 21 F.3d 1251 (2d Cir. 1994); United States v. Amato, 15 F.3d 230 (2d Cir. 1994).

48. In the case of mob boss John Gotti, for example, the only evidence of Gotti’s participation in what the defense characterized as the centerpiece crime—the spectacular murder of former Gambino Family Boss Paul Castellano—was the testimony of Gotti’s former Underboss, Salvatore Gravano. With respect to three other murders, Gravano’s testimony was corroborated by Gotti himself in taped conversations. With respect to the murder of Castellano, however, there was no such corroboration. Indeed, on the tapes Gotti denied any involvement in the Castellano murder, yet the jury, relying on Gravano’s otherwise reliable testimony, nevertheless found Gotti guilty. United States v. Gotti, 90
At first glance, the difference between the federal and the state approach to accomplice testimony is difficult to fathom. The federal rule seems a natural corollary of the Fifth Amendment privilege against self-incrimination. Because the government cannot compel a defendant to account for his own behavior, it must prove its case using sources of evidence other than the defendant himself. Against this background, it seems illogical to place off limits the next best source: the defendant’s colleagues in the crime. The concern that an accomplice has incentives to fabricate testimony against the defendant is equally applicable in state and federal courts.

The different approach to accomplice testimony in state court makes sense, however, when considered in the context of the prototypical state prosecution, which focuses on a discrete, isolated criminal act. If a robbery prosecution consists solely of one robber testifying that he committed the crime with the defendant, a rule forbidding a conviction is eminently defensible, and may even be unnecessary, as most juries would not convict on such a presentation.

On the other hand, organized crime cases place in clear relief the appropriateness of the federal approach to accomplice testimony. Even if it is uncorroborated with respect to a particular criminal act, such testimony usually has a richly detailed context, which assists the jury in making its credibility determination. There may be extensive evidence, for example, that the criminal organization regularly met at a particular location and that the witness and the defendant were observed there together. The rules of the organization may help establish that the witness was in a position to know about the type of criminal act at issue or may even establish a motive for the defendant to have committed the offense.

Put another way, it is one thing to allow a conviction based on the simple assertion of a criminal that the defendant was his colleague in a crime and quite another to allow it when it has also been demonstrated that the witness and the defendant are colleagues in a criminal organization and that they frequently interacted in the context of that organization and that the crime at issue is the type of crime that the organization commits. Strictly speaking, the latter testimony is not "corroborated"; but as a practical matter, depending on the witness’s demeanor, it may nevertheless be quite compelling.49 Because the


49. The Gotti case, see supra note 48, is an excellent example. Although Gotti’s participation in the Castellano homicide was established solely on the testimony of the accom-
overwhelming majority of state prosecutions do not provide this type of context for accomplice testimony, the corroboration requirement in many state courts is not unreasonable. Similarly, the absence of such a requirement in federal court does not mean that simple federal prosecutions alleging discrete crimes are based solely on accomplices. Indeed, that virtually never happens, because juries are naturally skeptical of such testimony. However, the more permissive federal rule has tremendous significance in the organized crime setting, where the context in which “uncorroborated” testimony is given may render it far more palatable to a jury. The inability to offer such evidence is a source of great frustration to state and local prosecutors and a compelling reason to bring federal prosecutions against organized crime.

B. The Federal Grand Jury

A federal grand jury investigation may be commenced any time a prosecutor chooses. A formal allegation that a crime has occurred is not required; an anonymous tip or rumor may suffice. Indeed, an investigation may be commenced simply to provide assurance that the law has not been violated.50

Once an investigation has begun, the powers of the federal grand jury are enormous (and therefore controversial). The grand jury has nationwide subpoena power over persons and documents, and the Supreme Court has protected the unimpeded use of that power.51 In order to insulate such investigations from delay, a motion to quash a grand jury subpoena on grounds of relevance must be denied unless the movant can satisfy the virtually insurmountable burden of showing that there is no “reasonable possibility” that the witness or documents will “produce information relevant to the general subject of the grand jury’s investigation.”52

plice Gravano, the other evidence included (1) tape recordings establishing that Gravano was Gotti’s underboss; (2) hundreds of videotapes of them walking in front of their social club/headquarters and whispering in each other’s ear; (3) tape recordings establishing that Gotti hated Castellano; and (4) tape recordings of Gotti stating that he believed, shortly before the murder occurred, that he was about to be killed by Castellano. Thus, while Gravano’s testimony that Gotti participated in the murder did not meet the state law corroboration requirement, the organized crime context provided ample indicia of reliability.

51. Id. at 297-302; see also United States v. Calandra, 414 U.S. 338, 343 (1974) (grand jury “may compel the production of evidence on the testimony of witnesses it considers appropriate, and its operation is generally unrestrained by the technical procedural and evidentiary rules governing the conduct of criminal trials”).
52. Id. at 301.
For the same reason, among others, the grand jury may hear evidence that would be inadmissible at trial. Consequently, federal prosecutors routinely present hearsay to grand juries. Indeed, the evidence of accomplice witnesses, civilian eyewitnesses, and victims is usually recounted by a federal agent who is familiar with the witnesses' statements. So long as the grand jurors are not misled as to the hearsay nature of the evidence and are aware of their right to request that the witnesses appear, they may return an indictment based entirely on hearsay.

The broad subpoena powers of the grand jury are enforced not only by laws against perjury and obstruction of justice, but also by the district court's contempt powers. A witness who, without lawful justification, refuses to answer questions or provide documents may be jailed civilly for as long as eighteen months, which is intended to coerce compliance with the subpoena. That confinement may be followed by a criminal prosecution, which is intended to punish noncompliance and, depending on the underlying offense under investigation, can lead to a substantial prison term. Finally, the prosecutors have at their disposal the federal immunity statute, which can be used to compel testimony in exchange for use immunity and which does not protect the witness from prosecution for perjury, obstruction of justice, or contempt.

In these and other respects, federal grand jury practice is stacked in favor of the prosecution and is often attacked on that ground. On the other hand, prosecutorial control of the grand jury proceedings


54. See Costello, 350 U.S. at 363. See also United States v. Diaz, 922 F.2d 998, 1006 (2d Cir. 1990); United States v. Alexander, 789 F.2d 1046, 1048 (4th Cir. 1986). Some courts have suggested that the use of hearsay be limited. See, e.g., United States v. Cruz, 478 F.2d 408, 410-11 (5th Cir. 1973).


58. See, e.g., Peter Aranella, Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication, 78 Mich. L. Rev. 463 (1980) (criticizing the grand jury for "rubber stamping" prosecutive decisions); William H. Campbell, Eliminate the Grand Jury, 64 J. Crim. L. & Criminology 174 (1973) (arguing that the grand jury is the prosecutor's alter ego and should be abolished); Tom Wolfe, The Bonfire of the Vanities 603 (quoting the Chief Judge of the New York Court of Appeals as saying that "a grand jury would 'indict a ham sandwich' if that's what [the prosecutor] wanted").
may perhaps be defended as necessary and inevitable at the investiga-
tive stage, with careful protection of the rights of the accused rele-
gated to the trial.\textsuperscript{59} However one resolves the overall debate, this
much is clear: The distinctive features of the federal grand jury give it
a peculiarly important role in the investigation of organized crime.

In many instances a grand jury will be impaneled at the outset of
an investigation and provided with background material about the tar-
get group. Such material may consist of informant information, prior
electronic surveillance tapes, transcripts of related accomplice testi-
mony at previous trials, and physical surveillance summaries. As the
investigation proceeds, the prosecutors will use the grand jury as an
investigative tool. In the proactive, covert phase of the investigation,
the grand jury's actions can be coordinated with other investigative
techniques. A subpoena for a witness or for documents may be served
at a location in which a "bug" is in place, stimulating conversations
about the subpoena. Since most criminal organizations monitor grand
jury proceedings closely, a prosecutor can rely on the fact that ques-
tions posed to certain witnesses will be reported back to the targets of
the investigation. These events sometimes produce evidence of how
criminal groups use "house counsel" to subordinate the interests of an
individual client to the interests of the organization\textsuperscript{60} and, more im-
portantly, often constitute obstructions of justice that later become
racketeering acts and independent counts in the eventual
indictment.\textsuperscript{61}

It is not uncommon for federal grand juries to sit for up to three
years\textsuperscript{62} and to return a series of indictments of members of a crime
organization. And the role of the grand jurors is sometimes surpris-
ingly active. During the course of a long investigation, there may be

\textsuperscript{59} \textit{See}, e.g., Thomas P. Sullivan & Robert D. Nachman, \textit{If It Ain't Broke, Don't Fix It: Why the Grand Jury's Accusatory Function Should Not Be Changed}, 75 J. CRIM. L. & CRIMINOLOGY 1047 (arguing that the federal grand jury can fulfill the accusatory function better than proposed alternatives); Ronald F. Wright, \textit{Why Not Administrative Grand Juries?}, 44 ADMIN. L. REV. 465 (1992) (urging recreation of administrative grand juries).

\textsuperscript{60} \textit{See}, e.g., United States v. Gotti, 771 F. Supp. 552, 555-58 (E.D.N.Y. 1991) (dis-
qualifying defense counsel for, among other reasons, suggesting that one member of the
Gambino Family pled guilty to save the others the trouble of appearing as witnesses at his
trial).

\textsuperscript{61} \textit{See}, e.g., id.; United States v. Cairo, 922 F.2d 1008, 1012-13 (2d Cir. 1991) (ob-
struction of justice charges based on house counsel's coaching of witnesses subpoenaed to
testify falsely before the grand jury).

\textsuperscript{62} \textit{See} 18 U.S.C. § 3331 (1988). Special grand juries, which are impaneled pursuant
to § 3331 and frequently used for organized crime investigations, may sit for up to three
years. A grand jury impaneled pursuant to Rule 6 of the Federal Rules of Criminal Proce-
dure is limited to two years.
periods of grand jury inactivity, such as when the prosecutors are in trial on one of the indictments, and periods of intense work, particularly after the investigation (or a part thereof) is no longer secret and immunized witnesses can be brought before the grand jury. Perhaps because the grand jurors are not distracted by the intervening trials, they often remember the testimony of prior witnesses as well as the prosecutors and can point out connections or themes in the evidence, suggest helpful follow-up questions and, on occasion, even provide useful investigative suggestions. In short, in a long-term organized crime investigation, the prosecution team and the grand jury work as partners. The prosecutors are in control, but the grand jury is a valuable addition to the investigative effort.

In many state systems, grand juries operate very differently. In some jurisdictions—notably New York—hearsay is not allowed before the grand jury, and its usefulness in investigating criminal groups is therefore severely compromised. More widely, the use of grand juries is frustrated by the unavailability to state prosecutors of testimony coerced by a grant of limited immunity. In both of these respects (as described more fully below), federal prosecutors enjoy distinct advantages over their state and local counterparts.

(I) The No-Hearsay Rule

Some states, including New York and (less strictly) California, require the rules of evidence to be followed in the grand jury hearing. Although there are narrow exceptions for matters such as forensic evidence and proof of ownership of some types of property, the no-hearsay rule requires that accomplices, eyewitnesses, and victims appear personally before the grand jury. The rule makes sense in the ordinary state prosecution, involving a one-on-one confrontation between a civilian complainant and a defendant charged with assault, robbery, or some other crime. Many such cases, especially those in which the victim knows the defendant, drop out of the system due to the lack of cooperation of the victim. The no-hearsay rule operates to weed out such cases before indictment. The use of hearsay testimony would allow indictment on the arresting officer's recitation of the complain-

ant's statement, but the exercise would often be pointless. If the
witness fails to appear before the grand jury, the long-term prospects
for the case are bleak, and the defendant should not be indicted.

In contrast, organized crime investigations consider a broad array
of activity over an extended period of time. They are almost never
one witness cases, and even when they are, that witness is an accom-
plice. Although accomplices present many problems, failure to ap-
pear is not one of them; the accomplices are almost always in custody.
Thus, one useful function that the no-hearsay rule serves in ordinary
state prosecutions is simply inapplicable to organized crime
investigations.

The fact that in some states the no-hearsay rule nevertheless ap-
plies has major adverse consequences in state organized crime inves-
tigations. For one thing, getting an indictment is far more cumbersome
and time-consuming. Rather than have the agent assigned to the in-
vestigation relay to the grand jury the essence of the testimony of ac-
complices, eyewitnesses, and victims, each of those witnesses must
testify. Since their appearances before the grand jury will produce a
recorded statement of the witness that can be used in later cross-ex-
aminations, a responsible investigative team has to drop everything
and engage in the painstaking process of preparing accomplice wit-
tnesses to testify about events that are often several years old and em-
bedded in a life of crime. State prosecutors correctly regard this
requirement as an unnecessary obstacle in the process of indicting or-
ganized crime targets.

The no-hearsay rule also prevents a state grand jury from keeping
up with a fast-moving investigation. In a federal investigation, when
an arrested defendant chooses to cooperate, time is of the essence.
The new defendants identified by the cooperator's information are
often arrested immediately, detained pending trial, and indicted
within the ten-day time limit of the Speedy Trial Act by having a case
agent summarize the accomplice's testimony for the grand jury.
Often, one or more of the new defendants chooses to cooperate, pro-
ducing fresh avenues of investigation and sometimes a new wave of
arrests and indictments. In New York state, defendants must be in-
dicted or released within six days of arrest, and the indictment must be
based on first-hand testimony.64 This is simply not feasible if the ac-

64. N.Y. CRIM. PROC. LAW § 180.80 (McKinney 1993). The only alternative is to
grant the defendant a preliminary hearing. From the prosecutor's perspective, preliminary
hearings are disastrous. Not only must the accomplice testify personally, but he is subject
to cross-examination by defense counsel.
complice must be signed to a plea/cooperation agreement, prepared to testify, and produced in the grand jury. As a result, state prosecutors cannot follow the natural course of the investigation as well as federal prosecutors can.

In some organized crime cases, the no-hearsay rule makes indictment impossible. Most civilian witnesses in organized crime investigations—extortion victims, relatives of murder victims, and chance eyewitnesses—are extremely reluctant to testify. Often they refuse to do so even in the secrecy of the grand jury. A state prosecutor burdened with the no-hearsay rule cannot get an indictment based on such a witness, even if the prosecutor intends to dismiss that count if it proceeds to trial. A federal prosecutor is not so restricted, and the ability to return the indictment based on hearsay is a valuable tool. The defendants can be detained pending trial precisely because of their dangerousness, and once they are off the street, the reluctant witnesses often feel more secure. Also, the defendants are not likely to know which, if any, of the various charges in the RICO indictment may not survive at trial, and the pressure of such a case often causes at least one of them to cooperate, alleviating the need for the reluctant civilians to testify at all. In addition, trial may be avoided altogether by a guilty plea. Indeed, the shakiness of fearful witnesses may induce the prosecutor to make what appears to the defendants to be an attractive plea offer.

The point is that much can happen after an indictment shakes the tree of an organized criminal group. The problem with the no-hearsay rule is that it can sometimes prevent state prosecutors from shaking the tree at all.

(2) Limited Immunity

Another major advantage of federal grand jury practice is that federal prosecutors can coerce testimony by granting limited immunity for the use or derivative use of such testimony. In many states, including New York, California, and Illinois, prosecutors can force testimony only by granting transactional immunity, which protects the

65. Of course, the prosecutor can compel their testimony by granting immunity, but many witnesses are so fearful that they would lie. As a practical matter, their fear renders immunity worthless, as the only thing worse (for the prosecution) than a recalcitrant witness is one who has falsely exculpated the defendant under oath.


witness from prosecution for any activity mentioned in the immunized testimony.68 In part for the reasons described below, we think the federal rule preferable, but again, the question is controversial and has prompted substantial debate.69

Whatever the overall merits of use-and-derivative-use versus transactional immunity, the difference between them is especially critical in organized crime investigations. In the course of such investigations, a federal prosecutor likely can identify persons in the organization who are at least witnesses and possibly potential defendants but who cannot be indicted because the evidence against them is insufficient. An example would be a person who is present for a conversation in which a mob boss mentions that he has ordered a particular murder. As explained below, that person is an ideal candidate for use-immunity in a federal grand jury.

Members of organized crime generally do not tell the truth in the grand jury, even when protected by a grant of immunity. Usually, such witnesses have more to fear from their colleagues if they tell the truth than from the government if they lie. Thus, even minor organization members typically do not confess and do not implicate others, at least not intentionally. The prosecutor should therefore expect that the immunized testimony will be of little or no investigative use against the witness. If evidence later becomes available against that witness, in all likelihood he can be prosecuted for the offense despite having been given use-and-derivative-use immunity.

That such immunized grand jury testimony does not directly implicate anyone does not mean that it is useless. Often it works as a prophylactic against fabricated exculpations. A person who, according to the government’s evidence, overheard a boss discuss a murder contract is an ideal defense witness. When the government’s case is exposed through discovery and at trial, the defense can call that person to provide exculpatory testimony specifically tailored to rebut the government’s evidence (the defendant never said it, he said it but later

68. See generally Charles H. Whitebread & Christopher Slobothin, Criminal Procedure § 8.11, at 424 (2d ed. 1992) (reporting that although a “substantial number” of states have moved to use-and-derivative-use immunity, a majority still require transactional immunity).

revoked it, he always talks that way and never really means it, etc.). In the grand jury setting, however, before the government's evidence is revealed, the opportunity to provide carefully-crafted exculpatory evidence is much reduced. Moreover, although these witnesses are less intimidated than others at the prospect of a perjury prosecution, they do not want to risk inviting one based on evidence (particularly electronic surveillance tapes) the government may have. The result is grand jury testimony littered with the stock answer: "I don't remember; do you have a tape recording that might refresh my recollection?" That answer, which every experienced federal organized crime prosecutor has heard many times, is designed to avoid implicating colleagues in crime and the witness in perjury.

Such answers appear wholly uninformative, but they are in fact valuable to the prosecution. First, by using the grand jury to investigate potential defenses, the prosecutor has neutralized a prospective defense witness. Having professed under oath to a profound absence of recollection, the witness cannot credibly give contrary evidence at trial. Second, if there really is a tape recording or other compelling evidence of a conversation that could not plausibly be forgotten (such as a crime boss discussing a murder contract), the witness may be successfully prosecuted for perjury. Third, for every five witnesses who attempt this tightrope act in an organized crime investigation, there is at least one who goes to jail for contempt rather than testify. Between perjury prosecutions and contempts, the grand jury process can produce the incarceration of significant parts of the criminal enterprise. Fourth, if it can be proven that the targets of the investigation have induced the perjury or contempt, the eventual indictment will include such charges, and this will also be powerful evidence of the targets' consciousness of guilt of the charges for which they were originally under investigation. Finally, if subsequent events produce evidence sufficient to convict the witness of the crime he was called to testify about, he can be prosecuted for that as well.70

70. During the investigation of Gambino Family Boss John Gotti and Underboss Salvatore Gravano, the government questioned "Acting Captain" Paul Graziano at length under immunity in the grand jury about the murder of Graziano's brother-in-law, Louis DiBono. A year and one-half later, after Gotti and Gravano had been indicted for that murder, Graziano became a government witness and informed the government that Graziano was a participant in the conspiracy to kill DiBono, not just a witness. Graziano was indicted for that offense and subsequently convicted. See United States v. Conte, 93 CR 85 (ILG) (E.D.N.Y. 1994). See also United States v. Gambino, 90 CR 1051 (S-3) (ILG) (E.D.N.Y. 1993) (convicting Gambino Family captain of racketeering despite having been immunized and questioned regarding his role in the family); United States v. Montoya, No. 93-50411, 1995 WL 9707, *8 (9th Cir., Jan. 12, 1995) (upholding money laundering convic-
None of this can be done in a New York state grand jury (or those of many other states) because, absent a waiver by the witness, New York law confers transactional immunity on any grand jury witness.71 Thus, although a state prosecutor has the option to immunize, he or she must be extremely circumspect in doing so because the immunized witness will forever be immune from prosecution for any crime "concerning which he gave evidence," truthful or otherwise.72 In most enterprise crime investigations, that is simply too risky. These investigations tend to focus on a large number of overlapping crimes, and the irrevocable "bath" given the witness is too high a price to pay in order to neutralize him as a defense witness.

The handicap of not having use-or-derivative-use immunity was best described by one of the nation's leading prosecutors, New York County District Attorney Robert M. Morgenthau:

New York's transactional immunity rule often makes effective investigation and prosecution of crime impossible. In short, we cannot risk conferring transactional immunity on a potential grand jury witness if there is any possibility that the witness may be involved in the offense being investigated or any offense which might inadvertently be touched upon in the grand jury inquiry. This creates especially serious problems in cases involving narcotics and organized crime.73

Despite this testimony, no reform seems likely. Based in part on the 20,000 member police union's promise that a use-or-derivative-use immunity of defendant who, as an immunized grand jury witness, had denied knowledge about the leader of the organization and told the government "only what he believed was already known").

71. N.Y. CRIM. PROC. LAW §§ 190.40 & 50.20 (McKinney 1992 & 1993). Despite a sustained effort by prosecutors and some legislators, the New York Legislature failed to enact the six use-or-derivative-use immunity bills that were introduced in 1983-1988. The repeated rejection of this reform owed something to strenuous opposition from a surprising source. The police, acting through their unions and lobbyists, demanded transactional, rather than use-or-derivative-use immunity, as a precondition to testifying about investigative activities. See Paul Browne, DAs Ask End to Total Immunity for Grand Jury Witness, N.Y. L.J., Apr. 12, 1988, at 1 (noting that the police union feared that narrower immunity would expose police to prosecution for crimes committed during investigations); Stop Immunizing Criminals Against Prosecution, NEWSDAY, May 19, 1988, at 96 (noting that opposition to use-or-derivative-use immunity comes from civil libertarians and from the police and opining that "sparing a few cops from just punishment" is not a sufficient reason to continue transactional immunity).

72. The only limit is that the statute does not immunize the witness from prosecution for crimes that are "gratuitously given or volunteered by the witness." N.Y. CRIM. PROC. LAW § 190.40(2)(b) (McKinney 1993). Thus, the witness cannot blurt out that he killed Jimmy Hoffa and expect a lifetime pass for it (unless, of course, the prosecutor made the egregious mistake of asking a question to which the confession was responsive).

73. Letter from Robert M. Morgenthau to Angelo DelToro, Member of the New York Assembly (on file with Hastings Law Journal).
immunity statute would make its members "hesitant to vigorously enforce the law," the long-standing effort to enact such a law has now come to nothing.

C. Federal Sentencing Guidelines and Mandatory Minimum Sentences

In 1984 Congress created the United States Sentencing Commission to study, among other things, the absence of uniformity in the sentences of federal defendants and to correct it through the promulgation of Sentencing Guidelines. A great deal has been written about the Sentencing Commission's work, and the Sentencing Guidelines continue to be the most controversial area of federal criminal law. Indeed, the sentencing ranges prescribed by the Guidelines have caused some district judges to denounce them publicly, and one to resign in protest.

The Sentencing Guidelines took effect on November 1, 1987, and apply only to offenses committed after that date. The current controversy over the fairness of the Guidelines notwithstanding, the essential reason for implementing them—that similarly situated defendants in the federal system were being sentenced very disparately—remains indisputable. Illustrative are the sentences imposed on the drug couriers arrested on incoming international flights. On any given day, a handful of poor, uneducated Nigerians with no criminal histories can be arrested for importation of heroin as the flight from Lagos arrives at John F. Kennedy International Airport in New York. Before the Guidelines came into effect, these lowest-level drug defendants, who in all respects relevant to sentencing were utterly indistinguishable, were receiving significantly different sentences depending on which judge was doing the sentencing. This category of cases, and others

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74. Patrolmen's Benevolent Association's Memorandum in Opposition to Bill (New York State Assembly No. 5317) (on file with Hastings Law Journal). See also Legislative Committee of the Joint Metropolitan Police Conference of New York State, Inc., and Police Conference of New York, Inc., Agenda for the 1985 Session of the State Legislature, at 10 (opposing elimination of transactional immunity on the perplexing ground that it is not necessary "if District Attorneys and their investigators do their homework properly . . . ").


like it, simply highlighted what all criminal law practitioners knew to be the case—that some judges were much tougher than others in imposing sentence. So long as the sentences were within the broad statutory range, there was nothing either the government or an unlucky defendant could do about such disparity.\textsuperscript{78}

The Sentencing Guidelines establish an elaborate mechanism to prescribe sentences for federal crimes. Judicial discretion, which was previously limited only by the statutory maximum, has been narrowly restricted by the creation of sentencing "ranges." Absent extraordinary circumstances justifying a "departure," the court must impose a sentence within the specified range. Since the ranges are narrow,\textsuperscript{79} and their application triggered by the formula specified in the Guidelines, federal sentences have become much more predictable. The simultaneous abolition of parole made the sentences more certain as well.\textsuperscript{80}

Although the point is certainly subject to debate,\textsuperscript{81} the contribution of the Sentencing Guidelines to regularity, even-handedness, and consistency in sentencing is, in our opinion, for the better. Less clearly defensible is the severity of the Guidelines themselves. Many critics who approve of certainty in sentencing are nevertheless outraged (in our view with justification) by the harshness of the authorized sentences.\textsuperscript{82}


\textsuperscript{79} The maximum of any sentencing range cannot exceed the minimum by more than the greater of 25\% or six months. 28 U.S.C. § 994(b)(2) (1988).


\textsuperscript{82} See, e.g., Marvin E. Frankel, Keynote Address, Sentencing Guidelines, A Need for Creative Collaboration, 101 Yale L.J. 2043, 2046 (1992) (reporting that judges find Guidelines both too rigid and too severe); Markus D. Dubber, Book Review, Judicial Positivism
This argument is essentially political and in any event is beyond the scope of this Article. Our goal is to examine a narrower point that has received too little attention: The Sentencing Guidelines empower prosecutors. Indeed, if federal prosecutors had been asked to create the sentencing regime that would place the maximum permissible pressure on criminal defendants to cooperate with the government, they could hardly have done better than the Sentencing Commission. The Guidelines have become a valuable tool, used by federal law enforcement authorities to turn targets and defendants into accomplice witnesses. Indeed, in ways that are not widely understood, the Guidelines have altered the way federal investigations into organized crime are conducted and have contributed significantly to the success of those investigations in recent years.

The Sentencing Commission established only one readily available escape from these essentially mandatory sentences: cooperation with the government. Sentencing Guideline section 5K1.1 allows a district court to "depart" from the applicable guideline range if the defendant's cooperation has resulted in "substantial assistance" to the government. There is no limit to the degree of departure; a defendant whose guideline range is 324 to 405 months may be sentenced to any lesser term or not incarcerated at all.

Significantly, this type of downward departure requires a motion from the government. The government has unreviewable discretion in determining whether to enter into a cooperation agreement and substantial leeway in determining whether the defendant has complied with the agreement and rendered the requisite assistance. In effect, the prosecutor holds the key to the jailhouse door.

At the same time the Sentencing Commission conferred this power on prosecutors, Congress provided precisely the same escape mechanism for the extraordinarily severe mandatory minimum sentences for narcotics offenses. If a defendant is caught trafficking in fifty grams of crack, one kilogram of heroin, or five kilograms of cocaine, the government can bring a charge carrying a mandatory mini-

and Hitler's Injustice, 93 COLUM. L. REV. 1807, 1830 (1993) ("The federal sentencing guidelines are infamous for their brutal penalties in drug cases . . . "); David Margolick, Full Spectrum of Judicial Critics Assail Prison Sentencing Guidelines; 5-Year Effort Is Called Hobgoblin of U.S. Courts, N.Y. TIMES, Apr. 12, 1992, at A1 (quoting Judge Kleinfeld, generally a supporter of the Guidelines, as having written that, "I have sometimes felt compelled [by the Guidelines] to impose a sentence which seemed much too long, and this has been a very painful event.").
mum prison term of ten years and a maximum term of life. This provision trumps the Guidelines. The small-time crack dealer can sell ten grams in a matter of minutes. Although the guideline range for doing so would be thirty to thirty-seven months, a person charged under the statutory mandatory minimum provisions faces ten years because it is a narcotics offense. A defendant in that situation has only one way out: The court has authority to sentence below the mandatory minimum only upon a government motion based on the defendant’s “substantial assistance” to the prosecution.

This regime gave an enormous boost to federal law enforcement generally and, in particular, altered the strategy for investigating organized crime. Before the Guidelines, it was difficult to “turn” members of an organized criminal group. This was especially true during the investigative phase—that is, before the prospective witness was indicted. When investigators identified a target of the investigation as a potential cooperator, their ability to make a persuasive plea offer was hampered by an undercurrent of uncertainty about the reward for cooperating. Although sentencing judges generally took cooperation into account, lenient judges tended to sentence leniently even without cooperation. Thus, in the investigative setting, when it was not known which judge would get the case, it was not clear that the benefit attributable to cooperation would outweigh the substantial costs of becoming a witness in an organized crime case. The fact of parole eligibility after one-third of any future sentence further blunted the force of these attempts to turn targets into witnesses.

The new regime allows a federal prosecutor to make a much stronger pitch. Now a target can be walked through the Guidelines calculations and shown precisely where he will fall on the Commission’s sentencing chart. The bottom end of that range will be the best


84. Sentencing Guidelines § 2D1.1 establishes a base offense level of 26 for distributing 10 grams of crack. 18 U.S.C.A. § 2D1.1 (Supp. 1994). With a 3-level adjustment for acceptance of responsibility and a 4-level adjustment for being a minimal participant, a defendant would have a total level of 19, which carries a range of 30-37 months for a person with no criminal history. 18 U.S.C.A. §§ 3E1.1, 3B1.2, 5A (Supp. 1994).

85. 18 U.S.C. § 3553(e) (1988). In addition, the 1994 Crime Bill eliminated mandatory minimums for a narrow class of defendants who satisfy the following requirements: (1) minimal criminal history; (2) no use or threat of violence or of a dangerous weapon; (3) no resulting death or serious bodily injury; (4) no management role in the offense; and (5) provision of truthful information and evidence to the government. 18 U.S.C. § 3553(f) (1994).
he can possibly do, even before a lenient judge. If he is charged with narcotics trafficking, he is in an even worse position because even relatively small amounts of drugs can trigger onerous mandatory minimum sentences. In all events, the sentences will be without parole. The prospective witness will then hear, from both his attorney and the prosecutor, that the only way out of that position on the chart is to cooperate with the government. Especially in investigations involving murder or large amounts of narcotics, in which the guideline ranges are very high, the inducement is enormously powerful. It has produced far more cooperation and accomplice testimony in organized crime cases than occurred in the pre-Guidelines era.

In effect, the Sentencing Guidelines have added a new dimension to the federal effort to combat enterprise crime: plea or cooperation bargaining as an investigative tool. Many investigations reach a point where further progress requires helpful information from one of the targets. The investigative team selects a prospective cooperator, based on a variety of factors, including the strength of the case against him, an assessment of his ability to endure a lengthy prison term, and the degree of credibility-damaging baggage he would bring to the witness stand. The prosecution then offers the prospect the opportunity to plead guilty, typically to the most serious offense he has committed, and to testify for the government in exchange for a "substantial assistance motion." This motion is the witness's only means of escape from the mandatory guideline sentence. The negotiation is done as secretly as possible, so that the opportunity is preserved for the witness to cooperate proactively by wearing a "wire" among the rest of the targets. Even if the cooperation is only historical, as is usually the case in organized crime investigations, the information that the new witness provides is often the key to a successful investigation, and the cooperation is usually the direct result of the incentives created by the Sentencing Guidelines.

A final respect in which the federal sentencing regime empowers prosecutors is superficially paradoxical. While federal law conditions leniency on prosecutorial initiative, it allows the prosecutor to delegate to the court the task of determining the degree of leniency. The

86. For example, if the defendant was involved in the importation of 20 kilograms of cocaine, had a managerial role in the organization, and possessed a weapon in connection with the offense, his guideline range would be at least 262-327 months. 18 U.S.C.A. §§ 2D1.1, 3B1.1, 2K2.1, 5a (Supp. 1994). Murder, of course, results in the highest guideline range—life imprisonment without parole. 18 U.S.C.A. §§ 2A1.2, 5A (Supp. 1994).
distinction is critical to the credibility of the accomplice witnesses on whom most organized crime prosecutions depend.

Of course, a federal prosecutor can confer leniency directly. For example, the prosecutor can agree not to charge a cooperating witness or even to grant immunity to that witness. The prosecutor can also control sentencing by charge bargaining. A major narcotics trafficker, for example, could be charged with only a four-year “telephone count”—using a telephone to facilitate a drug deal. The effect would be to restrict judicial discretion to the small range of penalties authorized for that offense. A third way for prosecutors to control sentencing is to agree that a specific sentence will be imposed after the accomplice’s testimony, although such agreements require court approval.

All these options raise a common problem. When the accomplice testifies, the jury learns that he will receive lenient treatment and that the terms of that leniency have been set by an interested party—the government. That fact bolsters the standard defense argument that the accomplice’s willingness to testify in exchange for the prosecutor’s leniency makes him an unreliable witness.

To avoid—or at least to minimize—this difficulty, the most common plea agreement in organized crime cases requires the witness to plead guilty to his most serious crime, even if it carries a sentence of life imprisonment. In return, the accomplice gets only a “substantial assistance” motion and a report to the court of the nature and value of the cooperation rendered. This agreement allows the prosecutor to argue to the jury that any leniency the witness receives will come from the court, which has no stake in the outcome and which will be lenient only if justice so requires. When, as is often true, the accomplice has pleaded guilty to participation in a murder, the prosecutor can say to the jury that if the witness spends one day less than the rest of his life in prison, it will be because the court, not the prosecutor, thought that the right result. Why should the jury not listen to what the accomplice has to say?

Moreover, this argument is not merely a talking point for the jury. It also has substance. The accomplice ordinarily will be sentenced by the judge who hears his testimony. Judges are presumably concerned about the truthfulness of the accomplice’s testimony, not

88. FED. R. CRIM. P. 11(e)(1)(C).
89. FED. R. CRIM. P. 11(e)(2).
its effectiveness. The result channels the accomplice’s selfish motives into a desire to tell the truth.

Obviously, the scheme collapses if judges do not—or are not known to—reward cooperation. In fact, judges do reward cooperation, sometimes very generously.90 By creating a system in which the prosecutor alone can make an accomplice witness eligible for leniency, but in which the terms of that leniency are determined afterward by the court, Congress has vastly strengthened the hands of federal prosecutors in dealing with organized crime.

The results have been impressive. As one district judge who has presided over a series of organized crime cases in recent years has observed:

Discipline [within the Mafia] has eroded in recent years... Perhaps most significantly, the code of silence that sealed the mobs off from penetration by law enforcement, is dissolving. Members now frequently testify against their associates. For example, at the trials of these defendants, the juries learned about the operations of La Cosa Nostra from members of the Colombo family itself, from the former acting boss of the Luchese family and from the former consigliere of the Gambino family.91

The court went on to laud the accomplishments of organized crime investigators: “The increased numbers of members of gangs willing to testify and the deterioration in the quality of their leadership and membership does show the utility and efficiency of the tenacious and sometimes brilliant work of law enforcement agencies.”92 Perhaps these investigators are as tenacious and as brilliant as is alleged, but much of the credit for their success goes to the effect of the Sentencing Guidelines.

In this respect more than any other, the Sentencing Guidelines are the envy of state and local prosecutors. For various reasons, state

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90. Salvatore Gravano is a prominent example. Gravano was arrested for various crimes, including three murders. From the prosecution, he received a 20-year “cap” on his sentence pursuant to Federal Rule of Criminal Procedure 11(e)(1)(C). After three years of cooperation, during which Gravano admitted his participation in sixteen additional murders and assisted in the prosecution of more than three dozen Mafia figures and union officials, he received a sentence of five years. United States v. Gravano, 90 CR 1051 (S-2) (ILG) (E.D.N.Y. Sept. 26, 1994). See also United States v. Ross, 719 F.2d 615, 623 (2d Cir. 1983) (Friendly, J., concurring and dissenting) (noting that a court’s ability to offer leniency in return for cooperation is an indispensable tool of law enforcement); United States v. Milken, No. 89-CR41, 1992 U.S. Dist. LEXIS 11670, at *8 (S.D.N.Y. 1992) (conceding the inequity inherent in the fact “that the worst criminals usually benefit most from cooperation,” but stating that “if society did not reward [such] cooperation... many serious crimes would be undetected [and] unpunished”).


92. Id. at 875.
systems do not create the same incentive to cooperate. The chief reason is that the control over sentencing given by the Sentencing Guidelines to federal prosecutors, about which some federal judges have complained vehemently,93 has not been vested in state prosecutors. Also, contrary to the federal system, in which the judge is forbidden from participating in plea negotiations,94 state court judges may take an active role in plea discussions.95 Moreover, state judges often have interests that are different from those of the prosecutor and even from those of a federal judge hearing the same type of case. Specifically, state courts tend to have bone-crushing caseloads, and docket management becomes an overwhelming concern. Where the prosecutor may want to demand cooperation in exchange for a lenient sentence, the court may, quite understandably, be more interested in simply getting the case off its docket.

Consequently state prosecutors in enterprise crime investigations threaten to bring their evidence against the prospective witness to the United States Attorney, where the rigors of the Sentencing Guidelines cannot be avoided without cooperation. Even more frequently, and despite the district attorneys’ desire to prosecute high-profile cases themselves, state investigators and prosecutors are teaming up with federal authorities for the express purpose of bringing organized crime cases in the prosecution-friendly arena of federal court. In one recent case, the court noted that the successes combating traditional organized crime families are the result of the “unrelenting pressure of hundreds of talented city, state, and federal investigators over many years.”96 Indeed, joint federal and state task forces are now the rule,

93. See, e.g., United States v. Harrington, 947 F.2d 956, 963-70 (D.C. Cir. 1991) (Edwards, J., concurring). Judge Edwards laments that the Guidelines have “placed enormous power in the hands of the AUSA, effectively ‘replacing judicial discretion over sentencing with prosecutorial discretion.’” Id. at 964 (quoting United States v. Kikumura, 918 F.2d 1084, 1119 (3d Cir. 1990) (Rosenn, J., concurring). Of particular concern to him and some other judges is the fact that the key to the “substantial assistance” escape from the Guidelines has been taken from the judges and given to the prosecutors: “One wonders whether the guidelines, in transferring discretion from the district judge to the prosecutor, have not left the fox guarding the chicken coop of sentencing uniformity.” Id. at 965 n.5.
94. FED. R. CRIM. P. 11(e)(1).
95. A state judge may participate in the plea bargaining as long as that participation does not undermine voluntariness. See, e.g., Frank v. Blackburn, 646 F.2d 873, 883, 887 (5th Cir. 1980) (en banc) (imposing 33-year sentence on defendant to whom judge had offered a 20-year sentence for pleading guilty held to be insufficient evidence of judicial vindictiveness). But see Longval v. Meachum, 693 F.2d 236, 238 (1st Cir. 1982) (vacating sentence when judge made an unsolicited midtrial suggestion that the defendant consider a plea, and then gave the uncooperative defendant a sentence 37-47 years longer than that imposed on a plea-bargained codefendant).
rather than the exception, in the investigation of all forms of organized crime, and the prosecutions resulting from those joint efforts are virtually always brought in federal court.

Conclusion

The most distinctive feature of federal criminal law is that it has evolved piecemeal, with overlapping and often inconsistent statutes passed at different times in response to different national concerns. The 1994 Crime Bill continues this ad hoc expansion of federal criminal law to embrace common misbehaviors that traditionally were the exclusive province of state and local authorities. Perhaps because of the patchwork quality of federal criminal legislation, there is too little recognition of its comprehensiveness. For all practical purposes, most crime has been "federalized" for some time, and the recent additions to the federal criminal code are merely the latest in a long trend. Whether desirable or not, the federalization of the substantive criminal law is largely an accomplished fact.

It follows that real debate should shift to the resources and priorities of federal prosecutors. With legislation covering virtually any crime they might plausibly wish to prosecute, federal prosecutors pick their targets and marshal their resources, not in response to the limitations of the substantive law but according to their own priorities and agendas. Informed debate should focus, therefore, squarely on the federal prosecutive function.

In this Article, we have tried to identify features of federal law and practice that should—and do—influence the decisions of federal prosecutors. The ability to use uncorroborated accomplice testimony in federal court counsels in favor of bringing the types of cases that typically are based on historical accounts of continuing criminal activity. The ability to use the powers of the federal grand jury, unburdened by a no-hearsay rule, suggests that the grand jury be integrated into long-term investigations. The ability to demand testimony in exchange for use-and-derivative-use immunity is most important when immunized witnesses are crucial—even when immunized witnesses will not tell the truth. And the cooperation incentives created by the

Sentencing Guidelines are most useful when deployed to strip away the code of silence that characterizes organized crime.

These aspects of federal law help explain the enormous successes that federal prosecutors have achieved in RICO prosecutions of organized crime. Other features of the federal system—including pre-trial detention for dangerousness, the Witness Security Program, federal forfeiture statutes, and differences in evidentiary requirements—also contribute. This focus is chiefly descriptive, but it also has normative implications. Federal prosecutors are peculiarly well equipped to combat organized crime. In our view, this is precisely what they should be doing.