TASK FORCE REPORT:

ORGANIZED CRIME

ANNOTATIONS AND CONSULTANTS' PAPERS

148306

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Task Force on Organized Crime

THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE

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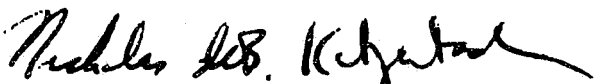
FOREWORD

In February of this year the President's Commission on Law Enforcement and Administration of Justice issued its general report, "The Challenge of Crime in a Free Society." As noted in the foreword to that report, the Commission's work was a joint undertaking, involving the collaboration of Federal, State, local, and private agencies and groups, hundreds of expert consultants and advisers, and the Commission's own staff. The Organized Crime Task Force received extensive material describing organized crime activities throughout the Nation from the Organized Crime and Racketeering Section and the Federal Bureau of Investigation in the United States Department of Justice; and the Secret Service, Internal Revenue Service, and the Bureau of Narcotics in the Treasury Department. In addition, information and material were made available by the New York City, Chicago, and Los Angeles Police Departments and the crime commissions of New York, Illinois, Chicago, and New Orleans. We are grateful for the cooperation extended to us by these organizations and agencies.

Chapter 7 of the Commission's report made findings and recommendations relating to the organized crime problems facing the Nation. That chapter is reprinted as the first part of this volume, with the addition of annotations to indicate source materials and to elaborate on statements contained in the chapter.

In addition, this volume contains four of the papers submitted to the Commission by outside consultants. Some material from these papers was used as background documentation in the preparation of the volume, and they are believed to be of interest and value as source material. However, the inclusion of these papers does not indicate endorsement by the panel of Commission members or by the staff of the positions or findings of the authors of these papers.

The Commission is deeply grateful for the talent and dedication of its staff and for the unstinting assistance and advice of consultants, advisers, and collaborating agencies whose efforts are reflected in this volume.



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CONTENTS

*This section of the report is an annotated version of the chapter on organized crime appearing in the Commission's general report, "The Challenge of Crime in a Free Society."

TABLE OF RECOMMENDATIONS

This Table of Recommendations is reprinted from the general report of the Commission, "The Challenge of Crime in a Free Society." It lists the Commission's recommendations on organized crime and shows where in this volume each is treated in more detail.

Proof of Criminal Violations

Investigation and Prosecution Units

Crime Investigating Commissions

Noncriminal Controls

Organized Crime

ORGANIZED CRIME is a society that seeks to operate outside the control of the American people and their governments. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits.[1]

The core of organized crime activity is the supplying of illegal goods and services—gambling, loan sharking, narcotics, and other forms of vice—to countless numbers of citizen customers.[2] But organized crime is also extensively and deeply involved in legitimate business and in labor unions.[3] Here it employs illegitimate methods—monopolization, terrorism, extortion, tax evasion—to drive out or control lawful ownership and leadership and to exact illegal profits from the public.[4] And to carry on its many activities secure from governmental interference, organized crime corrupts public officials.[5]

Former Attorney General Robert F. Kennedy illustrated its power simply and vividly. He testified before a Senate subcommittee in 1963 that the physical protection of witnesses who had cooperated with the Federal Government in organized crime cases often required that those witnesses change their appearances, change their names, or even leave the country.[6] When the government of a powerful country is unable to protect its friends from its enemies by means less extreme than obliterating their identities surely it is being seriously challenged, if not threatened.

What organized crime wants is money and power. What makes it different from law-abiding organizations and individuals with those same objectives is that the ethical and moral standards the criminals adhere to, the laws and regulations they obey, the procedures they use are private and secret ones that they devise themselves, change when they see fit, and administer summarily and invisibly. Organized crime affects the lives of millions of Americans, but because it desperately preserves its invisibility many, perhaps most, Americans are not aware how they are affected, or even that they are affected at all. The price of a loaf of bread may go up one cent as the result of an organized crime conspiracy, but a housewife has no way of knowing why she is paying more.[7] If organized criminals paid income tax on every cent of their vast earnings everybody's tax bill would go down, but no one knows how much.[8]

But to discuss the impact of organized crime in terms of whatever direct, personal, everyday effect it has on individuals is to miss most of the point. Most individuals are not affected, in this sense, very much. Much of the money organized crime accumulates comes from innumerable petty transactions: [9] 50-cent bets, $3-a-month private garbage collection services, quarters dropped into racketeer-owned jukeboxes, or small price rises resulting from protection rackets. A one-cent-a-loaf rise in bread may annoy housewives, but it certainly does not impoverish them.

Sometimes organized crime's activities do not directly affect individuals at all. Smuggled cigarettes in a vending machine cost consumers no more than tax-paid cigarettes, but they enrich the leaders of organized crime. Sometimes these activities actually reduce prices for a short period of time, as can happen when organized crime, in an attempt to take over an industry, starts a price war against legitimate businessmen. Even when organized crime engages in a large transaction, individuals may not be directly affected. A large sum of money may be diverted from a union pension fund to finance a

[1] The Kefauver committee found that:

"1. There is a Nation-wide crime syndicate known as the Mafia, whose tentacles are found in many large cities. It has international ramifications which appear most clearly in connection with the narcotics traffic.

"2. Its leaders are usually found in control of the most lucrative rackets in their cities.

"3. There are indications of a centralized direction and control of these rackets, but leadership appears to be in a group rather than in a single individual.

"4. The Mafia is the cement that helps to bind the Costello-Adonis-Lansky syndicate of New York and the Accardo-Guzik-Fischetti syndicate of Chicago as well as smaller criminal gangs and individual criminals throughout the country. These groups have kept in touch with Luciano since his deportation from this country.

"5. The domination of the Mafia is based fundamentally on 'muscle' and 'murder.' The Mafia is a secret conspiracy against law and order which will ruthlessly eliminate anyone who stands in the way of its success in any criminal enterprise in which it is interested. It will destroy anyone who betrays its secrets. It will use any means available—political influence, bribery, intimidation, etc., to defeat any attempt on the part of law-enforcement to touch its top figures or to interfere with its operations."

Sen. Special Comm. to Investigate Organized Crime in Interstate Commerce [hereinafter cited as Kefauver Comm.], *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 150 (1951). See also OFFICE OF THE N.Y. COUNSEL TO THE GOVERNOR, COMBATING ORGANIZED CRIME—A REPORT OF THE 1965 OYSTER BAY, NEW YORK, CONFERENCES ON COMBATING ORGANIZED CRIME (1966).

[2] Johnson, *Organized Crime: Challenge to the American Legal System* (pts. 1-3), 53 J. CRIM. L., C. & P.S. 399, 402-04 (1962), 54 J. CRIM. L., & P.S. 1, 127 (1963).

[3] See generally Sen. Select Comm. on Improper Activities in the Labor or Management Field [hereinafter cited as McClellan, Labor-Mgt. Reps.], *1st Interim Rep.*, S. REP. NO. 1417, 85th Cong., 2d Sess. (1958), *2d Interim Rep.* (pts. 1 & 2), S. REP. NO. 621, 86th Cong., 1st Sess. (1959), *Final Rep.* (pts. 1-4), S. REP. NO. 1139, 86th Cong., 2d Sess. (1960), *Index to Reports*, 86th Cong., 2d Sess. (1960).

[4] "A gangster or racketeer in a legitimate business does not suddenly become respectable. . . . [E]vidence was produced before the committee concerning the use of unscrupulous and discriminatory business practices, extortion, bombing and other forms of violence to eliminate competitors and to compel customers to take articles sold by the mobsters." Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 170 (1951).

[5] Johnson, *supra* note 2, at 412-14, 419-22; Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 181-86 (1951).

[6] *Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations* [hereinafter cited as McClellan, *Narcotics Hearings*], 88th Cong., 1st Sess., pt. 1, at 25 (1963).

[7] Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 170-71 (1951): "There can be little doubt that the public suffers from gangster penetration into legitimate business. It suffers because higher prices must be paid for articles and services which it must buy . . . The public suffers because it may have to put up with shoddy and inferior merchandise in fields where gangsters have been able to obtain a monopoly."

[8] One indication of the amount of tax revenue lost is found in the testimony of Comm'r of Internal Revenue Sheldon S. Cohen before the Senate Subcommittee on Administrative Practice and Procedure on July 13, 1965. He stated that during the period between February 1961 and March 13, 1965, more than $219 million in taxes and penalties had been recommended for assessment against subjects of the Federal organized crime drive. *Hearings Before the Subcomm. on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary* [hereinafter cited as *Long Comm. Hearings*], 89th Cong., 1st Sess., pt. 3, at 1119 (1965).

[9] See generally McClellan, Labor-Mgt. Reps., *Final Rep.*, S. REP. NO. 1139, 86th Cong., 2d Sess., pt. 4 (1960).

business venture without immediate and direct effect upon the individual members of the union.[10]

It is organized crime's accumulation of money, not the individual transactions by which the money is accumulated, that has a great and threatening impact on America. A quarter in a jukebox means nothing and results in nothing. But millions of quarters in thousands of jukeboxes can provide both a strong motive for murder and the means to commit murder with impunity.[11] Organized crime exists by virtue of the power it purchases with its money. The millions of dollars it can invest in narcotics or use for layoff money give it power over the lives of thousands of people and over the quality of life in whole neighborhoods.[12] The millions of dollars it can throw into the legitimate economic system give it power to manipulate the price of shares on the stock market,[13] to raise or lower the price of retail merchandise, to determine whether entire industries are union or nonunion, to make it easier or harder for businessmen to continue in business.[14]

The millions of dollars it can spend on corrupting public officials may give it power to maim or murder people inside or outside the organization with impunity; to extort money from businessmen; to conduct businesses in such fields as liquor, meat, or drugs without regard to administrative regulations; to avoid payment of income taxes or to secure public works contracts without competitive bidding.[15]

The purpose of organized crime is not competition with visible, legal government but nullification of it. When organized crime places an official in public office, it nullifies the political process. When it bribes a police official, it nullifies law enforcement.

There is another, more subtle way in which organized crime has an impact on American life. Consider the former way of life of Frank Costello, a man who has repeatedly been called a leader of organized crime. He lived in an expensive apartment on the corner of 72d Street and Central Park West in New York. He was often seen dining in well-known restaurants in the company of judges, public officials, and prominent businessmen. Every morning he was shaved in the barbershop of the Waldorf Astoria Hotel. On many weekends he played golf at a country club on the fashionable North Shore of Long Island. In short, though his reputation was common knowledge, he moved around New York conspicuously and unashamedly, perhaps ostracized by some people but more often accepted, greeted by journalists, recognized by children, accorded all the freedoms of a prosperous and successful man. On a society that treats such a man in such a manner, organized crime has had an impact.

And yet the public remains indifferent. Few Americans seem to comprehend how the phenomenon of organized crime affects their lives. They do not see how gambling with bookmakers, or borrowing money from loan sharks, forwards the interests of great criminal cartels.[16] Businessmen looking for labor harmony or nonunion status through irregular channels rationalize away any suspicions that organized crime is thereby spreading its influence. When an ambitious political candidate accepts substantial cash contributions from unknown sources, he suspects but dismisses the fact that organized crime will dictate some of his actions when he assumes office.[17]

President Johnson asked the Commission to determine why organized crime has been expanding despite the Nation's best efforts to prevent it. The Commission drew upon the small group of enforcement personnel and other knowledgeable persons who deal with organized crime. Federal agencies provided extensive material. But because so little study and research have been done in this field, we also secured the assistance of sociologists, systems analysts, political scientists, economists, and lawyers.[18] America's limited response to organized crime is illustrated by the fact that, for several of these disciplines, our call for assistance resulted in their first concentrated examination of organized crime.

THE TYPES OF ORGANIZED CRIMINAL ACTIVITIES

CATERING TO PUBLIC DEMANDS

Organized criminal groups participate in any illegal activity that offers maximum profit at minimum risk of law enforcement interference. They offer goods and services that millions of Americans desire even though declared illegal by their legislatures.

Gambling[19] Law enforcement officials agree almost unanimously that gambling is the greatest source of revenue for organized crime.[20] It ranges from lotteries, such as "numbers" or "bolita," to off-track horse betting, bets on sporting events, large dice games and illegal casinos. In large cities where organized criminal groups exist, very few of the gambling operators are independent of a large organization.[21] Anyone whose independent operation becomes successful is likely to receive a visit from an organization representative who convinces the independent, through fear or promise of greater profit, to share his revenue with the organization.[22]

Most large-city gambling is established or controlled by organized crime members through elaborate hierarchies.[23] Money is filtered from the small operator who takes the customer's bet, through persons who pick up

[10] Such bootlegging activities cost the city and State of New York about $40 million a year in lost tax revenues. N.Y. Times, Feb. 2, 1967, p. 21.
For a discussion of the problems of cigarette smuggling in New York State, see Weintraub, A Report on Bootlegging of Cigarettes in the City and State of New York, Jan. 1966 (prepared for Cigarette Merchandisers Ass'n, Inc., New York, N.Y.); Weintraub & Kaufman, Bootlegged Cigarettes, Jan. 1967 (prepared for Wholesale Tobacco Distributors of New York, Inc., New York, N.Y.). See also Weintraub, The Bootlegging of Cigarettes Is a National Problem, Oct. 1966 (prepared for Wholesale Tobacco Distributors of New York, Inc., New York, N.Y.).

[11] Peterson, *Chicago: Shades of Capone*, Annals, May 1963, p. 30.

[12] Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 171 (1951).

[13] See Lefkowitz. *New York: Criminal Infiltration of the Securities Industry*, Annals, May 1963, p. 51. See also excerpt from Porter, *On Wall Street*, N.Y. Post, Aug. 3–7, 1959, in ORGANIZED CRIME IN AMERICA 298 (Tyler ed. 1962).

[14] Johnson, *supra* note 2, at 406.

[15] Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 30–144 (1951).

[16] See generally COOK, THE TWO DOLLAR BET MEANS MURDER (1961).

[17] For an excellent discussion of the influences of underworld money in politics, see HEARD, THE COSTS OF DEMOCRACY 154–68 (1960).

[18] Selected papers of Commission consultants appear in the appendices to this volume.

[19] See generally Permanent Subcomm. on Investigations of the Sen. Comm. on Gov't Operations, *Gambling and Organized Crime* [hereinafter cited as McClellan, *Gambling Rep.*], S. REP. NO. 1310, 87th Cong., 2d Sess. (1962). See also N.Y. TEMPORARY COMM'N OF INVESTIGATION, SYNDICATED GAMBLING IN NEW YORK STATE (1961).

[20] "Gambling is the principle source of income for organized criminal gangs in the country." Kefauver Comm., *2d Interim Rep.*, S. REP. NO. 141, 82d Cong., 1st Sess. 11 (1951).
"According to major Federal, state and local law enforcement officials who have made studies and who are known to the subcommittee staff, organized crime in the United States is primarily dependent upon illicit gambling, a multibillion dollar market, for the necessary funds required to operate other criminal and illegal activities or enterprises." McClellan, *Gambling Rep.*, S. REP. NO. 1310, 87th Cong., 2d Sess. 43 (1962).

[21] Information submitted to Commission by a Federal agency.

[22] Statement by then Deputy Inspector Arthur C. Grubert, New York City Police Dep't, In-Service Training Program, Apr. 19, 1965, New York, N.Y.

[23] "Number gambling follows the general pattern of organization of all large scale vice and crime. This pattern consists of four basic elements: (1) an

money and slips, to second-echelon figures in charge of particular districts, and then into one of several main offices.[24] The profits that eventually accrue to organization leaders move through channels so complex that even persons who work in the betting operation do not know or cannot prove the identity of the leader. Increasing use of the telephone for lottery and sports betting has facilitated systems in which the bookmaker may not know the identity of the second-echelon person to whom he calls in the day's bets. Organization not only creates greater efficiency and enlarges markets,[25] it also provides a systematized method of corrupting the law enforcement process by centralizing procedures for the payment of graft.[26]

Organization is also necessary to prevent severe losses. More money may be bet on one horse or one number with a small operator than he could pay off if that horse or that number should win. The operator will have to hedge by betting some money himself on that horse or that number. This so-called "layoff" betting is accomplished through a network of local, regional, and national layoff men, who take bets from gambling operations.[27]

There is no accurate way of ascertaining organized crime's gross revenue from gambling in the United States. Estimates of the annual intake have varied from $7 to $50 billion.[28] Legal betting at racetracks reaches a gross annual figure of almost $5 billion, and most enforcement officials believe that illegal wagering on horse races, lotteries, and sporting events totals at least $20 billion each year. Analysis of organized criminal betting operations indicates that the profit is as high as one-third of gross revenue—or $6 to $7 billion each year. While the Commission cannot judge the accuracy of these figures, even the most conservative estimates place substantial capital in the hands of organized crime leaders.[29]

Loan Sharking.[30] In the view of most law enforcement officials loan sharking, the lending of money at higher rates than the legally prescribed limit, is the second largest source of revenue for organized crime.[31] Gambling profits provide the initial capital for loan-shark operations.[32]

No comprehensive analysis has ever been made of what kinds of customers loan sharks have, or of how much or how often each kind borrows. Enforcement officials and other investigators do have some information. Gamblers borrow to pay gambling losses;[33] narcotics users borrow to purchase heroin. Some small businessmen borrow from loan sharks when legitimate credit channels are closed.[34] The same men who take bets from employees in mass employment industries also serve at times as loan sharks, whose money enables the employees to pay off their gambling debts or meet household needs.[35]

Interest rates vary from 1 to 150 percent a week, according to the relationship between the lender and borrower, the intended use of the money, the size of the loan, and the repayment potential.[36] The classic "6-for-5" loan, 20 percent a week, is common with small borrowers. Payments may be due by a certain hour on a certain day, and even a few minutes' default may result in a rise in interest rates. The lender is more interested in perpetuating interest payments than collecting principal; and force, or threats of force of the most brutal kind, are used to effect interest collection, eliminate protest when interest rates are raised, and prevent the beleaguered borrower from reporting the activity to enforcement officials.[37] No reliable estimates exist of the gross revenue from organized loan sharking, but profit margins are higher than for gambling operations, and many officials classify the business in the multi-billion-dollar range.[38]

Narcotics.[39] The sale of narcotics is organized like a legitimate importing-wholesaling-retailing business. The distribution of heroin, for example, requires movement of the drug through four or five levels between the importer and the street peddler.[40] Many enforcement officials believe that the severity of mandatory Federal narcotics penalties has caused organized criminals to restrict their activities to importing and wholesale distributon.[41]

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elaborate hierarchical organization of personnel, (2) a spatial organization in which a wide territory is controlled from a central metropolitan area, (3) the 'fix,' in which public officials, principally police and politicians, are drawn into and made a part of the organization, (4) legal aid in which members of the legal profession become the advisors and consultants of the organization." Carlson, Numbers Gambling, A Study of a Culture Complex 68, 1940, unpublished Ph.D. dissertation, Univ. of Mich. Dep't of Sociology.

[24] It was reported, for example, that in Detroit there were almost 100 positions involved in the operation of one lottery enterprise. Bet slips were delivered by 50 "pick up" men to substations where they were tabulated. After a "bookkeeper" determined the winning slips, the proceeds were taken to a "section chief" who passed a portion up through the hierarchy. McClellan, *Narcotics Hearings*, 88th Cong., 1st Sess., pt. 2, at 460-62 (1963).

[25] In his statement to the Temporary Commission of Investigation of the State of New York on Apr. 22, 1960, Charles R. Thom, Comm'r of Police of Suffolk County (Eastern Long Island), N.Y., said: "The *advantages* of syndicate operation to the previously independent bookie included: (1) unlimited resources with absolute backing which eliminated the need to lay off, thus permmiting vast expansion, and the average bookie quickly discovered he was making a bigger net on a 50-50 basis than he formerly made when he controlled the entire operation; (2) New York City telephone numbers could be passed along to regular bettors and players, which made the bookie merely a collector of money, credited on the books of the syndicate through an efficient bookkeeping system, and adding the tremendous factor that use of telephones was thus changed, greatly reducing the efficiency of telephone taps; and (3) the syndicate agreed to provide 'stand-up men' where feasible." Mimeo. p. 2.

[26] "It is somewhat startling to learn that the syndicates are particularly happy with the consolidation of the nine police deparments into the Suffolk County Police Department, as they feel that protection is easier to arrange through one agency than through many. The intensive campaign against gamblers instituted by this Department commencing January 1st had the astounding side effect in solving the recruitment problem of the syndicate, as our drive successfully stampeded the independents into the arms of the syndicate for protection, and the syndicate can now pick and choose those operators which they wish to admit." *Ibid.*

[27] See Cressey, *The Functions and Structure of Criminal Syndicates*, Sept. 1966, at 35-36, printed as appendix A of this volume.

[28] "[G]ambling is the leading source of organization revenue, accounting for probably half of organization profits. It has been estimated that illegal gambling grosses from seven to twenty billion dollars annually." Johnson, *supra* note 2, at 402. For some estimates on the volume of illegal gambling, see *id.* at 402 n.22.

[29] "Gambling profits are the principal support of big-time racketeering and gangsterism. These profits provide the financial resources whereby ordinary criminals are converted into big-time racketeers, political bosses, pseudo businessmen, and alleged philanthropists." Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 2 (1951).

[30] For an excellent treatment of the subject in New York State, see N.Y. TEMPORARY COMM'N OF INVESTIGATION, THE LOAN SHARK RACKET (1965).

[31] "[S]hylocking . . . represents a substantial portion of the multibillion dollar take of organized crime." Johnson, *supra* note 2, at 403.

[32] Permanent Subcomm. on Investigations of the Sen. Comm. on Gov't Operations, *Organized Crime and Illicit Traffic in Narcotics* [hereinafter cited as McClellan, *Narcotics Rep.*], S. REP. NO. 72, 89th Cong., 1st Sess. 18 (1965); testimony of J. Edgar Hoover, *Hearings Before the Subcomm. on Dep'ts of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations of the House Comm. on Appropriations*, 89th Cong., 2d Sess. 272 (1966).

[33] In his statement to the Temporary Commission of Investigation of the State of New York on Apr. 22, 1960, Comm'r Charles R. Thom described how loan sharking provided the means for organizing previously independent bookmakers:

"Speaking generally, prior to 1958, professional gambling in Suffolk County was conducted primarily by independent operators. There was no known pattern of organized gambling beyond the usual facilities for laying off, and no reported rackets or collateral criminal activities.

"About two years ago, representatives of one or more syndicates began approaching these independent gambling operators with a view to incorporating them into syndicated operations. By and large, these independent gamblers refused to be so organized, and the syndicates withdrew their efforts without resort to rough tactics. The syndicates then commenced an insidious campaign of infiltration, wherein the principle M.O. was *finance*. With open pocketbook, the syndicate recruited a number of independent operators, by financing their operations until these bookies were hooked. Part of this system included the notorious 6 for 5 plus 5 per cent per week, which meant simply that they financed the bookies on the basis that the gambling operator had to return $6.00 for every $5.00 borrowed, plus the staggering interest of 5 per cent per week. It follows that a bookie who had a couple of bad weeks was completely hooked and fell under the control of the syndicate. Most of these independent bookies were small businessmen, including the typical barber, candy store operator and the like, without the financial resources to withstand this squeeze, which was effectively accomplished by the money men of the syndicate. Once hooked, the bookies now worked for the syndicate on a 50-50 basis."

[34] N.Y. TEMPORARY COMM'N OF INVESTIGATION, THE LOAN SHARK REPORT 45 (1965).

[35] Information submitted to Commission by a Federal agency.

[36] See McClellan, Labor-Mgt. Reps., *Final Rep.*, S. REP. NO. 1139, 86th Cong., 2d Sess., pt. 4, at 772 (1960).

[37] Information submitted to Commission by a Federal agency.

[38] N.Y. TEMPORARY COMM'N OF INVESTIGATION, THE LOAN SHARK REPORT 17 (1965).

[39] See generally McClellan, *Narcotics Hearings*, 88th Cong., 1st Sess., pts. 1 & 2 (1963), 1st & 2d Sess., pts. 3 & 4 (1963-64), 2d Sess., pt. 5 (1964). McClellan, *Narcotics Rep.*, S. REP. NO. 72, 89th Cong., 1st Sess. (1965).

[40] See Cressey, *supra* note 5, at 35.

[41] McClellan, *Narcotics Rep.*, S. REP. NO. 72, 89th Cong., 1st Sess. 120 (1965).

They stay away from smaller-scale wholesale transactions or dealing at the retail level. Transactions with addicts are handled by independent narcotics pushers using drugs imported by organized crime.[42]

The large amounts of cash and the international connections necessary for large, long-term heroin supplies can be provided only by organized crime. Conservative estimates of the number of addicts in the Nation and the average daily expenditure for heroin indicate that the gross heroin trade is $350 million annually,[43] of which $21 million are probably profits to the importer and distributor.[44] Most of this profit goes to organized crime groups in those few cities in which almost all heroin consumption occurs.

Other Goods and Services. Prostitution and bootlegging play a small and declining role in organized crime's operations.[45] Production of illegal alcohol is a risky business. The destruction of stills and supplies by law enforcement officers during the initial stages means the loss of heavy initial investment capital. Prostitution is difficult to organize and discipline is hard to maintain. Several important convictions of organized crime figures in prostitution cases in the 1930's and 1940's made the criminal executives wary of further participation.[46]

BUSINESS AND LABOR INTERESTS

Infiltration of Legitimate Business. A legitimate business enables the racket executive to acquire respectability in the community and to establish a source of funds that appears legal and upon which just enough taxes may be paid to avoid income tax prosecution.[47] Organized crime invests the profit it has made from illegal service activities in a variety of businesses throughout the country.[48] To succeed in such ventures, it uses accountants, attorneys, and business consultants, who in some instances work exclusively on its affairs.[49] Too often, because of the reciprocal benefits involved in organized crime's dealings with the business world, or because of fear, the legitimate sector of society helps the illegitimate sector.[50] The Illinois Crime Commission, after investigating one service industry in Chicago, stated:

There is a disturbing lack of interest on the part of some legitimate business concerns regarding the identity of the persons with whom they deal. This lackadaisical attitude is conducive to the perpetration of frauds and the infiltration and subversion of legitimate businesses by the organized criminal element.[51]

Because business ownership is so easily concealed, it is difficult to determine all the types of businesses that organized crime has penetrated.[52] Of the 75 or so racket leaders who met at Apalachin, N.Y., in 1957, at least 9 were in the coin-operated machine industry, 16 were in the garment industry, 10 owned grocery stores, 17 owned bars or restaurants, 11 were in the olive oil and cheese business, and 9 were in the construction business. Others were involved in automobile agencies, coal companies, entertainment, funeral homes, ownership of horses and race tracks, linen and laundry enterprises, trucking, waterfront activities, and bakeries.[53]

Today, the kinds of production and service industries and businesses that organized crime controls or has invested in range from accounting firms to yeast manufacturing. One criminal syndicate alone has real estate interests with an estimated value of $300 million.[54] In a few instances, racketeers control nationwide manufacturing and service industries with known and respected brand names.[55]

Control of business concerns has usually been acquired through one of four methods: (1) investing concealed profits acquired from gambling and other illegal activities; (2) accepting business interests in payment of the owner's gambling debts; (3) foreclosing on usurious loans; and (4) using various forms of extortion.[56]

Acquisition of legitimate businesses is also accomplished in more sophisticated ways. One organized crime group offered to lend money to a business on condition that a racketeer be appointed to the company's board of directors and that a nominee for the lenders be given first option to purchase if there were any outside sale of the company's stock.[57] Control of certain brokerage houses was secured through foreclosure of usurious loans, and the businesses then used to promote the sale of fraudulent stock, involving losses of more than $2 million to the public.[58]

Criminal groups also satisfy defaulted loans by taking over businesses, hiring professional arsonists to burn buildings and contents, and collecting on the fire insurance. Another tactic was illustrated in the recent bankruptcy of a meatpacking firm in which control was secured as payment for gambling debts. With the original owners remaining in nominal management positions, extensive product orders were placed through established lines of credit, and the goods were immediately sold at low prices before the suppliers were paid. The organized criminal group made a quick profit of three-quarters of a million dollars by pocketing the receipts from sale of the products ordered and placing the firm in bankruptcy without paying the suppliers.[59]

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[42] *Id.* at 121–22.
[43] *Id.* at 120.
[44] Information submitted to Commission by a Federal agency.
[45] "Gambling has supplanted prostitution and bootlegging as the chief source of revenue for organized crime. Before the First World War, the major profits of organized criminals were obtained from prostitution. The passage of the Mann White Slave Act, the changing sexual mores, and public opinion, combined to make commercialized prostitution a less profitable and more hazardous enterprise." Kefauver Comm., *2d Interim Rep.*, S. REP. NO. 141, 82d Cong., 1st Sess. 11 (1952).
For a recent investigation of commercialized prostitution, see N.Y. TEMPORARY COMM'N OF INVESTIGATION, AN INVESTIGATION OF LAW ENFORCEMENT IN BUFFALO (1961).
[46] People v. Luciano, 277 N.Y. 348, 14 N.E.2d 433, *cert. denied sub nom.*, Luciano v. New York, 305 U.S. 620 (1938). See also POWELL, NINETY TIMES GUILTY (1939), and for a brief description of Charles Luciano's role in organized crime, see excerpt from SONDERN, BROTHERHOOD OF EVIL (1959), in ORGANIZED CRIME IN AMERICA 302 (Tyler ed. 1962).
[47] See Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 170 (1951).
[48] "[C]riminals and racketeers are using the profits of organized crime to buy up and operate legitimate enterprises." Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 170 (1951).
[49] "Mobsters and racketeers have been assisted by some tax accountants and tax lawyers in defrauding the Government." *Id.* at 4.
[50] "In some instances legitimate businessmen have aided the interests of the underworld by awarding lucrative contracts to gangsters and mobsters in return for help in handling employees, defeating attempts at unionization, and in breaking strikes." *Id.* at 5.
[51] 1965 ILL. CRIME INVESTIGATING COMM'N REP. 11.
[52] "Using dummy fronts, the real owners of a business, the men who put up the money, never have to list themselves as owners or partners or as even being involved in any way in the business." Grutzner, *Mafia Steps Up Infiltration and Looting of Businesses*, N.Y. Times, Feb. 14, 1965, p. 1, col. 3, at 65, col. 1.
[53] McClellan, Labor-Mgt. Reps., *Final Rep.*, S. REP. NO. 1139, 86th Cong., 2d Sess., pt. 3, at 487–88 (1960). The report of the Kefauver Committee provides a discussion of the degree of infiltration into legitimate business, including a list of 50 types of business enterprises in which organized crime is involved. Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 170–81 (1951).
[54] Information submitted to Commission by a Federal agency.
[55] *Ibid.*
[56] *Ibid.*
[57] *Ibid.*
[58] *Ibid.* See also Grutzner, *supra* note 5, at 65, cols. 5–6.
[59] Id. cols. 1–3. *Hearings Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary*, 89th Cong., 2d Sess., at 204–06 (1966).

Too little is known about the effects on the economy of organized crime's entry into the business world, but the examples above indicate the harm done to the public [60] and at least suggest how criminal cartels can undermine free competition.[61] The ordinary businessman is hard pressed to compete with a syndicate enterprise. From its gambling and other illegal revenue—on most of which no taxes are paid—the criminal group always has a ready source of cash with which to enter any business. Through union connections, the business run by organized crime either prevents unionization or secures "sweetheart" contracts from existing unions.[62] These tactics are used effectively in combination. In one city, organized crime gained a monopoly in garbage collection by preserving the business's nonunion status and by using cash reserves to offset temporary losses incurred when the criminal group lowered prices to drive competitors out of business.[63]

Strong-arm tactics are used to enforce unfair business policy and to obtain customers.[64] A restaurant chain controlled by organized crime used the guise of "quality control" to insure that individual restaurant franchise holders bought products only from other syndicate-owned businesses. In one city, every business with a particular kind of waste product useful in another line of industry sold that product to a syndicate-controlled business at one-third the price offered by legitimate business.

The cumulative effect of the infiltration of legitimate business in America cannot be measured.[65] Law enforcement officials agree that entry into legitimate business is continually increasing and that it has not decreased organized crime's control over gambling, usury and other profitable, low-risk criminal enterprises.

Labor Racketeering.[66] Control of labor supply and infiltration of labor unions by organized crime prevent unionization of some industries, provide opportunities for stealing from union funds and extorting money by threats of possible labor strife, and provide funds from the enormous union pension and welfare systems for business ventures controlled by organized criminals. Union control also may enhance other illegal activities. Trucking, construction, and waterfront shipping entrepreneurs, in return for assurance that business operations will not be interrupted by labor discord, countenance gambling, loan sharking, and pilferage on company property. Organized criminals either direct these activities or grant "concessions" to others in return for a percentage of the profits.

Some of organized crime's effects on labor union affairs, particularly in the abuse of pension and welfare funds, were disclosed in investigations by Senator John McClellan's committee. In one case, almost immediately after receiving a license as an insurance broker, the son of a major organized crime figure in New York City was chosen as the broker for a number of such funds, with significant commissions to be earned and made available for distribution to "silent partners." The youthful broker's only explanation for his success was that he had advertised in the classified telephone directory.[67]

In New York City, early in 1966, the head of one organized crime group was revealed to be a partner in a labor relations consulting firm. One client of the firm, a nationally prominent builder, said he did not oppose unions but that better and cheaper houses could be built without them. The question of why a legitimate businessman would seek the services of an untrained consultant with a criminal record to handle his labor relations was not answered.

LOCATION OF ORGANIZED CRIME ACTIVITIES

Organized criminal groups are known to operate in all sections of the Nation. In response to a Commission survey of 71 cities, the police departments in 80 percent of the cities with over 1 million residents, in 20 percent of the cities with a population between one-half million and a million, in 20 percent of the cities with between 250,000 and 500,000 population, and in over 50 percent of the cities between 100,000 and 250,000, indicated that organized criminal groups exist in their cities. In some instances Federal agency intelligence indicated the presence of organized crime where local reports denied it.[68] Of the nine cities not responding to the Commission survey,[69] six are known to Federal agencies to have extensive organized crime problems.[70] Where the existence of organized crime was acknowledged, all police departments indicated that the criminal group would continue even though a top leader died or was incarcerated.

Organized crime in small cities is more difficult to assess. Law enforcement personnel are aware of many instances in which local racket figures controlled crime in a smaller city and received aid from and paid tribute to organized criminal groups located in a nearby large city. In one Eastern town, for example, the local racket figure combined with outside organized criminal groups to establish horse and numbers gambling grossing $1.3 million annually, an organized dice game drawing customers from four states and having an employee payroll of $350,000 annually, and a still capable of producing $4 million worth of alcohol each year. The town's population was less than 100,000.[71] Organized crime cannot be seen as merely a big-city problem.

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[60] "There can be little doubt that the public suffers from gangster penetration into legitimate business. It suffers because higher prices must be paid for articles and services which it must buy. . . . The public suffers because it may have to put up with shoddy and inferior merchandise in fields where gangsters have been able to obtain a monopoly." Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 170–71 (1951).

[61] See Johnson, *Organized Crime: Challenge to the American Legal System* (pt. 1), 53 J. CRIM. L., C. & P.S. 399, 406–07.

[62] See generally McClellan, Labor-Mgt. Reps., *1st Interim Rep.*, S. REP. NO. 1417, 85th Cong., 2d Sess. (1958), *2d Interim Rep.* (pts. 1 & 2), S. REP. NO. 621, 86th Cong., 1st Sess. (1959), *Final Rep.* (pts. 1–4), S. REP. NO. 1139, 86th Cong., 2d Sess. (1960).

[63] Information submitted to Commission by a Federal agency.

[64] "When organized crime embarks on a venture in legitimate business it ordinarily brings to that venture all the techniques of violence and intimidation which are employed in its illegal enterprises." Johnson, *Organized Crime: Challenge to the American Legal System* (pt. 1), 53 J. CRIM. L., C. & P.S. 399, 402–04 (1963).

[65] For a discussion of the criminal infiltration of legitimate activities, see Woetzel, *An Overview of Organized Crime: Mores versus Morality*, Annals, May 1963, pp. 1, 6–7. For an excellent discussion of criminal infiltration into business in Chicago, see Peterson, *Chicago: Shades of Capone*, Annals, May 1963, pp. 30, 32–39.

[66] For a detailed examination of labor racketeering, see McClellan, Labor-Mgt. Reps., *1st Interim Rep.*, S. REP. NO. 1417, 85th Cong., 2d Sess. (1958), *2d Interim Rep.* (pts. 1 & 2), S. REP. NO. 621, 86th Cong., 1st Sess. (1959), *Final Rep.* (pts. 1–4), S. REP. NO. 1139, 86th Cong., 2d Sess. (1960).

[67] Interview with James P. Kelly, former investigator for Sen. Select Comm. on Improper Activities in the Labor or Management Field, Nov. 23, 1966.

[68] Information submitted to Commission by a Federal agency. The Kefauver Committee encountered similar inconsistencies in responses of certain local law enforcement officials: "Whether out of ignorance or indolence is not clear, but some local authorities insisted, orally and in writing, that there was no organized crime in their jurisdiction, although the subsequent testimony proved them pathetically in error" Kefauver Comm., *2d Interim Rep.*, S. REP. NO. 141, 82d Cong., 1st Sess. 7 (1951).

[69] Buffalo, N.Y.; Flint, Mich., Kansas City, Kans.; Milwaukee, Wis.; Mobile, Ala.; Nashville, Tenn.; New Orleans, La.; Oakland, Calif.; Youngstown, Ohio.

[70] Information submitted to Commission by a Federal agency.

[71] *Ibid.*

CORRUPTION OF THE ENFORCEMENT AND POLITICAL SYSTEMS [72]

Today's corruption is less visible, more subtle, and therefore more difficult to detect and assess than the corruption of the prohibition era. All available data indicate that organized crime flourishes only where it has corrupted local officials.[73] As the scope and variety of organized crime's activities have expanded, its need to involve public officials at every level of local government has grown. And as government regulation expands into more and more areas of private and business activity, the power to corrupt likewise affords the corrupter more control over matters affecting the everyday life of each citizen.

Contrast, for example, the way governmental action in contract procurement or zoning functions today with the way it functioned only a few years ago. The potential harm of corruption is greater today if only because the scope of governmental activity is greater. In different places at different times, organized crime has corrupted police officials, prosecutors, legislators, judges, regulatory agency officials, mayors, councilmen, and other public officials, whose legitimate exercise of duties would block organized crime and whose illegal exercise of duties helps it.[74]

Neutralizing local law enforcement is central to organized crime's operations. What can the public do if no one investigates the investigators, and the political figures are neutralized by their alliance with organized crime? Anyone reporting corrupt activities may merely be telling his story to the corrupted; in a recent "investigation" of widespread corruption, the prosecutor announced that any citizen coming forward with evidence of payments to public officials to secure government action would be prosecuted for participating in such unlawful conduct.

In recent years some local governments have been dominated by criminal groups. Today, no large city is completely controlled by organized crime, but in many there is a considerable degree of corruption.[75]

Organized crime currently is directing its efforts to corrupt law enforcement at the chief or at least middle-level supervisory officials. The corrupt political executive who ties the hands of police officials who want to act against organized crime is even more effective for organized crime's purposes.[76] To secure political power organized crime tries by bribes or political contributions to corrupt the nonoffice-holding political leaders to whom judges, mayors, prosecuting attorneys, and correctional officials may be responsive.

It is impossible to determine how extensive the corruption of public officials by organized crime has been. We do know that there must be more vigilance against such corruption, and we know that there must be better ways for the public to communicate information about corruption to appropriate governmental personnel.

MEMBERSHIP AND ORGANIZATION OF CRIMINAL CARTELS [77]

Some law enforcement officials define organized crime as those groups engaged in gambling, or narcotics pushing, or loan sharking, or with illegal business or labor interests. This is useful to the extent that it eliminates certain other criminal groups from consideration, such as youth gangs, pickpocket rings, and professional criminal groups who may also commit many types of crimes, but whose groups are ad hoc. But when law enforcement officials focus exclusively on the crime instead of the organization, their target is likely to be the lowest-level criminals who commit the visible crimes. This has little effect on the organization.[78]

The Commission believes that before a strategy to combat organized crime's threat to America can be developed, that threat must be assessed by a close examination of organized crime's distinctive characteristics and methods of operation.

NATIONAL SCOPE OF ORGANIZED CRIME

In 1951 the Kefauver Committee declared that a nationwide crime syndicate known as the Mafia operated in many large cities and that the leaders of the Mafia usually controlled the most lucrative rackets in their cities.[79]

In 1957, 20 of organized crime's top leaders were convicted (later reversed on appeal)[80] of a criminal charge arising from a meeting at Apalachin, N.Y. At the sentencing the judge stated that they had sought to corrupt and infiltrate the political mainstreams of the country, that they had led double lives of crime and respectability, and that their probation reports read "like a tale of horrors."

Today the core of organized crime in the United States consists of 24 groups operating as criminal cartels in large cities across the Nation. Their membership is exclusively men of Italian descent, they are in frequent communication with each other, and their smooth functioning is insured by a national body of overseers.[81] To date, only the Federal Bureau of Investigation has been able to document fully the national scope of these groups, and FBI intelligence indicates that the organization as a whole has changed its name from the Mafia to La Cosa Nostra.

In 1966 J. Edgar Hoover told a House of Representatives Appropriations Subcommittee:

La Cosa Nostra is the largest organization of the criminal underworld in this country, very closely organized and strictly disciplined. They have committed almost every crime under the sun . . .

La Cosa Nostra is a criminal fraternity whose membership is Italian either by birth or national origin, and it has been found to control major racket activities in many of our larger metropolitan areas, often working in concert with criminals representing other ethnic backgrounds.

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[72] "Finally, the public suffers because the vast economic resources that gangsters and racketeers control [enable] them to consolidate their economic and political positions. Money, and particularly ready cash, is power in any community and over and over again this committee has found instances where racketeers' money has been used to exercise influence with Federal, state, and local officials and agencies of government . . . The money used by hoodlums to buy economic and political control is also used to induce public apathy." Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 171 (1951).

[73] "[C]orruption by organized crime is a normal condition of American local government and politics." Moynihan, *The Private Government of Organized Crime*, The Reporter, July 6, 1961, p. 14.

[74] See, for example, United States v. Kahaner, 317 F.2d 459, *cert. denied*, 375 U.S. 836 (1963), in which a State judge, a Federal prosecutor, and a racketeer were involved in a conspiracy to obstruct justice in connection with the sentencing of a Federal law violator. See also Johnson, *supra* note 61, at 419–22.

[75] Information submitted to Commission by a Federal agency.

[76] "The largest single factor in the breakdown of law enforcement agencies in dealing with organized crime is the corruption and connivance of many public officials." ABA, REPORT ON ORGANIZED CRIME AND LAW ENFORCEMENT 16 (1952).

[77] See generally Cressey, *supra* note 27. For detailed information on organized crime members and their activities in various areas of the country, see McClellan, *Narcotics Hearings*, 88th Cong., 1st Sess., pts. 1 & 2 (1963), 1st & 2d Sess., pts. 3 & 4 (1963–64), 2d Sess., pt. 5 (1964).

[78] "Minor members . . . may be imprisoned, but the top leaders remain relatively untouched by law enforcement agencies." ABA, *op. cit. supra* note 76, at 13.

[79] Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 150 (1951).

[80] United States v. Bufalino, 285 F.2d 408 (2d Cir. 1960).

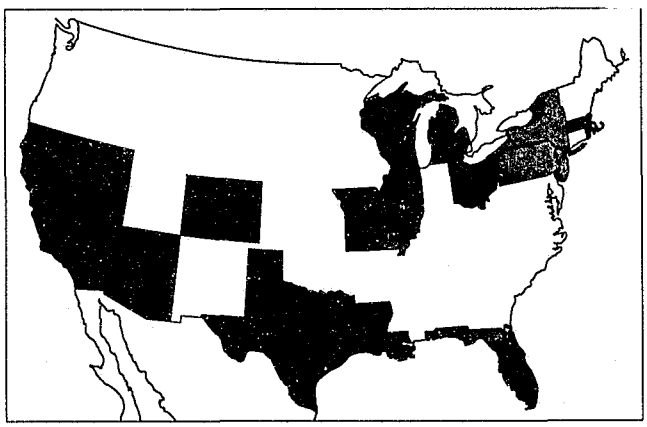
[81] See testimony of J. Edgar Hoover, *supra* note 32, at 272–74.

It operates on a nationwide basis, with international implications, and until recent years it carried on its activities with almost complete secrecy. It functions as a criminal cartel, adhering to its own body of "law" and "justice" and, in so doing, thwarts and usurps the authority of legally constituted judicial bodies . . .[82]

In individual cities, the local core group may also be known as the "outfit," the "syndicate," or the "mob."[83] These 24 groups work with and control other racket groups, whose leaders are of various ethnic derivations. In addition, the thousands of employees who perform the street-level functions of organized crime's gambling, usury, and other illegal activities represent a cross section of the Nation's population groups.

The present confederation of organized crime groups arose after Prohibition, during which Italian, German, Irish, and Jewish groups had competed with one another in racket operations. The Italian groups were successful in switching their enterprises from prostitution and bootlegging to gambling, extortion, and other illegal activities. They consolidated their power through murder and violence.[84]

Today, members of the 24 core groups reside and are active in the States shown on the map. The scope and



States in Which Organized Crime Core Group Members Both Reside and Operate

effect of their criminal operations and penetration of legitimate businesses vary from area to area. The wealthiest and most influential core groups operate in States including New York, New Jersey, Illinois, Florida, Louisiana, Nevada, Michigan, and Rhode Island.[85] Not shown on the map are many States in which members of core groups control criminal activity even though they do not reside there. For example, a variety of illegal activities in New England is controlled from Rhode Island.[86]

Recognition of the common ethnic tie of the 5,000 or more members of organized crime's core groups [87] is essential to understanding the structure of these groups today. Some have been concerned that past identification of Cosa Nostra's ethnic character has reflected on Italian-Americans generally. This false implication was eloquently refuted by one of the Nation's outstanding experts on organized crime, Sgt. Ralph Salerno of the New York City Police Department. When an Italian-American racketeer complained to him, "Why does it have to be one of your own kind that hurts you?", Sgt. Salerno answered:

I'm not your kind and you're not my kind. My manners, morals, and mores are not yours. The only thing we have in common is that we both spring from an Italian heritage and culture—and you are the traitor to that heritage and culture which I am proud to be part of.[88]

Organized crime in its totality thus consists of these 24 groups allied with other racket enterprises to form a loose confederation operating in large and small cities. In the core groups, because of their permanency of form, strength of organization and ability to control other racketeer operations, resides the power that organized crime has in America today.

INTERNAL STRUCTURE [89]

Each of the 24 groups is known as a "family," with membership varying from as many as 700 men to as few as 20. Most cities with organized crime have only one family; New York City has five. Each family can participate in the full range of activities in which organized crime generally is known to engage. Family organization is rationally designed with an integrated set of positions geared to maximize profits. Like any large corporation, the organization functions regardless of personnel changes, and no individual—not even the leader—is indispensable. If he dies or goes to jail, business goes on.

The heirarchical structure of the families resembles that of the Mafia groups that have operated for almost a century on the island of Sicily. Each family is headed by one man, the "boss," whose primary functions are maintaining order and maximizing profits. Subject only to the possibility of being overruled by the national advisory group, which will be discussed below, his authority in all matters relating to his family is absolute.

Beneath each boss is an "underboss," the vice president or deputy director of the family. He collects information for the boss; he relays messages to him and passes his instructions down to his own underlings. In the absence of the boss, the underboss acts for him.

On the same level as the underboss, but operating in a staff capacity, is the *consigliere,* who is a counselor, or adviser. Often an elder member of the family who has partially retired from a career in crime, he gives advice to family members, including the boss and underboss, and thereby enjoys considerable influence and power.

Below the level of the underboss are the *caporegime,* some of whom serve as buffers between the top members of the family and the lower-echelon personnel. To maintain their insulation from the police, the leaders of the hierarchy (particularly the boss) avoid direct communication with the workers. All commands, information, complaints, and money flow back and forth through a

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[82] *Id.* at 272.

[83] See testimony of former New York City Police Comm'r Michael J. Murphy, McClellan, *Narcotics Hearings,* 88th Cong., 1st Sess., pt. 1, at 63 (1963); testimony of Capt. William Duffy, *id.* pt. 2, at 506; OFFICE OF THE N.Y. COUNSEL TO THE GOVERNOR, COMBATING ORGANIZED CRIME—A REPORT OF THE 1965 OYSTER BAY, NEW YORK, CONFERENCES ON COMBATING ORGANIZED CRIME 24 (1966).

[84] See generally ORGANIZED CRIME IN AMERICA 147–224 (Tyler ed. 1962).

[85] Information submitted to Commission by a Federal agency.

[86] *Ibid.*

[87] Testimony of J. Edgar Hoover, *Hearings Before the Subcomm. on Dep'ts of State, Justice, and Commerce, the Judiciary, and Related Agencies Appropriations of the House Comm. on Appropriations,* 89th Cong., 2d Sess. 273 (1966).

[88] Grutzner, City Police Expert on Mafia Retiring from Force, N.Y. Times, Jan. 21, 1967, p. 65, col. 3.

[89] For an extensive discussion of the internal structure of the organized crime groups, see Cressey, *The Functions and Structure of Criminal Syndicates,* Sept. 1966, at 31–40, printed as appendix A of this volume. See also McClellan, *Narcotics Hearings,* 88th Cong., 1st Sess., pts. 1 & 2 (1963), 1st & 2d Sess., pts. 3 & 4 (1963–64), 2d Sess., pt. 5 (1964).

trusted go-between. A *caporegima* fulfilling this buffer capacity, however, unlike the underboss, does not make decisions or assume any of the authority of his boss.

Other *caporegime* serve as chiefs of operating units. The number of men supervised in each unit varies with the size and activities of particular families. Often the *caporegima* has one or two associates who work closely with him, carrying orders, information, and money to the men who belong to his unit. From a business standpoint, the *caporegima* is analogous to plant supervisor or sales manager.

The lowest level "members" of a family are the *soldati,* the soldiers or "button" men who report to the *caporegime.* A soldier may operate a particular illicit enterprise, *e.g.,* a loan-sharking operation, a dice game, a lottery, a bookmaking operation, a smuggling operation, on a commission basis, or he may "own" the enterprise and pay a portion of its profit to the organization, in return for the right to operate. Partnerships are common between two or more soldiers and between soldiers and men higher up in the hierarchy. Some soldiers and most upper-echelon family members have interests in more than one business.

Beneath the soldiers in the hierarchy are large numbers of employees and commission agents who are not members of the family and are not necessarily of Italian descent. These are the people who do most of the actual work in the various enterprises. They have no buffers or other insulation from law enforcement. They take bets, drive trucks, answer telephones, sell narcotics, tend the stills, work in the legitimate businesses. For example, in a major lottery business that operated in Negro neighborhoods in Chicago, the workers were Negroes; the bankers for the lottery were Japanese-Americans; but the game, including the banking operation, was licensed, for a fee, by a family member.[90]

The structure and activities of a typical family are shown in the chart on the following page.

There are at least two aspects of organized crime that characterize it as a unique form of criminal activity. The first is the element of corruption. The second is the element of enforcement, which is necessary for the maintenance of both internal discipline and the regularity of business transactions. In the hierarchy of organized crime there are positions for people fulfilling both of these functions. But neither is essential to the long-term operation of other types of criminal groups. The members of a pickpocket troupe or check-passing ring, for example, are likely to take punitive action against any member who holds out more than his share of the spoils, or betrays the group to the police; but they do not recruit or train for a well-established position of "enforcer."

Organized crime groups, on the other hand, are believed to contain one or more fixed positions for "enforcers," whose duty it is to maintain organizational integrity by arranging for the maiming and killing of recalcitrant members. And there is a position for a "corrupter," whose function is to establish relationships with those public officials and other influential persons whose assistance is necessary to achieve the organization's goals.[91] By including these positions within its organization, each criminal cartel, or "family," becomes a government [92] as well as a business.

The highest ruling body of the 24 families is the "commission." This body serves as a combination legislature, supreme court, board of directors, and arbitration board; its principal functions are judicial. Family members look to the commission as the ultimate authority on organizational and jurisdictional disputes. It is composed of the bosses of the Nation's most powerful families but has authority over all 24. The composition of the commission varies from 9 to 12 men. According to current information, there are presently 9 families represented, 5 from New York City and 1 each from Philadelphia, Buffalo, Detroit, and Chicago.[93]

The commission is not a representative legislative assembly or an elected judicial body. Members of this council do not regard each other as equals. Those with long tenure on the commission and those who head large families, or possess unusual wealth, exercise greater authority and receive utmost respect. The balance of power on this nationwide council rests with the leaders of New York's 5 families. They have always served on the commission and consider New York as at least the unofficial headquarters of the entire organization.

In recent years organized crime has become increasingly diversified and sophisticated. One consequence appears to be significant organizational restructuring. As in any organization, authority in organized crime may derive either from rank based on incumbency in a high position or from expertise based on possession of technical knowledge and skill. Traditionally, organized crime groups, like totalitarian governments, have maintained discipline through the unthinking acceptance of orders by underlings who have respected the rank of their superiors. However, since 1931, organized crime has gained power and respectability by moving out of bootlegging and prostitution and into gambling, usury, and control of legitimate business. Its need for expertise, based on technical knowledge and skill, has increased. Currently both the structure and operation of illicit enterprises reveal some indecision brought about by attempting to follow both patterns at the same time. Organized crime's "experts" are not fungible, or interchangeable, like the "soldiers" and street workers, and since experts are included within an organization, discipline and structure inevitably assume new forms. It may be awareness of these facts that is leading many family members to send their sons to universities to learn business administration skills.

As the bosses realize that they cannot handle the complicated problems of business and finance alone, their authority will be delegated. Decisionmaking will be decentralized, and individual freedom of action will tend to increase. New problems of discipline and authority may occur if greater emphasis on expertise within the ranks denies unskilled members of the families an opportunity to rise to positions of leadership. The unthinking acceptance of rank authority may be difficult to maintain when experts are placed above long-term, loyal soldiers. Primarily because of fear of infiltration by law enforce-

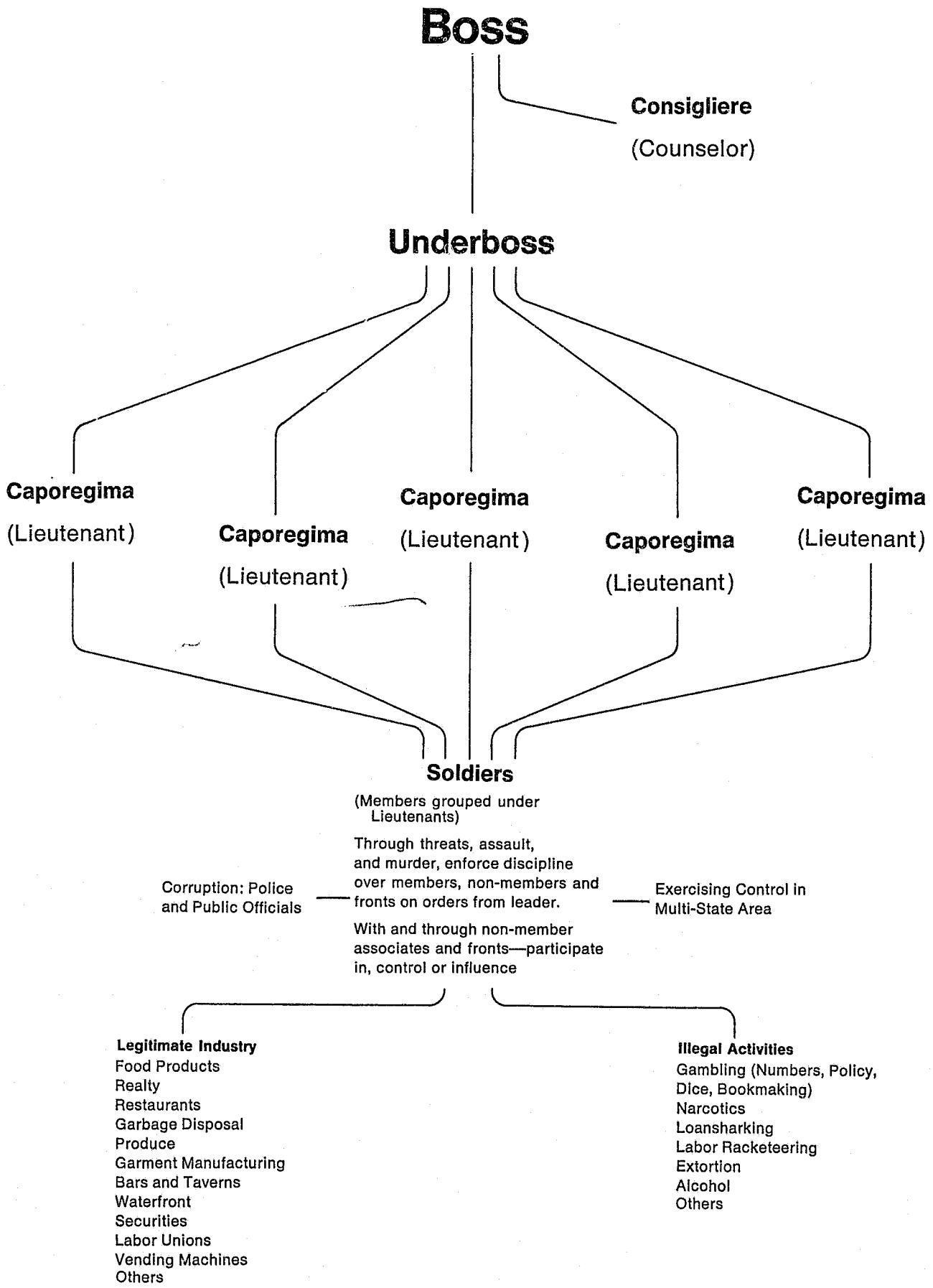
[90] Information submitted to Commission by a Federal agency.

[91] Federal agency intelligence indicates that the *consigliere* frequently acts as the "corrupter." In this connection, the Kefauver Committee underscored the sinister influence Frank Costello exercised upon the New York County Democratic organization. Kefauver Comm., *3d Interim Rep.*, S. REP. NO. 307, 82d Cong., 1st Sess. 143–44 (1951).

[92] "[I]n effect organized crime constitutes a kind of private government whose power rivals and often supplants that of elected public government." Moynihan, *supra* note 73, at 15.

[93] Information submitted to Commission by a Federal agency.

An Organized Crime Family



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ment, many of the families have not admitted new members for several years. That fact plus the increasing employment of personnel with specialized and expert functions may blur the lines between membership and nonmembership. In organized crime, internal rebellion would not take the form of strikes and picketing. It would bring a new wave of internal violence.

CODE OF CONDUCT [94]

The leaders of the various organized crime families acquire their positions of power and maintain them with the assistance of a code of conduct that, like the hierarchical structure of the families, is very similar to the Sicilian Mafia's code—and just as effective. The code stipulates that underlings should not interfere with the leader's interests and should not seek protection from the police. They should be "standup guys" who go to prison in order that the bosses may amass fortunes. The code gives the leaders exploitative authoritarian power over everyone in the organization. Loyalty, honor, respect, absolute obedience—these are inculcated in family members through ritualistic initiation and customs within the organization,[95] through material rewards, and through violence. Though underlings are forbidden to "inform" to the outside world, the family boss learns of deviance within the organization through an elaborate system of internal informants. Despite prescribed mechanisms for peaceful settlement of disputes between family members, the boss himself may order the execution of any family member for any reason.

The code not only preserves leadership authority but also makes it extremely difficult for law enforcement to cultivate informants and maintain them within the organization.

NEED FOR GREATER KNOWLEDGE OF ORGANIZATION AND STRUCTURE

Although law enforcement has uncovered the skeletal organization of organized crime families, much greater knowledge is needed about the structure and operations of these organizations. For example, very little is known about the many functions performed by the men occupying the formally established positions in the organizations. In private business identifying a person as a "vice president" is meaningless unless one knows his duties. In addition to his formal obligations, the corporate officer may have important informal roles such as expediter or troubleshooter.

More successful law enforcement measures against the organized crime families will be possible only when the entire range of informal and formal roles for each position is ascertained. Answers to crucial questions must be found: While it is known that "money-movers" are employed to insure maximum use of family capital,[96] how does money move from lower-echelon workers to top leaders? How is that money spread among illicit activities and into legitimate business? What are the specific methods by which public officials are corrupted? What roles do corrupted officials play? What informal roles have been devised for successful continuation of each of the illicit enterprises, such as gambling and usury? Only through the answers to questions such as these will society be able to understand precisely how organized crime maintains a coherent, efficient organization with a permanency of form that survives changes in working and leadership personnel.

THE NATION'S EFFORTS TO CONTROL ORGANIZED CRIME

Investigation and prosecution of organized criminal groups in the 20th century has seldom proceeded on a continuous, institutionalized basis. Public interest and demands for action have reached high levels sporadically; but, until recently, spurts of concentrated law enforcement activity have been followed by decreasing interest and application of resources.

HISTORICAL BACKGROUND

The foothold that organized crime has gained in our society can be partly explained by the belated recognition on the part of the people and their governments of the need for specialized efforts in law enforcement to counter the enterprises and tactics of organized crime. A few law enforcement officials became concerned with the illicit enterprises of Mafia-type groups in the United States near the close of the 19th century. Sustained efforts at investigation were abruptly terminated by the murders of two police officers, one from New Orleans and one from New York City.[97] The multimillion-dollar bootlegging business in the Prohibition era of the 1920's produced intensive investigations by the Treasury Department and the conviction of Chicago racket leader Al Capone.

In the 1930's, the special racket group of Thomas E. Dewey in New York City secured the conviction of several prominent racketeers, including the late Lucky Luciano, the syndicate leader whose organizational genius made him the father of today's confederation of organized crime families.[98] In the early 1940's, FBI investigation of a million-dollar extortion plot in the moving picture industry resulted in the conviction of several racket leaders, including the Chicago family boss who was then a member of organized crime's national council.[99]

After World War II there was little national interest in the problem until 1950, when the U.S. Attorney General convened a national conference on organized crime. This conference made several recommendations concerning investigative and prosecutive needs.[100] Several weeks

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[94] See Cressey, *supra* note 89, at 40–50.

[95] For a description of the initiation ritual, see McClellan, *Narcotics Hearings*, 88th Cong., 1st Sess., pt. 1, at 180–85 (1963).

[96] A description of the roles of Nicholas "Jiggs" Forlano and Charles "Ruby" Stein in the movement of money for organized crime groups in New York City appears in a report of the Temporary Commission of Investigation of New York, THE LOAN SHARK RACKET 17–20 (1965). The status that an expert "money-mover" can achieve was noted by the Commission: "Forlano originally came out of the Brooklyn syndicate headed by the late Joseph Profaci. However, his sources of capital are not confined to his old syndicate. His reputation for moving money quickly and efficiently at great profit is generally known to the underworld bosses. As a result, his capital sources have no bounds. Any syndicate chieftan will entrust Forlano with unlimited funds, confident that a return on his investment will be assured." *Id.* at 19.

[97] See COOK, THE SECRET RULERS 61–67 (1966).

[98] Dewey's intensive antiracketeering campaign also led to the conviction in 1941 of the notorious Louis "Lepke" Buchalter and Emmanual "Mendy" Weiss for murder. For a description of the activities of Buchalter and Weiss, see the excerpt from TULLY, TREASURY AGENT (1958), IN ORGANIZED CRIME IN AMERICA 205 (Tyler ed. 1962).

[99] See Peterson, *supra* note 65, at 30–32.

[100] In a foreword to the report of the proceedings, Attorney General McGrath described the background of the Conference: "In the winter of 1949–50 representatives of the United States Conference of Mayors, American Municipal Association, National Institute of Municipal Law Officers, National Association of Attorneys General, and others came or wrote to me expressing their alarm over the mounting problems of criminal law enforcement facing their communities, particularly the difficulties that are presented to the local communities in meeting the evils arising from organized gambling operations." U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S CONFERENCE ON ORGANIZED CRIME v (1950). A key proposal by the American Municipal Association for the "development of a coordinated master plan of action on the whole system of Nation-wide rackets by Federal, State, and local governments, and citizens' groups" has never been implemented. *Id.* at 32.

later the well-publicized hearings of the Senate Special Committee under Senator Kefauver began. The Kefauver committee heard over 800 witnesses from nearly every State and temporarily aroused the concern of many communities. There was a brief series of local investigations in cities where the Senate committee had exposed organized crime operations and public corruption, but law enforcement generally failed to develop the investigative and prosecutive units necessary to root out the activities of the criminal cartels.

In 1957 the discovery of the meeting in Apalachin, N.Y., of at least 75 criminal cartel leaders from every section of the Nation aroused national interest again. This interest was further stimulated by disclosures in the hearings of Senator McClellan's Select Senate Committee investigating organized crime's infiltration of labor and business.[101] A concerted Federal enforcement response developed in the 1950's, and special, institutionalized efforts on the local level have been growing slowly since that time.

FEDERAL LAW ENFORCEMENT

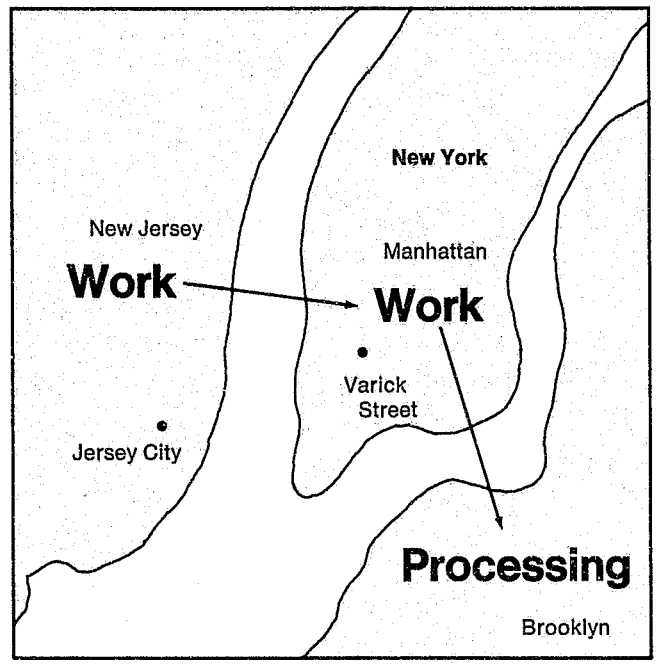
Following the Kefauver hearings, the Department of Justice commenced a concerted drive against the leading racket figures identified in the hearings. Federal prosecutors throughout the Nation were encouraged to initiate investigations and prosecutions of such persons. As a result, a number of high level organized crime participants were convicted of Federal law violations. Under authority of the immigration statutes, the Department was successful in effecting the deportation of other racketeers. In 1954, the Justice Department formed an Organized Crime and Racketeering (OCR) Section to encourage the continuation of these prosecutive efforts. Efforts to institutionalize an antiracketeering intelligence program were hindered by a lack of coordination and interest by some Federal investigative agencies.

In 1958, after Apalachin, an Attorney General's Special Group on Organized Crime was created in the Department of Justice with regional offices from which intelligence information was gathered and grand jury proceedings conducted, concerning the Apalachin conferees.[102] After trial and reversal of the convictions of 20 of these conferees for conspiring to obstruct justice, the group's functions were assumed by the existing OCR Section.

In September 1960, the Federal Bureau of Investigation began to supply the OCR Section with regular intelligence reports on 400 of the Nation's organized crime figures. But with only 17 attorneys and minimal intelligence information from other Federal agencies, the section could not adequately fulfill its functions, which included coordinating all Federal law enforcement activities against organized crime, accumulating and correlating all necessary data, initiating and supervising investigations, formulating general prosecutive policies, and assisting the Federal prosecuting attorneys throughout the country.

In 1961, the OCR Section expanded its organized crime program to unprecedented proportions. In the next 3 years, regular intelligence reports were secured from 26 separate Federal agencies, the number of attorneys was nealy quadrupled, and convictions increased.[103] Indicative of the cooperation during this enforcement effort was the pooling of information from several Federal agencies for investigative leads in income tax cases. Over 60 percent of the convictions secured between 1961 and July 1965 resulted from tax investigations conducted by the Internal Revenue Service.[104] Several high-level members of organized crime families in New York City were convicted through the efforts of the Federal Bureau of Narcotics.[105]

This is a diagram of an interstate gambling operation that the FBI disrupted. Gamblers based in Brooklyn controlled lottery operations not only in Brooklyn, but in Manhattan and Newark, N.J. The Newark "work" (cash and gambling records) went first to a secret location on Varick St. in Manhattan and then, together with the Manhattan "work," to the Brooklyn base where it was processed.



The FBI was responsible for convictions of organized crime figures in New York City, Chicago, and elsewhere. Enactment of statutes giving the FBI jurisdiction in interstate gambling cases [106] resulted in disruption, by investigation and prosecution, of major interstate gambling operations, including lay-off betting, which is essential to the success of local gambling businesses.

In 1965, a number of factors slowed the momentum of the organized crime drive. A Senate committee uncovered a few isolated instances of wiretapping and electronic surveillance by Treasury Department agents,[107] and some officials began to question whether special emphasis upon

[101] McClellan, Labor-Mgt. Reps., *1st Interim Rep.*, S. REP. NO. 1417, 85th Cong., 2d Sess. (1958), 2d INTERIM REP. (pts. 1 & 2), S. REP. NO. 621, 86th Cong., 1st Sess. (1959), *Final Rep.* (pts. 1–4), S. REP. NO. 1139, 86th Cong., 2d Sess. (1960).

[102] The Special Group on Organized Crime in the United States was created on April 10, 1958. A detailed report analyzing Federal investigative and prosecution requirements to contain organized crime successfully was submitted to the Attorney General on Feb. 10, 1959. See *Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 87th Cong., 1st Sess., ser. 16, at 102–10 (1961).

[103] "In 1960, before this drive began, we secured the conviction of 45 persons for racketeering crimes. In 1961, after the drive was first under way, we secured 73 convictions. In 1962, the number doubled to 138. In 1963, it doubled again to 288. And last year, it doubled once more, to 546." Testimony of Att'y Gen. Nicholas Katzenbach, *Long Comm. Hearings*, 89th Cong., 1st Sess., pt. 3, at 1158 (1965).

[104] *Id.* at 1159.

[105] These included John "Big John" Ormento, identified as a lieutenant in the Lucchese family, and Carmine Galante, underboss of the Bonnano family of New York City. McClellan, *Narcotics Hearings*, 88th Cong., 1st & 2d Sess., pt. 3, at 652 (charts F & E) (1963–64).

[106] Interstate and foreign travel or transportation in aid of racketeering enterprises, 75 Stat. 498, 18 U.S.C. § 1952; interstate transportation of wagering paraphernalia, 75 Stat. 492, 18 U.S.C. § 1953; transmission of wagering information, 75 Stat. 491, 18 U.S.C. § 1084 (1964).

[107] See generally *Long Comm. Hearings*, 89th Cong., 1st Sess., pts. 1–3, 1st & 2d Sess., pt. 4, 2d Sess., pts. 5–6 (1965).

organized crime in tax enforcement was appropriate or fair. The Department of Justice was accused of extensively using illegal electronic surveillance in investigations of rackeeter influence in Las Vegas casinos.[108] Federal prosecutors in some large cities demanded independence from OCR Section attorneys and prosecutive policies. Attacks appeared in the press on the intensity and tactics of the Federal investigative and prosecutive efforts. A high rate of turnover among OCR Section attorneys meant discontinuity of effort and reduced personnel by nearly 25 percent.

This combination of adverse circumstances apparently led the OCR Section to believe that it could no longer expect the high degree of cooperation it had received from some Federal investigative agencies, and the intensity of its efforts diminished. In May 1966, however, President Johnson directed Federal enforcement officials to review the status of the national program against organized crime. He restated his determination to continue and accelerate the program. In a White House momorandum he called upon the appropriate agencies and departments to coordinate their activities and cooperate to the utmost with the Department of Justice.[109]

STATE AND LOCAL LAW ENFORCEMENT

The Commission made a survey of 71 cities to determine the extent of State and local law enforcement against organized crime. The survey revealed that only 12 of the 19 cities that acknowledged having organized crime have specialized units within the police department to investigate that activity. In only 6 of those 19 cities are prosecutors specially assigned to work on organized crime. Only 3 of the 43 police departments that answered that they had no organized crime in their area had created units to gather intelligence concerning the possibility of its existence. One of the three, Los Angeles, has a 55-man unit that gathers intelligence information to prevent the expansion of organized crime.[110]

At present, well-developed organized crime investigation units and effective intelligence programs exist within police and prosecutive agencies in only a handful of jurisdictions.[111] There is, however, some evidence that local police and prosecutors are becoming more aware of the threat of organized crime. For example, in Philadelphia, both the police department and the prosecutor have created units to work exclusively in this area. In the Bronx County prosecutor's office responsibility for antiracketeering work has been centralized. The New England State Police Compact is a first step toward regional confrontations of organized crime.[112] In addition to provisions for mutual assistance in a number of areas and for coordination of command training, the compact provides for a centralization of organized crime data to which all members contribute and from which all draw. This system should reduce current duplication and permit a better coordinated attack upon organized crime.

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[108] Grandi v. Central Telephone Co., No. A28157, 8th Jud. Dist. Ct., Dec. 10, 1965; Levinson v. Elson, No. A28156, 8th Jud. Dist. Ct., Dec. 10, 1965; Levinson v. Rogers, No. A28155, 8th Jud. Dist. Ct., Dec. 10, 1965.

[109] Memorandum from Pres. Lyndon B. Johnson to Heads of Departments and Agencies Participating in the Federal Organized Crime Drive, May 5, 1966.

[110] Like counterpart units in the Chicago and New York City Police Departments, the history of the Los Angeles Police Department's Intelligence Division can be traced back some years. Its current program, however, is of relatively recent date. Under the leadership of the late Chief William H. Parker, the division was created in 1950. It has responsibility for gathering information about all phases of organized crime in the Los Angeles area. The primary purpose of the division is intelligence; it has no criminal investigation responsibility. Few arrests are made, and the information it obtains is transmitted to field units for action. It has jurisdiction over some activities in addition to organized crime. For example, it maintains a close liaison with the Secret Service concerning persons who might be dangerous to the security of the President of the United States. Since it has no criminal investigation responsibility, no close, day-to-day liaison is maintained with the local district attorney's office. The prosecutor's office does not receive regular intelligence reports and does not participate in selection of targets for investigation. However, liaison is maintained with local, State, regional, national, and Federal agencies concerned with organized crime.

The Los Angeles Police Department has 5,177 officers exclusive of civilian employees. The Intelligence Division has 51 full-time men assigned to it. These include one captain and four lieutenants. The division reports directly to the Chief of Police. Similar in part to Chicago, street-level vice activity is handled by commanders; area-wide activity, by the Administrative Vice Division; and pure intelligence work, by the Intelligence Division. The turnover of personnel is small, less than 10 percent a year. The average length of service for field investigators is about 15 years; for supervisors, about 22 years. Promotion and retirement are the primary factors leading to transfers into and out of the division.

The division makes extensive use of physical surveillance, not only as a means of obtaining information, but also to prevent hoodlum contacts from being made or illegitimate activity from being carried on. Although expensive, this procedure has been effective. The division also maintains a seven-man detail at the International Airport which covers the movements of hoodlums on a 24-hour basis. Extensive use is made of public sources of information. Use of electronic equipment, however, has been severely limited by State law and is seldom employed. This is in sharp contrast with the practices of a few years ago, when the use of such equipment was considered legal and was widely and, in the division's opinion, effectively employed.

The Los Angeles Police Department was one of the first local police agencies to become aware in detail of the cartel nature of the organization of modern organized crime. This was a major working premise in Los Angeles when it was denied or discounted elsewhere. The department believes that its ability to contain a serious and expanding organized crime problem was due in part to its use of electronic equipment. Today its personnel believe that the division's effectiveness is seriously undercut by its inability to use such equipment. Its present intelligence estimates, for example, reflect the lack of this source of information. In addition, the effectiveness of the department as a whole is believed to be undercut by the widespread use of the telephone by organized crime groups in both the gambling and narcotics fields. Little reliance is placed on the use of paid informants by the division although funds are available for the purchase of information.

Competence and dedication of the department has thus accounted, in part, for the present law enforcement control of organized crime in Los Angeles. The absence of serious political corruption problems has also played a major role. This is accounted for, in part, by the traditions of the State dating back to former Governor Earl Warren and the wide use of civil service.

The files of the Intelligence Division are indexed as to persons, classes of crime, areas of crime, and businesses. An excellent cross-index exists to speed information retrieval. The division regularly collects information from national newspapers and congressional and other investigative hearings. Blakey, Local Law Enforcement Response to Organized Crime, Jan. 1967 (unpublished report to this Commission).

[111] Illustrative of such organizations is that of the office of the district attorney for New York County, which has as its function the prosecution of all criminal matters occurring in that jurisdiction. The volume is staggering. In excess of 30,000 matters come up for consideration each year. The combined total is roughly equal to the other four counties which make up the greater New York area. These duties include listening to complaints brought directly to the office by citizens, examining matters brought to it by the police, preparing informations, presenting matters to the grand jury, handling preliminary matters in court, prosecuting trials, and defending and taking appeals. In addition, the office conducts or supervises certain direct and collateral investigations of its own.

The office regularly employs approximately 260 people. There are about 100 lawyers, 10 accountants, and 10 investigators. The rest are clerks, stenographers, process servers, and specialized employees, including a psychiatrist and a photographer. In addition, there are 70 to 75 New York City detectives regularly assigned to the office. The district attorney is elected, although since 1942 there have been no election contests. Staff personnel are covered by civil service. Legal personnel are selected without regard for politics, solely on the basis of merit. Salaries are lower than those offered for positions in private practice. Consequently, there is a relatively large turnover; most stay only four-five years, although some have remained in career positions out of dedication. All members of the staff work full time. Outside or personal work is not permitted. Since 1938, the office has been singularly free of corruption or political influence.

The office itself is organized into 13 bureaus. The names of most indicate their functions. The major bureaus include a Complaint Bureau, an Indictment Bureau, a Supreme Court Bureau (handles felony trials), a Criminal Courts Bureau (handles misdemeanor trials), a Homicide Bureau, and an Appeals Bureau. In addition, the office has a Frauds Bureau, an Accounting Bureau, an Investigations Bureau, and in response to the challenge of organized crime—a Rackets Bureau.

Traditionally the function of the prosecutor has been to present to the court evidence of criminal activity developed by the police or brought to him by a a citizen. The concept of the Rackets Bureau as developed in New York County, however, has been a radical departure from that traditional view. From 1935 through 1937 Thomas E. Dewey conducted a special rackets investigation in New York County at the direction of Governor Herbert H. Lehman. When Dewey became district attorney in 1938, he carried into the office the experience of that signal investigation. The Rackets Bureau, the Frauds Bureau, the Accounting Bureau, and the Investigations Bureau were set up based on that experience and were, at that time, unparalleled in the country.

Dewey found that evidence of organized criminal activity and corruption was not to be had merely for the asking. Victims of underworld terror or exploitation did not volunteer to testify. Documentary proof of extortion or graft was carefully concealed in doctored books and records. Dewey thus found that the traditional role of the district attorney—merely that of courtroom accuser—was inadequate if the challenge of organized crime and corruption was to be met.

The Rackets Bureau and the Frauds Bureau operate in a similar fashion. The Frauds Bureau deals with modern commercial fraud. The Rackets Bureau deals with modern organized crime and corruption. Both employ the expert assistance of the trained criminal accountants and investigators of the Accounting and Investigations Bureaus.

The Rackets Bureau is headed by one top man and a chief assistant. Approximately 10 to 12 other assistant district attorneys are assigned to the bureau. The bureau shares 10 accountants with the Frauds Bureau, and each draws on the services of the office's own investigators and the New York City detectives assigned to it. The assistants in the bureau take charge of their cases at every stage: investigative, preparation, grand jury presentation, and trial. An integrated approach to each case is thus obtained. The bureau maintains its own files on major organized criminals, cultivates confidential sources of information—although

In 1956 the Law Enforcement Intelligence Unit was established in California.[113] This was the first step toward the development of a network for the exchange of data concerning people active in organized crime. The LEIU has since expanded to more than 150 members throughout the Nation. It maintains a central file in California, and information is available to its members on request.

The effectiveness of these State and local efforts is difficult to assess. But only New York and California have developed continuing State programs that have produced a series of convictions against major figures in organized crime. Coordinated police activity has substantially aided this process. On the local level, Chicago and New York City, where the organized crime problem is the most severe, appear to be the only cities in which large, firmly established police intelligence units continue to develop major cases against members of the criminal cartels.[114]

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it has no paid informant program—and keeps tab on the movements of known criminals; it also maintains liaison with other law enforcement agencies in the New York area concerned with organized crime.

The Rackets Bureau has developed a special technique of investigation in organized crime and corruption cases, which combines the skillful use of physical surveillance, examination of records, and interrogation of witnesses under oath before the grand jury. Under a grant of immunity witnesses are faced with perjury if they lie or with a citation for contempt if they refuse to cooperate. The unanimous opinion of the staff is that the use, under strict controls and court orders, of electronic surveillance, both wiretaps and bugs, has been virtually indispensable to the success of this means of investigation. Wiretaps were the mainstay of its activity prior to 1957, when Federal court rulings intervened. Now they are used solely for intelligence purposes, and reliance has been placed on court ordered bugs. The experience of the bureau with the dependence of racket figures on the phone as a means of communication and with the necessity to hold meetings confirms that of the CIB, see note 114 *infra*. The experience of the bureau, moreover, has shown that certain kinds of key witnesses—witnesses which often the bureau has had to protect before, during, and after trials, almost always found in organized crime or corruption cases—cases which often take years to build—can only be induced to cooperate by playing for them the sound of their own voices, which they cannot deny, and then facing them with the choice of cooperation or jail for contempt or perjury. The opinion of the bureau is thus that the use of electronic equipment is the key to success in any serious organized crime drive. It has not found, however, that the need to use the equipment required that it be employed extensively. The bureau has used an average of only about 19 bugs and 65 wiretaps per year since 1957. Yet its record of achievement in the area of major organized crime and corruption cases is unmatched anywhere in the United States on the local or State level. The failure of the office to do more has been primarily attributable to the inherent difficulties in this kind of investigation and a lack of manpower resources at its command to deal with the problem. Blakey, Local Law Enforcement Response to Organized Crime. Jan. 1967 (unpublished report to this Commission).

[112] The office of the Commissioner of the Connecticut State Police advised the Commission that the compact evolved from discussions between the six New England State Police Commissioners, who meet regularly to consider law enforcement matters of mutual interest. The compact was drafted by the Council of State Governments with the aid of the New England Council and has been enacted in Rhode Island (R.I. Gen. Laws Ann. § 42-37-1 to -3 (Supp. 1965)) and Maine (Me. Rev. Stat. Ann. tit. 25, § 1667 (Supp. 1966)); and will be effective upon enactment by one more New England State. Enabling legislation is now pending before the legislatures of each of the four remaining States.

[113] The Law Enforcement Intelligence Unit was conceived by Frank Ahern, then Chief of the San Francisco Police Department, and Capt. James Hamilton of the Los Angeles Police Department's Intelligence Division. The organization was formed on March 29, 1956, by law enforcement officials representing 26 police and sheriffs' departments in seven western States. It developed in response to the need felt by law enforcement officials for a means by which confidential information on certain persons and organizations could be exchanged; it provides a central clearinghouse for such information, outside the channels of routine, interdepartmental communication. As of Nov. 1, 1965, the LEIU had a membership of 152 different agencies including State police, sheriffs' departments, metropolitan police, prosecutors' offices, and such others as the investigative unit of the Waterfront Commission of New York Harbor.

A requisite for membership in LEIU is that member departments maintain a permanent intelligence unit. Membership is not restricted to departments from areas of known organized crime activity. Although organized crime is not the exclusive interest of all participants, the subject is given substantial attention. Information is exchanged about persons and organizations engaged in various forms of criminal conduct.

The LEIU exists only as a unifying concept; it has no independent investigative authority or personnel. It operates through an executive board composed of three persons selected from among the members at large plus the four chairmen of member agencies in the four zones of the country, northwestern, southwestern, central, and eastern. The heart of the information clearing system which the organization has developed is a set of constantly increasing file cards which contain subjects' names, addresses, class of criminal activity, associates, and most important, the name of the unit contributing the descriptive information. This permits an interested agency to make direct inquiry to the department in possession of details on a subject of interest.

The processing and dissemination of these file cards to member agencies is handled by the Bureau of Identification and Investigation of the State of California. For an interesting discussion of the function of the LEIU and organized crime, see Paul Levy's article, *The Quiet War on Big Crime*, in the Sunday Bulletin (Phila.), Nov. 28, 1965, § 2, p. 1.

[114] The history of the Central Investigation Bureau (CIB) in the New York Police Department may be traced back to the turn of the century when an Italian Squad was set up to investigate extortion activities victimizing recently arrived Italian immigrants. In the late 1910's a similar small squad was created in the department in an attempt to put together information on major racketeers of any ethnic background. The current program, however, is best dated from 1956, when under the leadership of former Police Commissioner Stephen P. Kennedy the CIB was organized in its present form.

The CIB has as its objectives maintaining a continuing program to understand the structure and operation of organized crime in New York City; providing support for field units in the department and for district attorneys in the preparation of organized crime cases; and educating and advising law enforcement units, other governmental agencies, and citizens concerning the threat posed by organized crime. The work of the bureau is concentrated mainly on organized crime as exemplified by large well-organized operations. In practice this means that most of their efforts are directed against the six organized crime families which operate in the New York metropolitan area.

The bureau seeks to discover the key personnel in each family, their relationships to each other, the criminal and legitimate enterprises they operate, and the chains of control by which they operate. In this way it attempts to define trends, discover emerging leaders, put together a guide for strategy, select targets, and generate new investigations. Since the crime situation it faces is never static, the bureau tries to chart the changes which occur in the families and to map the growth and development of each major area of criminal and legitimate activity of the families. The ultimate objective of this program is to find situations which have prosecutive potential. If useful leads or evidence is obtained which suggests such a possibility, reports are prepared for followup action by appropriate field units in the department. The work of the bureau is consciously kept nonoperational to avoid unnecessary conflicts with the activities of other units in the department and to permit the bureau to maintain perspective. The bureau does, however, loan its men to other field units to conduct surveillance, to operate electronic surveillance equipment, and to install electronic equipment pursuant to court order. The CIB provides training on the nature of organized crime for new men in the department. It has also worked closely with State and Federal investigating committees. Finally, the bureau maintains a close liaison with each of the five County District Attorneys in New York City. In these offices one or more assistant district attorneys are assigned to organized crime work. They often confer with members of the bureau during investigations, although the prosecutors do not receive regular intelligence reports or participate in the selection of targets. Liaison is also maintained with various local, State, regional, national, and Federal law enforcement agencies concerned with organized crime.

The New York City Police Department has 27,000 officers exclusive of civilian employees. The Bureau has 96 full-time men assigned to it. These include one deputy inspector, one captain, three lieutenants, and seven sergeants. The bureau reports directly to the Chief of Detectives. The average length of service for field investigators is 5 years; supervisors, 4.7. The primary factor which leads to transfers into and out of the unit is promotion to higher rank and the replacement of such personnel.

In its investigations the bureau makes extensive use of physical surveillance. Hotels, night clubs, airports, race tracks, and similar places are watched to detect events of significance in organized crime. Extensive use is made of public sources of information, such as the registry of deeds. The bureau's mainstay, however, has been the use of electronic equipment, both wiretaps and bugs. The bureau has found that the large, well-organized criminal activity, especially that which operates over a large geographical area, must use the telephone as a means of communication. No matter what attempts are made to code messages, the meaning can be determined. Meetings, too, must be held. Careful investigation can determine where. The use of electronic equipment, however, is strictly limited. After supervisory approval within the bureau, a court order must be secured. The Legal Bureau of the Police Department processes all applications for such orders. All overhears are recorded, and strict controls govern access to the information secured. This is done both to protect its confidentiality and to insulate the other information the bureau has from legal contamination, since information electronically obtained generally cannot be used by the Federal law enforcement agencies with which the bureau has contacts. The bureau makes the technical installations of equipment for all units of the department other than for the Police Commissioner's Confidential Investigating Unit, which conducts investigations within the department itself.

No paid informant program is maintained by the bureau. While many of its investigators have personal sources of information, experience has shown that the quality, quantity, and reliability of information obtained from informants is not adequate for the CIB to do its job. All too often, for example, this information concerns merely low-level operations. Members of the hierarchy of organized crime rarely become informants, and those on the periphery have little valuable information. Undercover agents are used by the bureau, but their effectiveness is severely limited, since members of organized crime groups seldom trust those not known by them to have committed a major crime.

Of major importance to the operation of the CIB is its file system. Individual working files are maintained by each agent. The general files are subdivided into individuals, types of crimes, geographical areas, and industries. A library of congressional hearings and other similar information is maintained. Indexing and cross-referencing make the files a working tool. Other special files containing, for example, license plate numbers are also maintained.

Like the CIB, the history of the Chicago Intelligence Division (CID) may be traced back to the turn of the century, when a "Black Hand" squad was set up to investigate extortion activities victimizing the Italian immigrant population. Later a group called the "Scotland Yard Unit" was established. It dealt with everything from buglary offenses to hoodlum activity. It was disbanded, however, in 1956, and its functions shifted into the commissioner's office. The current program is best dated from 1960, when under the reform leadership of Superintendent O. W. Wilson the CID was set up.

Like the CIB the division's main objective is obtaining information concerning high-level criminal activity; its agents are primarily involved in the detection, prevention, and neutralization of crime syndicate activity. The division tends to concentrate its investigations in specific areas of activity rather than on individuals. Its major efforts are directed toward gambling, loan sharking or "juice," criminal participation in legitimate enterprises, labor racketeering, narcotics, and prostitution. Unlike the CIB, it has jurisdiction over other activities. The CID, for example, must also concern itself with the activities of subversive groups. Although the CIB is not operational, the CID carries its investigations through to arrest and trial. The division also has training and educational functions. Little liaison is maintained with the local district attorney's office, other than when a case is actively in the prosecution stage. No assistant prosecutors are regularly assigned to the division, although it is possible to obtain their help in securing warrants. The CID does not provide regular intelligence reports to the prosecutor's office. Liaison is maintained with various local, State, national, and Federal law enforcement agencies concerned with organized crime.

The Chicago Police Department has 10,000 officers exclusive of civilian employees, of which 95 men are assigned on a full-time basis to the CID. These include a director, 5 lieutenants, and 20 sergeants. The division routinely reports to a deputy superintendent, although it is possible to report directly to

PUBLIC AND PRIVATE CRIME COMMISSIONS

Among the most effective vehicles for providing public information on organized crime are the crime investigating commissions, which exist in a number of States. When established without having to rely on continuing governmental financial support and the resulting potential political pressures, the private crime commission has frequently rendered major service in exposing organized crime and corruption and arousing public interest. The Chicago Crime Commission and the Metropolitan Crime Commission of New Orleans have played major roles in informing the citizens within their jurisdictions of the menace of organized crime and have fulfilled substantial educational, investigative, and legislative functions.[115]

A governmentally sponsored nonpartisan crime commission, such as the New York State Temporary Commission on Investigation, has significant benefits. Established shortly after the Apalachin meeting,[116] it has through a series of public hearings exposed organized crime and corruption.[117] Recent loan-shark hearings [118] prompted legislative action to make prosecution of such offenders less difficult.[119] The Illinois Crime Commission, through public hearings and the efforts of its own investigators, continually exposes organized criminal activity. A governmental commission in California detailed the operations of criminal cartels in that State in the early 1950's and recommended action that subsequently proved effective.[120]

LIMITATIONS ON CONTROL EFFORTS

Efforts to curb the growth of organized crime in America have not been successful. It is helpful in devising a program for the future to examine the problems encountered in attempting to combat organized crime.

Difficulties in Obtaining Proof. As described above, criminal cartels have organized their groups and operations to insulate their higher echelon personnel from law enforcement and regulatory agencies. Every measure has been taken to insure that governmental investigation, no matter how intensive, will be unable to secure live witnesses, the sine qua non of prosecution. Street workers, who are not members of organized crime families, cannot prove the identities of the upper-level personnel. If workers are arrested for gambling or other illicit activities, the fear instilled in them by the code of nondisclosure prevents their telling even the little they may know. The organization provides money and food for families of incarcerated workers; this helps to keep the workers loyal. Lawyers provided by the cartels for arrested employees preserve the interests of the organization ahead of those of the particular defendant.

Usually, when a crime is committed, the public calls the police, but the police have to ferret out even the existence of organized crime. The many Americans who are compliant "victims" have no incentive to report the illicit operations. The millions of people who gamble illegally are willing customers who do not wish to see their supplier destroyed. Even the true victims of organized crime, such as those succumbing to extortion, are too afraid to inform law enforcement officials. Some misguided citizens think there is social stigma in the role of "informer," and this tends to prevent reporting and cooperating with police.

Law enforcement may be able to develop informants, but organized crime uses torture and murder to destroy the particular prosecution at hand and to deter others from cooperating with police agencies. Informants who do furnish intelligence to the police often wish to remain anonymous and are unwilling to testify publicly. Other informants are valuable on a long-range basis and cannot be used in public trials. Even when a prosecution witness testifies against family members, the criminal organization often tries, sometimes successfully, to bribe or threaten jury members or judges.

Documentary evidence is equally difficult to obtain. Bookmakers at the street level keep no detailed records. Main offices of gambling enterprises can be moved often enough to keep anyone from getting sufficient evidence for a search warrant for a particular location. Mechanical devices are used that prevent even the telephone company from knowing about telephone calls. And even if an enforcement agent has a search warrant, there are easy ways to destroy written material [121] while the agent fulfills the legal requirements of knocking on the door, announcing his identity and purpose, and waiting a reasonable time for a response before breaking into the room.

Lack of Resources. No State or local law enforcement agency is adequately staffed to deal successfully with the problems of breaking down criminal organizations. Just one major organized crime case may take 2 to 3 years to develop and then several more years to complete through prosecution and appeal. Cases may require several man-years of investigative resources. The percentage of investigations that result in arrests is quite low. Requests for increased budgets in government are usually granted

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the superintendent. Turnover statistics for CID personnel are not meaningful, since the division has not been in existence long enough. The primary factors leading to transfers in and out of the division have been promotions and retirement.

In its investigations the CID makes extensive use of physical surveillance. As with the CIB, hotels, night clubs, airports, and similar places are routinely covered for significant events in organized crime. Extensive use is made of public sources of information. The use of electronic equipment is illegal under State law. Its personnel believe this has severely handicapped the work of the division. Reliance has been placed on a paid informant program. The money available, although limited by the budget, has been liberal in terms of overall police priorities. Not only have the quantity, quality, and reliability of the informant information gathered by the division differed substantially from that obtained electronically by the CIB, but CID personnel believe the existing informant program has seriously suffered because of the apparent ability and evident willingness of crime syndicate figures in the Chicago area to take violent action, including physical torture and brutal murder, against those who cooperate with the police. Undercover agents used by the division are subject to the same limitations found in New York.

Of major importance to the division is its file system. Prior to 1960 no generally reliable, accessible, or comprehensive files on organized crime existed in the Chicago Police Department. The existing files are organized in much the same way as those of the CIB. Blakey, Local Law Enforcement Response to Organized Crime, Jan. 1967 (unpublished report to this Commission).

[115] An excellent documentation of organized crime activities in Chicago may be found in the annual reports of the Chicago Crime Commission, A REPORT ON CHICAGO CRIME, prepared annually since 1953 by Virgil Peterson, Operating Director. Illustrative of a continuing campaign by a crime commission to educate citizens about organized crime is the publication by the New Orleans Metropolitan Crime Comm'n, Survey Report Organized Crime Outlets—Jefferson Parish, Louisiana (mimeo. Oct. 1963).

[116] The commission of investigation was established on May 1, 1958, by N.Y. UNCONSOL. LAWS § 7051.

[117] See, for example, N.Y. TEMPORARY COMM'N OF INVESTIGATION, AN INVESTIGATION OF LAW ENFORCEMENT IN BUFFALO (1961).

[118] N.Y. TEMPORARY COMM'N OF INVESTIGATION, THE LOAN SHARK RACKET (1965).

[119] N.Y. PENAL LAW §§ 2401–2403 (1965).

[120] See CAL. SPECIAL CRIME STUDY COMM'N ON ORGANIZED CRIME, COMBINED REPS. (1950), and CAL. SPECIAL CRIME STUDY COMM'N ON ORGANIZED CRIME, FINAL REP. (1953). For a report on organized crime conditions in the late 1950's, see Subcomm. on Rackets of the Cal. Assembly Interim Comm. on Judiciary, *Organized Crime in California*, 20 ASSEMBLY INTERIM REPS. 1957–59, NO. 10 (1959).

[121] "Flash paper" and "rice paper" are both frequently used in gambling operations if written notations are essential. Flash paper is a paper that is chemically treated to convert the cellulose contained in the paper to nitrocellulose by treatment with a mixture of concentrated sulfuric and nitric acids. "This paper is highly flammable and will burst into flame if a cigarette is placed on it. In less time than it will take a law enforcement officer to cross the room, a bookmaker can turn his records into a pile of ashes of no use as evidence against him." Testimony of Att'y Gen. Robert Kennedy, *Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 87th Cong., 1st Sess., ser. 16, at 30. Rice paper is water soluble paper treated chemically to cause it to dissolve very quickly when submerged in water. For a more extensive description, see MODERN PLASTICS ENCYCLOPEDIA FOR 1948, at 201.

only upon a showing of success; *i.e.*, a high number of arrests. An effective organized crime investigative effort may not be able to produce such statistics without years of intelligence gathering, and the drive for statistics may divert investigative energy to meaningless low-level gambling arrests that have little effect on the criminal organizations. Even with these known problems, the organized crime units of all but a few city police departments are staffed by less than 10 men, and only 6 prosecutors' offices have assigned assistants to work exclusively or particularly in organized crime cases.

Effective investigation and prosecution of organized crime require extensive experience. Assistant prosecutors rarely stay in a district attorney's office for more than a few years, if that long.[122] On the investigative level, with the exception of some Federal agencies, assignment to the organized crime intelligence unit may be only a step in an officer's career. The most proficient people are likely to be promoted out of the unit into supervisory positions, and their replacements must then start the difficult job of acquiring the skills for the peculiar demands of organized crime investigation. In addition, few units have any personnel with the necessary accounting and legal knowledge.

Lack of Coordination. Local police are hampered by their limited geographical jurisdiction, and law enforcement has not responded by developing sufficient coordination among the agencies.[123] One gambling operation may range through several police jurisdictions; if only one agency is involved in the investigation, it may be unable to detect key elements of the illegal enterprise. The potential for Federal-local cooperation was illustrated in the past 3 years in Chicago. With search warrant affidavits signed by FBI agents and based on FBI information, Chicago police have arrested almost 1,000 gambling defendants and seized money and wagering paraphernalia valued at approximately $400,000. The monthly gross of gambling sites so raided exceeded $8½ million.[124] Unfortunately, such instances of sustained intensity are extremely rare.

Agencies do not cooperate with each other in preparing cases, and they do not exchange information with each other. Enforcement officers do not trust each other for they are sensitive to organized crime's ability to corrupt law enforcement. Agencies have not developed strategies to overcome these problems and to insure that needed data may be effectively transferred.

Failure to Develop Strategic Intelligence.[125] Intelligence deals with all of the things that should be known before initiating a course of action. In the context of organized crime there are two basic types of intelligence information: tactical and strategic. Tactical intelligence is the information obtained for specific organized crime prosecutions. Strategic intelligence is the information regarding the capabilities, intentions, and vulnerabilities of organized crime groups. For example, the body of knowledge built up by the FBI concerning the structure, membership, activities, and purposes of La Cosa Nostra represents significant strategic intelligence.

At present, most law enforcement agencies gather organized crime intelligence information with prosecution as the immediate objective. This tactical focus has not been accompanied by development of the full potential for strategic intelligence. That failure accounts for the gaps in knowledge, described above, concerning the ways in which criminal cartels organize and operate as a business. Prosecution based merely upon individual violations that come to the attention of law enforcement may result in someone's incarceration, but the criminal organization simply places someone else in the vacated position.

A body of strategic intelligence information would enable agencies to predict what directions organized crime might take, which industries it might try to penetrate, and how it might infiltrate. Law enforcement and regulatory agencies could then develop plans to destroy the organizational framework and coherence of the criminal cartels. Comprehensive strategic planning, however, even with an expanded intelligence effort, will not be possible until relevant disciplines, such as economics, political science, sociology, and operations research, begin to study organized crime intensively.

Failure to Use Available Sanctions. Gambling is the largest source of revenue for the criminal cartels, but the members of organized crime know they can operate free of significant punishment. Street workers have little reason to be deterred from joining the ranks of criminal organizations by fear of long jail sentences or large fines. Judges are reluctant to jail bookmakers and lottery operators. Even when offenders are convicted, the sentences are often very light. Fines are paid by the organization and considered a business expense.

And in other organized crime activity, when management level figures are convicted, too frequently the sentences imposed are not commensurate with the status of the offender.

Lack of Public and Political Commitment. The public demands action only sporadically, as intermittent, sensational disclosures reveal intolerable violence and corruption caused by organized crime. Without sustained public pressure, political office seekers and office holders have little incentive to address themselves to combatting organized crime. A drive against organized crime usually uncovers political corruption; this means that a crusading mayor or district attorney makes many political enemies. The vicious cycle perpetuates itself. Politicians will not act unless the public so demands; but much of the urban public wants the services provided by organized crime and does not wish to disrupt the system that provides those services. And much of the public does not

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[122] See General Report of this Commission, THE CHALLENGE OF CRIME IN A FREE SOCIETY 147-48 (1967), and Report of the Task Force on the Administration of Justice, ch. 4.

[123] In regard to the problem of lack of coordination among police agencies, see the General Report of this Commission, THE CHALLENGE OF CRIME IN A FREE SOCIETY 119-20 (1967); for a more detailed treatment, see Report of the Police Task Force, ch. 4.

[124] A program involving the Federal Bureau of Investigation and the Chicago Police Department, principally the Intelligence Division, was formally initiated in 1963. With information supplied by the FBI, police raids on gambling establishments have been carried out very successfully. Between 1963 and 1966 a total of 82 raids have been conducted upon sizable crap games, high-stake poker games, policy wheels, number games, horse bookmaking, sports bookmaking, wire rooms, and casino gambling. As a result of these raids, $382,398 in wagering paraphernalia and currency have been seized. Records confiscated indicate that the monthly bookmaking take in Chicago is approximately $6,300,000; policy wheel and numbers, $1,050,000; and casino gambling, $1,200,000. This program has apparently seriously curtailed important sources of organized crime revenue in the Chicago area. Other gambling enforcement efforts in Cook County have been less effective. Of the 11,158 gambling arrests made in 1963, for example, 76.2 percent were dismissed; only 16.3 percent resulted in convictions. Only 17 jail terms were imposed, and only 4 of those were in excess of 30 days. Blakey, Local Law Enforcement Response to Organized Crime, Jan. 1967 (unpublished report to this Commission).

[125] With regard to the concept of strategic intelligence, see generally KENT STRATEGIC INTELLIGENCE (1949); PLATT, STRATEGIC INTELLIGENCE PRDUCTION (1957). For a discussion of organized crime intelligence, see OFFICE OF THE N.Y. COUNSEL TO THE GOVERNOR, COMBATING ORGANIZED CRIME—A REPORT OF THE 1965 OYSTER BAY, NEW YORK, CONFERENCES ON COMBATING ORGANIZED CRIME 31-34 (1966).

see or understand the effects of organized crime in society.

A NATIONAL STRATEGY AGAINST ORGANIZED CRIME

Law enforcement's way of fighting organized crime has been primitive compared to organized crime's way of operating. Law enforcement must use methods at least as efficient as organized crime's. The public and law enforcement must make a full-scale commitment to destroy the power of organized crime groups. The Commission's program indicates ways to implement that commitment.

PROOF OF CRIMINAL VIOLATION

The previous section has described the difficulties that law enforcement agencies meet in trying to prove the participation of organized crime family members in criminal acts. Although earlier studies indicated a need for new substantive criminal laws, the Commission believes that on the Federal level, and in most State jurisdictions where organized crime exists, the major problem relates to matters of proof rather than inadequacy of substantive criminal laws, as the latter—for the most part—are reasonably adequate to deal with organized crime activity. The laws of conspiracy have provided an effective substantive tool with which to confront the criminal groups. From a legal standpoint, organized crime continues to grow because of defects in the evidence-gathering process.[126] Under present procedures, too few witnesses have been produced to prove the link between criminal group members and the illicit activities that they sponsor.

Grand Juries.[127] A compulsory process is necessary to obtain essential testimony or material. This is most readily accomplished by an investigative grand jury or an alternate mechanism through which the attendance of witnesses and production of books and records may be ordered. Such grand juries must stay in session long enough to allow for the unusually long time required to build an organized crime case. The possibility of arbitrary termination of a grand jury by supervisory judges constitutes a danger to successful completion of an investigation.

The Commission recommends:

At least one investigative grand jury should be impaneled annually in each jurisdiction that has major organized crime activity.

If a grand jury shows the court that its business is unfinished at the end of a normal term, the court should extend that term a reasonable time in order to allow the grand jury to complete pending investigations. Judicial dismissal of grand juries with unfinished business should be appealable by the prosecutor and provisions made for suspension of such dismissal orders during the appeal.

The automatic convening of these grand juries would force less than diligent investigators and prosecutors to explain their inaction. The grand jury should also have recourse when not satisfied with such explanations.

The Commission recommends:

The grand jury should have the statutory right of appeal to an appropriate executive official, such as an attorney general or governor, to replace local prosecutors or investigators with special counsel or special investigators appointed only in relation to matters that they or the grand jury deem appropriate for investigation.

When a grand jury terminates, it should be permitted by law to file public reports regarding organized crime conditions in the community.

Immunity.[128] A general immunity statute as proposed by the Commission [129] is essential in organized crime investigations and prosecutions. There is evidence to indicate that the availability of immunity can overcome the wall of silence that so often defeats the efforts of law enforcement to obtain live witnesses in organized crime cases. Since the activities of criminal groups involve such a broad scope of criminal violations, immunity provisions covering this breadth of illicit actions are necessary to secure the testimony of uncooperative or criminally involved witnesses. Once granted immunity from prosecution based upon their testimony, such witnesses must testify before the grand jury and at trial, or face jail for contempt of court.

Federal, State, and local coordination of immunity grants, and approval by the jurisdiction's chief law enforcement officer before immunity is granted, are crucial in organized crime investigations. Otherwise, without such coordination and approval, or through corruption of officials, one jurisdiction might grant immunity to someone about to be arrested or indicted in another jurisdiction.

The Commission recommends:

A general witness immunity statute should be enacted at Federal and State levels, providing immunity sufficiently broad to assure compulsion of testimony. Immunity should be granted only with the prior approval of the jurisdiction's chief prosecuting officer. Efforts to coordinate Federal, State, and local immunity grants should be made to prevent interference with existing investigations.

Perjury.[130] Many prosecutors believe that the incidence of perjury is higher in organized crime cases than in routine criminal matters. Immunity can be an effective prosecutive weapon only if the immunized witness then testifies truthfully. The present special proof require-

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[126] For a detailed discussion, see generally Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis*, printed as appendix C of this volume.
[127] *Id.* at 83–85.
[128] *Id.* at 86–88.
[129] See the General Report of this Commission, THE CHALLENGE OF CRIME IN A FREE SOCIETY 140–41 (1967).
[130] See Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis* 88–91, printed as appendix C of this volume.

ments in perjury cases [131] inhibit prosecutors from seeking perjury indictments and lead to much lower conviction rates for perjury than for other crimes. Lessening of rigid proof requirements in perjury prosecutions would strengthen the deterrent value of perjury laws and present a greater incentive for truthful testimony.

The Commission recommends:

Congress and the States should abolish the rigid two-witness and direct-evidence rules in perjury prosecutions, but retain the requirement of proving an intentional false statement.

WIRETAPPING AND EAVESDROPPING [132]

In connection with the problems of securing evidence against organized crime, the Commission considered issues relating to electronic surveillance, including wiretapping and "bugging"—the secret installation of mechanical devices at specific locations to receive and transmit conversations.

Significance to Law Enforcement. The great majority of law enforcement officials believe that the evidence necesary to bring criminal sanctions to bear consistently on the higher echelons of organized crime will not be obtained without the aid of electronic surveillance techniques. They maintain these techniques are indispensable to develop adequate strategic intelligence concerning organized crime, to set up specific investigations, to develop witnesses, to corroborate their testimony, and to serve as substitutes for them—each a necessary step in the evidence-gathering process in organized crime investigations and prosecutions.

As previously noted, the organizational structure and operational methods employed by organized crime have created unique problems for law enforcement. High-ranking organized crime figures are protected by layers of insulation from direct participation in criminal acts, and a rigid code of discipline inhibits the development of informants against them. A soldier in a family can complete his entire crime career without ever associating directly with his boss. Thus, he is unable, even if willing, to link the boss directly to any criminal activity in which he may have engaged for their mutual benefit. Agents and employees of an organized crime family, even when granted immunity from prosecution, cannot implicate the highest level figures, since frequently they have neither spoken to nor even seen them.

Members of the underworld, who have legitimate reason to fear that their meetings might be bugged or their telephones tapped, have continued to meet and to make relatively free use of the telephone—for communication is essential to the operation of any business enterprise. In legitimate business this is accomplished with written and oral exchanges. In organized crime enterprises, however, the possibility of loss or seizure of an incriminating document demands a minimum of written communication. Because of the varied character of organized criminal enterprises, the large numbers of persons employed in them, and frequently the distances separating elements of the organization, the telephone remains an essential vehicle for communication. While discussions of business matters are held on a face-to-face basis whenever possible, they are never conducted in the presence of strangers. Thus, the content of these conversations, including the planning of new illegal activity, and transmission of policy decisions or operating instructions for existing enterprises, cannot be detected. The extreme scrutiny to which potential members are subjected and the necessity for them to engage in criminal activity have precluded law enforcement infiltration of organized crime groups.

District Attorney Frank S. Hogan, whose New York County office has been acknowledged for over 27 years as one of the country's most outstanding, has testified that electronic surveillance is:

the single most valuable weapon in law enforcement's fight against organized crime . . . It has permitted us to undertake major investigations of organized crime. Without it, and I confine myself to top figures in the underworld, my own office could not have convicted Charles "Lucky" Luciano, Jimmy Hines, Louis "Lepke" Buchalter, Jacob "Gurrah" Shapiro, Joseph "Socks" Lanza, George Scalise, Frank Erickson, John "Dio" Dioguardi, and Frank Carbo . . . [133]

Over the years New York has faced one of the Nation's most aggravated organized crime problems. Only in New York have law enforcement officials achieved a level of continuous success in bringing prosecutions against organized crime. For over 20 years, New York has authorized wiretapping on court order. Since 1958, bugging has been similarly authorized.[134] Wiretapping was the mainstay of the New York attack against organized crime until Federal court decisions intervened.[135] Recently chief reliance in some offices has been placed on bugging, where the information is to be used in court. Law enforcement officials believe that the successes achieved in some parts of the State are attributable primarily to a combination of dedicated and competent personnel and adequate legal tools; and that the failure to do more in New York has resulted primarily from the failure to commit additional resources of time and men. The debilitating effect of corruption, political influence, and incompetence, underscored by the New York State Commission of Investigation, must also be noted.

In New York at one time, Court supervision of law enforcement's use of electronic surveillance was sometimes perfunctory, but the picture has changed substantially under the impact of pretrial adversary hearings on motions to suppress electronically seized evidence. Fifteen years ago there was evidence of abuse by low-rank policemen. Legislative and administrative controls, how-

[131] See the General Report of this Commission, THE CHALLENGE OF CRIME IN A FREE SOCIETY 141 (1967).

[132] For one view on this subject, see Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis* 83, printed as appendix C of this volume.

[133] Testimony in support of the Attorney General's program (S. 2813), *Hearings Before the Sen. Comm. on the Judiciary*, 87th Cong., 2d Sess. 172-73 (1962).

[134] N.Y. CODE CRIM. PROC. § 813a, b (1958).

[135] In Benanti v. United States, 355 U.S. 96 (1957), the Supreme Court held that evidence obtained as the result of a wiretap conducted by State officers was inadmissible in a Federal court, on the grounds that its divulgence would be a violation of § 605 of the Federal Communications Act. Many New York State prosecutors thereafter refrained from offering wiretap evidence secured under State court order because of the conflict with Federal law.

ever, have apparently been successful in curtailing its incidence.

The Threat to Privacy. In a democratic society privacy of communication is essential if citizens are to think and act creatively and constructively. Fear or suspicion that one's speech is being monitored by a stranger, even without the reality of such activity, can have a seriously inhibiting effect upon the willingness to voice critical and constructive ideas. When dissent from the popular view is discouraged, intellectual controversy is smothered, the process for testing new concepts and ideas is hindered and desirable change is slowed. External restraints, of which electronic surveillance is but one possibility, are thus repugnant to citizens of such a society.

Today, in addition to some law enforcement agents, numerous private persons are utilizing these techniques. They are employed to acquire evidence for domestic relations cases, to carry on industrial espionage and counterespionage, to assist in preparing for civil litigation, and for personnel investigations, among others. Technological advances have produced remarkably sophisticated devices, of which the electronic cocktail olive is illustrative, and continuing price reductions have expanded their markets. Nor has man's ingenuity in the development of surveillance equipment been exhausted with the design and manufacture of electronic devices for wiretapping or for eavesdropping within buildings or vehicles. Parabolic microphones that pick up conversations held in the open at distances of hundreds of feet are available commercially, and some progress has been made toward utilizing the laser beam to pick up conversations within a room by focusing upon the glass of a convenient window. Progress in microminiaturizing electronic components has resulted in the production of equipment of extremely small size. Because it can detect what is said anywhere—not just on the telephone—bugging presents especially serious threats to privacy.

Detection of surveillance devices is difficult, particularly where an installation is accomplished by a skilled agent. Isolated instances where equipment is discovered in operation therefore do not adequately reflect the volume of such activity; the effectiveness of electronic surveillance depends in part upon investigators who do not discuss their activities. The current confusion over the legality of electronic surveillance compounds the assessment problem since many agents feel their conduct may be held unlawful and are unwilling to report their activities. It is presently impossible to estimate with any accuracy the volume of electronic surveillance conducted today. The Commission is impressed, however, with the opinions of knowledgeable persons that the incidence of electronic surveillance is already substantial and increasing at a rapid rate.

Present Law and Practice. In 1928 the Supreme Court decided that evidence obtained by wiretapping a defendant's telephone at a point outside the defendant's premises was admissible in a Federal criminal prosecution.[136] The Court found no unconstitutional search and seizure under the Fourth Amendment. Enactment of Section 605 of the Federal Communications Act in 1934[137] precluded interception and disclosure of wire communications. The Department of Justice has interpreted this section to permit interception so long as no disclosure of the content outside the Department is made.[138] Thus, wiretapping may presently be conducted by a Federal agent, but the results may not be used in court. When police officers wiretap and disclose the information obtained, in accordance with State procedure, they are in violation of Federal law.

Law enforcement experience with bugging has been much more recent and more limited than the use of the traditional wiretap. The legal situation with respect to bugging is also different. The regulation of the national telephone communication network falls within recognized national powers, while legislation attempting to authorize the placing of electronic equipment even under a warrant system would break new and uncharted ground. At the present time there is no Federal legislation explicitly dealing with bugging. Since the decision of the Supreme Court in *Silverman* v. *United States,* 365 U.S. 505 (1961), use of bugging equipment that involves an unauthorized physical entry into a constitutionally protected private area violates the Fourth Amendment, and evidence thus obtained is inadmissible. If eavesdropping is unaccompanied by such a trespass, or if the communication is recorded with the consent of one of the parties, no such prohibition applies.

The confusion that has arisen inhibits cooperation between State and Federal law enforcement agencies because of the fear that information secured in one investigation will legally pollute another. For example, in New York City prosecutors refuse to divulge the contents of wire communications intercepted pursuant to State court orders because of the Federal proscription but do utilize evidence obtained by bugging pursuant to court order. In other sections of New York State, however, prosecutors continue to introduce both wiretapping and eavesdropping evidence at trial.

Despite the clear Federal prohibition against disclosure of wiretap information, no Federal prosecutions of State officers have been undertaken, although prosecutions of State officers under State laws have occurred.

One of the most serious consequences of the present state of the law is that private parties and some law enforcement officers are invading the privacy of many citizens without control from the courts and reasonable legislative standards. While the Federal prohibition is a partial deterrent against divulgence, it has no effect on interception, and the lack of prosecutive action against violators has substantially reduced respect for the law.

The present status of the law with respect to wiretapping and bugging is intolerable. It serves the interests neither of privacy nor of law enforcement. One way or the other, the present controversy with respect to electronic surveillance must be resolved.

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[136] Olmstead v. United States, 277 U.S. 438 (1928).
[137] 48 Stat. 1103 (1934), 47 U.S.C. 605 (1958).
[138] See testimony of Att'y Gen. Nicholas Katzenbach, *Hearings Before the Subcomm. on Criminal Laws and Procedures of the Sen. Comm. on the Judiciary,* 89th Cong., 2d Sess., at 34 (1966).

The Commission recommends:

Congress should enact legislation dealing specifically with wiretapping and bugging.

All members of the Commission agree on the difficulty of striking the balance between law enforcement benefits from the use of electronic surveillance and the threat to privacy its use may entail. Further, striking this balance presents important constitutional questions now pending before the Supreme Court in *Berger* v. *New York*,[139] and any congressional action should await the outcome of that case.

All members of the Commission believe that if authority to employ these techniques is granted, is must be granted only with stringent limitations. One form of detailed regulatory statute that has been suggested to the Commission is outlined in appendix C, *infra*.[140] All private use of electronic surveillance should be placed under rigid control, or it should be outlawed.

A majority of the members of the Commission believe that legislation should be enacted granting carefully circumscribed authority for electronic surveillance to law enforcement officers to the extent it may be consistent with the decision of the Supreme Court in *Berger* v. *New York*,[141] and, further, that the availability of such specific authority would significantly reduce the incentive for, and the incidence of, improper electronic surveillance.

The other members of the Commission have serious doubts about the desirability of such authority and believe that without the kind of searching inquiry that would result from further congressional consideration of electronic surveillance, particularly of the problems of bugging, there is insufficient basis to strike this balance against the interests of privacy.

Matters affecting the national security not involving criminal prosecution are outside the Commission's mandate, and nothing in this discussion is intended to affect the existing powers to protect that interest.

SENTENCING

Criminal statutes do not now authorize greater punishment when the violation was committed as part of an organized crime business. The Model Sentencing Act creates a separate category for such violations. It provides for 30 years' commitment of any felony offender who is so dangerous that the public must be protected from him and whose felony was committed as part of a continuing criminal activity in concert with one or more persons.[142] The Model Penal Code also contains separate provisions for heavier sentences of defendants connected with organized crime.[143]

The Commission recommends:

Federal and State legislation should be enacted to provide for extended prison terms where the evidence, presentence report, or sentence hearing shows that a felony was committed as part of a continuing illegal business in which the convicted offender occupied a supervisory or other management position.

This will make it possible to distinguish, for example, between the streetworker in a gambling operation and an office supervisor or higher management person.

There must be some kind of supervision over those trial judges who, because of corruption, political considerations, or lack of knowledge, tend to mete out light sentences in cases involving organized crime management personnel. Consideration should therefore be given to allowing the prosecution the right of appeal regarding sentences of persons in management positions in an organized crime activity or group. Constitutional requirements for such an appellate procedure must first be carefully explored.

APPEALS FROM SUPPRESSION ORDERS

The Commission's recommendation [144] that prosecutors be permitted to appeal trial court orders suppressing evidence is particularly important in organized crime cases, where so much investigative and prosecutive time has been expended, and where evidence gathering is extremely difficult. Allowing appeals would also help overcome corrupt judicial actions. In gambling cases, particularly, arbitrary rejection of evidence uncovered in a search is one method by which corrupt judges perform their services for organized crime.

PROTECTION OF WITNESSES

No jurisdiction has made adequate provision for protecting witnesses in organized crime cases from reprisal. In a few instances where guards are provided, resources require their withdrawal shortly after the particular trial terminates. On a case-to-case basis, governments have helped witnesses find jobs in other sections of the country or have even helped them to emigrate. The difficulty of obtaining witnesses because of the fear of reprisal could be countered somewhat if governments had established systems for protecting cooperative witnesses.

The Commission recommends:

The Federal Government should establish residential facilities for the protection of witnesses desiring such assistance during the pendency of organized crime litigation.

After trial, the witness should be permitted to remain at the facility so long as he needs to be protected. The Federal Government should establish regular procedures to help Federal and local witnesses who fear organized crime reprisal, to find jobs and places to live in other parts of the country, and to preserve their anonymity from organized crime groups.

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[139] No. 615, U.S., April 6, 1967.

[140] Blakey, *Aspects of the Evidence Gathering Process in Organized Crime Cases: A Preliminary Analysis* 106–113, printed as appendix C of this volume.

[141] No. 615, U.S., April 6, 1967.

[142] NAT'L COUNCIL ON CRIME & DELINQUENCY, MODEL SENTENCING ACT art. 3, § 5(b), (c) (1963). See also Rector, *Sentencing the Racketeer*, 8 CRIME & DELINQUENCY 385–89 (1962).

[143] Article 7, § 7.03 (Proposed Official Draft 1962) provides in part: "The Court may sentence a person who has been convicted of a felony to an extended term of imprisonment if . . .

"(2) The defendant is a professional criminal whose commitment for an extended term is necessary for protection of the public.

"The Court shall not make such a finding unless the defendant is over twenty-one years of age and:

"(a) the circumstances of the crime show that the defendant has knowingly devoted himself to criminal activity as a major source of livelihood; or

"(b) the defendant has substantial income or resources not explained to be derived from a source other than criminal activity."

[144] General Report of this Commission, THE CHALLENGE OF CRIME IN A FREE SOCIETY, ch. 5 (1967); Report of the Task Force on the Administration of Justice 147–48.

State and Local Manpower. There is, as described above, minimal concentrated law enforcement activity directed at organized crime. Only a few cities have established police intelligence and prosecutorial units specifically for developing organized crime cases. Legal tools such as electronic surveillance and immunity will be of limited use unless an adequate body of trained and expert investigators and prosecutors exists to use those tools properly.

The Commission recommends:

Every attorney general in States where organized crime exists should form in his office a unit of attorneys and investigators to gather information and assist in prosecution regarding this criminal activity.

Investigators should include those with the special skills, such as accounting and undercover operations, crucial to organized crime matters. Members of the State police could be assigned to this unit. In local areas where it appears that the jurisdiction's law enforcement agencies are not adequately combatting organized crime, State police should conduct investigations, make arrests, or conduct searches upon request of any branch of the local government. This should be done without the knowledge of local officials if, because of apparent corruption, it is necessary. The State police should cooperate with and seek advice from the State attorney general's special unit. For local enforcement,

The Commission recommends:

Police departments in every major city should have a special intelligence unit solely to ferret out organized criminal activity and to collect information regarding the possible entry of criminal cartels into the area's criminal operations.

Staffing needs will depend on local conditions, but the intelligence programs should have a priority rating that insures assignment of adequate personnel. Perhaps the enormous amount of manpower devoted to petty vice conditions should be reduced and the investigative personnel for organized crime cases increased. Criteria for evaluating the effectiveness of the units, other than mere numbers of arrests, must be developed.

The background of potential intelligence unit members should be investigated extensively and only the most talented and trustworthy assigned to those units. Salary levels should be such that membership in the unit could be a career in itself.

One of the duties of the police legal advisers [145] should be consultation with the intelligence unit. Special training programs should be used to teach the necessary skills involved in organized crime investigative work.

Because of the special skills and extensive time involved in organized crime cases, prosecution thereof requires concentrated efforts.

The Commission recommends:

The prosecutor's office in every major city should have sufficient manpower assigned full time to organized crime cases. Such personnel should have the power to initiate organized crime investigations and to conduct the investigative grand juries recommended above.

Special training in these legal tactics should be provided; the prosecutors should work closely with the police units.

Development and dissemination of intelligence. Since the activities of organized crime overlap individual police jurisdictions, the various law enforcement agencies must share information and coordinate their plans.

On the Federal level, enforcement agencies are furnishing a large amount of intelligence to the Organized Crime and Racketeering (OCR) Section in the Department of Justice. But there is no central place where a strategic intelligence system regarding organized crime groups is being developed to coordinate an integrated Federal plan for enforcement and regulatory agencies.

The Commission recommends:

The Federal Government should create a central computerized office into which each Federal agency would feed all of its organized crime intelligence.

Intelligence information in the OCR Section is now recorded manually in a card catalog. Much information, such as that discovered in grand jury proceedings, has not been incorporated because of limited resources. Many Federal agencies do not submit information on a case until it has been completed. A central office in the Department of Justice should have proper recording facilities and should analyze intelligence information fed to it by all relevant Federal agencies keeping current with events. A pool of information experts from the FBI, Secret Service, Central Intelligence Agency and other departments and private companies should help build the system, which would employ punch cards, tapes, and other modern information storage and retrieval techniques. Each agency, of course, would maintain its own files, but being able to draw upon the capability of the central computer would eliminate duplication of effort and justify the cost of the new operation. A strategic intelligence system necessary to satisfy investigative, prosecutive, and regulatory needs must have specialists in economics, sociology, business administration, operations research, and other disciplines, as well as those trained in law enforcement.

Since organized crime crosses State lines, the Commission recommends the creation of regional organizations, such as that established by the New England State Police Compact. Large States could develop statewide systems, such as exists in New York,[146] as well as participate in regional compacts.

These systems should permit and encourage greater exchange of information among Federal, State, and local

[145] See Caplan, *The Police Legal Advisor*, Report of the Police Task Force (appendix A, ch. 3).

[146] For a description of the New York State system, see N.Y. STATE IDENTIFICATION & INTELLIGENCE SYSTEM, A NEW CONCEPT IN CRIMINAL JUSTICE INFORMATION-SHARING (1966).

Coordinated Effort Against Organized Crime

Federal Groups

Commitment of Political Leaders

26 Federal Investigative Agencies

Federal Prosecutors' Units

Federal Regulatory Agencies

Joint Congressional Investigative Committee

Local Groups

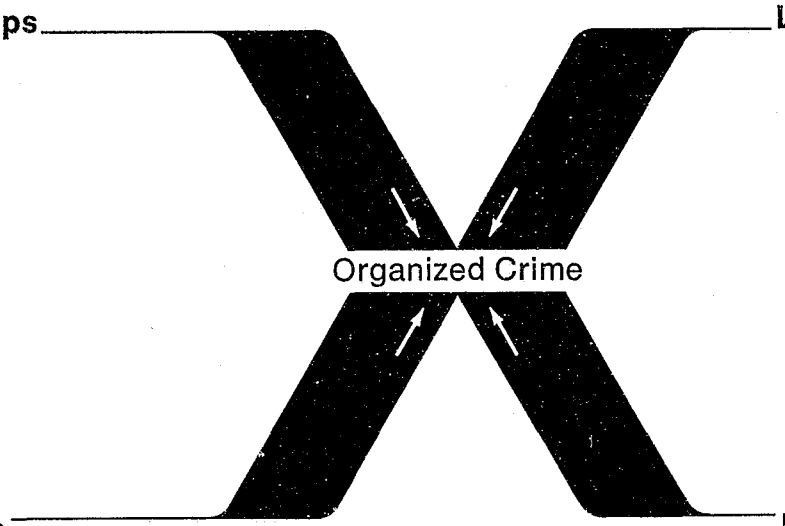
Commitment of Political Leaders

Local Police Special Units

Local Prosecutors' Units

Government Crime Commissions

Grand Jury Reports



State Groups

Commitment of Political Leaders

State Police Investigations

State Attorney General Intelligence Units

State and Regional Intelligence Groups

State Prosecutors' Units

State Regulatory Agencies

Government Crime Commissions

Private Groups

Commitment of Citizens

Private Crime Commissions

Press and News Media

Social Scientists

Private Trade Associations

agencies. Currently, information sharing proceeds on a personal basis; *i.e.,* information is given officers who, through personal contact with agents of the disseminator, have proved their trustworthiness.

Perhaps a central security system should be developed (like the military system), in which one who has been cleared to receive information and who demonstrates a need for it can obtain information, whether or not the disseminator and recipient are personally acquainted. Standards for clearance should be established, and any agency with available manpower could conduct the investigation of potential recipients of information.

Sharing information on other than a person-to-person basis of mutual trust will be a delicate evolutionary process. Preservation of the secrecy of each confidential informant's identity is an absolute requirement for any successful intelligence-gathering agency. Law enforcement agents are loath to make information available when its source could be guessed or inferred. However, great amounts of intelligence can be shared without revealing the possible identity of the informant, and information sharing by means of a mechanical, central security system would still be of great value.

The proposed organized crime intelligence program of the New York State Identification and Intelligence System is one way to solve the problem of keeping the source of information secret. By that system the agency that commits information to central storage would be allowed to choose what other agencies may draw upon those particular data.

The Commission recommends:

The Department of Justice should give financial assistance to encourage the development of efficient systems for regional intelligence gathering, collection and dissemination. By financial assistance and provisions of security clearance, the Department should also sponsor and encourage research by the many relevant disciplines regarding the nature, development, activities, and organization of these special criminal groups.

Federal Law Enforcement. The Attorney General should continue to be the focal point of the Federal enforcement drive against organized crime. The Organized Crime and Racketeering (OCR) Section is the coordinating and policymaking body within the Department of Justice. The Commission believes that greater centralization of the Federal effort is desirable and possible.

Experience in some areas has shown that an effective partnership can be built between OCR Section attorneys and prosecutors in the 94 U.S. Attorneys' offices throughout the Nation. Such cooperation should be the rule for the organized crime program, which should not be the exclusive province of either the OCR Section or the U.S. Attorneys.

Different responsibilities within the Federal agencies have produced investigators with special skills and talents. The expertise of these agents should be used by organizing them into investigative teams that work exclusively on organized crime matters under the direction of the OCR Section.

The Commission recommends:

The staff of the OCR Section should be greatly increased, and the section should have final authority for decision-making in its relationship with U.S. Attorneys on organized crime cases.

The Federal Government could also do much to assist and coordinate the work of State and local organized crime enforcement. There is very little such assistance at present.

The Commission recommends:

A technical assistance program should be launched wherein local jurisdictions can request the help of experienced Federal prosecutors from the OCR Section. The Department of Justice, through the FBI and the OCR Section, should conduct organized crime training sessions for State and local law enforcement officers.

This training could supplement the extensive general enforcement sessions now conducted by the FBI and the narcotics enforcement training offered by the Federal Bureau of Narcotics. The proposed training would concentrate on the development of special investigative and prosecutive techniques necessary in organized crime investigations.

In view of the additional responsibilities cast upon the OCR Section by these recommendations, perhaps its status should be raised to a division-level operation which would be headed by an Assistant Attorney General appointed by the President.

These recommendations for the OCR Section would not remove any of the existing responsibility of Federal investigating agencies.

Legislative Investigations. To give necessary impetus to a continuing drive against organized crime, the public must be constantly informed of its manifestations and influences. The changing nature of organized criminal activities also requires that legislators constantly analyze needs for new substantive and procedural provisions.

The Commission recommends:

A permanent joint congressional committee on organized crime should be created.[147]

A permanent committee would focus the interest of those members of Congress who have in the past displayed concern with the problem, and would involve a greater number of legislators than at present. It could mean that there would be a larger staff to concentrate on the problem and to permit consideration of the implications of any new legislation for organized crime. In addition, the creation of such a committee would place the prestige

[147] On Feb. 23, 1967, Cong. William C. Cramer (R. Fla.) introduced a bill calling for the creation of a joint congressional committee on organized crime to implement the recommendation of this Commission. H.R. 6054, 90th Cong., 1st Sess. (1967).

of the U.S. Congress behind the proposition that organized crime is a national problem of the highest priority.

PUBLIC AND PRIVATE CRIME INVESTIGATING COMMISSIONS

Crime investigating commissions financed by State governments, such as in New York and Illinois, have proved to be effective for informing the public about organized crime conditions. Legislative proposals to combat organized crime also result from the hearings of these committees.

The Commission recommends:

States that have organized crime groups in operation should create and finance organized crime investigation commissions with independent, permanent status, with an adequate staff of investigators, and with subpoena power. Such commissions should hold hearings and furnish periodic reports to the legislature, Governor, and law enforcement officials.

Independent citizen crime commissions in metropolitan areas can provide enlightened resistance to the growth of organized crime and to the formation of alliances between it and politics. A citizen crime commission can give reliable and determined community leadership to assess the local government's effort to control organzed crime. It can provide impartial public education, marshal public support for government agencies that have committed resources to special organized crime drives, monitor judicial and law enforcement performance, organize public responses, and enlist business cooperation against infiltration by organized crime.

The Commission recommends:

Citizens and business groups should organize permanent citizen crime commissions to combat organized crime. Financial contributions should be solicited to maintain at least a full-time executive director and a part-time staff.

At this time there are not enough citizen crime commissions functioning effectively in the Nation. A national coordinating headquarters could be established in Washington, D.C., to encourage and guide the creation of new commissions and to provide services to improve existing ones. Private foundation funds should be sought to help establish and administer the headquarters.

It would provide channels for communication among citizen crime commissions, between such commissions and national agencies of government, and between crime commissions and mutual interest associations such as the International Association of Chiefs of Police, the National District Attorneys Association, the National Council on Crime and Delinquency, and others. Such a headquarters could give concerned citizens in any community the technical assistance necessary for initiating a crime commission. In addition to making trained personnel available for short-term assignments with local commissions, a headquarters could establish formal procedures for training professionals in crime commission management. A national headquarters could also motivate States and communities to undertake reforms in their criminal justice systems and to deal with other community problems unrelated to organized crime.

PRIVATE AND GOVERNMENT REGULATION

Law enforcement is not the only weapon that governments have to control organized crime. Regulatory activity can have a great effect. One means to diminish organized crime's influence on politics, for example, would be legislation subjecting political contributions and expenditures to greater public visibility and providing incentives for wider citizen contributions to State and local political activity. Tax regulations could be devised to require disclosure of hidden, or beneficial, owners of partnerships and corporations that do not have public ownership.

Government at various levels has not explored the regulatory devices available to thwart the activities of criminal groups, especially in the area of infiltration of legitimate business. These techniques are especially valuable because they require a less rigid standard of proof of violation than the guilt-beyond-a-reasonable-doubt requirement of criminal law. Regulatory agencies also have powers of inspection not afforded to law enforcement. State income tax enforcement could be directed at organized crime's businesses. Food inspectors could uncover regulatory violations in organized crime's restaurant and food processing businesses. Liquor authorities could close premises of organized crime-owned bars in which illicit activities constantly occur.[148] Civil proceedings could stop unfair trade practices and antitrust violations by organized crime businesses. Trade associations could alert companies to organized crime's presence and tactics and stimulate action by private business.

The Commission recommends:

Groups should be created within the Federal and State departments of justice to develop strategies and enlist regulatory action against businesses infiltrated by organized crime.

Private business associations should develop strategies to prevent and uncover organized crime's illegal and unfair business tactics.

NEWS MEDIA

In recent years, the American press has become more concerned about organized crime. Some metropolitan newspapers report organized crime activity on a continuing basis, and a few employ investigative reporters whose exclusive concern is organized crime. The television in-

[148] Johnson, *Organized Crime: Challenge to the American Legal System* (pt. 2), 54 J. CRIM. L., C. & P.S. 1, 22-26 (1963).

dustry, as well, has accepted a responsibility for informing the American citizen of the magnitude of the problem.

In some parts of the country revelations in local newspapers have stimulated governmental action and political reform. Especially in smaller communities, the independence of the press may be the public's only hope of finding out about organized crime. Public officials concerned about organized crime are encouraged to act when comprehensive newspaper reporting has alerted and enlisted community support.

The Commission recommends:

All newspapers in major metropolitan areas where organized crime exists should designate a highly competent reporter for full-time work and writing concerning organized criminal activities, the corruption caused by it, and governmental efforts to control it. Newspapers in smaller communities dominated by organized crime should fulfill their responsibility to inform the public of the nature and consequence of these conditions.

PARTICIPATION BY LOCAL GOVERNMENT LEADERS

Enforcement against organized crime and accompanying public corruption proceeds with required intensity only when the political leaders in Federal, State, and local governments provide aggressive leadership.[149] They are the only persons who can secure the resources that law enforcement needs. They are the only ones who can assure police officials that no illegal activity or participating person is to be protected from proper enforcement action. They are the only ones who can insure that persons cooperating with organized criminal groups are not appointed to public office. They are the only ones who can provide for effective monitoring of regulatory action to expose irregular practices or favors given to businesses dominated by criminal groups. They are the ones who can provide full backing for a police chief who institutes internal inspection, promotion, and other practices [150] for controlling police corruption.

Mayors, Governors, and the President of the United States must be given adequate information concerning organized crime conditions. Dissemination of incomplete or unevaluated intelligence about individuals would present grave civil liberties problems. However, government leaders must be made aware of the particular activities of organized crime groups.

The Commission recommends:

Enforcement officials should provide regular briefings to leaders at all levels of government concerning organized crime conditions within the jurisdiction.

The briefings should be supplemented by written reports further describing those conditions as well as current governmental action to combat them. Reports of conditions should also be furnished periodically by the Federal Government to State and local jurisdictions, and by State governments to local jurisdictions. Reports should be withheld from jurisdictions where corruption is apparent and knowledge by a corrupt official of the information in the report could compromise enforcement efforts.

Public fears of reporting organized crime conditions to apparently corrupt police and governmental personnel must also be met directly. If an independent agency for accepting citizen grievances is established,[151] it should be charged with accepting citizen complaints and information about organized crime and corruption.

Information obtained in this way could be forwarded to Federal, State, or local law enforcement officials, or to all of them, at the direction of the agency. Names of sources should be kept confidential if the citizen so requests or if the agency deems it necessary.

The above program is not intended as a series of independent proposals. It represents an integrated package requiring combined action by the American people, its governments and its businesses. Organized crime succeeds only insofar as the Nation permits it to succeed. Because of the magnitude of the problem, the various branches of government cannot act with success individually. Each must help the other. Laws and procedures are of no avail without proper enforcement machinery. Prevention fails unless citizens, individually and through organizations, devise solutions and encourage their elected representatives. Regulation must accomplish what criminal law enforcement cannot. Above all, the endeavor to break the structure and power of organized crime—an endeavor that the Commission firmly believes can succeed—requires a commitment of the public far beyond that which now exists. Action must replace words; knowledge must replace fascination. Only when the American people and their governments develop the will can law enforcement and other agencies find the way.

In many ways organized crime is the most sinister kind of crime in America. The men who control it have become rich and powerful by encouraging the needy to gamble, by luring the troubled to destroy themselves with drugs, by extorting the profits of honest and hardworking businessmen, by collecting usury from those in financial plight, by maiming or murdering those who oppose them, by bribing those who are sworn to destroy them. Organized crime is not merely a few preying upon a few. In a very real sense it is dedicated to subverting not only American institutions, but the very decency and integrity that are the most cherished attributes of a free society. As the leaders of Cosa Nostra and their racketeering allies pursue their conspiracy unmolested, in open and continuous defiance of the law, they preach a sermon that all too many Americans heed: The government is for sale; lawlessness is the road to wealth; honesty is a pitfall and morality a trap for suckers.

The extraordinary thing about organized crime is that America has tolerated it for so long.

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[149] The results of the program initiated by Gov. John Dempsey in Connecticut illustrate the improvements in law enforcement which can be achieved against organized crime. In response to growing concern over the problems of organized gambling, on Feb. 25, 1965, the Governor created a Committee on Gambling "to take a hard look at illegal organized gambling in Connecticut and to initiate steps to deal with the problems that it presents." CONN. GOV.'S COMM. ON GAMBLING REP. 4 (1965). The committee was composed of judges, State and local law enforcement officials, representative Federal officials, and State prosecutors. Pursuant to its first report and recommendations, a significant increase in the number and term of jail sentences imposed by the courts on convicted gambling law offenders occurred. Local police department enforcement efforts improved, both independently and in collaboration with the State police. See CONN. GOV.'S COMM. ON GAMBLING REP. (1965); Conn. Gov.'s Comm. on Gambling, 1st Supplemental Rep. (mimeo. 1966). A second supplemental report is being prepared by the committee at the time of this writing, which will reveal still increased enforcement results.

[150] General Report of this Commission, THE CHALLENGE OF CRIME IN A FREE SOCIETY 115-16 (1967); Report of the Police Task Force, ch. 7.

[151] General report of this Commission, THE CHALLENGE OF CRIME IN A FREE SOCIETY 102-03 (1967).

THE FUNCTIONS AND STRUCTURE OF CRIMINAL SYNDICATES

by Donald R. Cressey

Contents

AMERICAN ORGANIZED CRIME AND THE SICILIAN MAFIA

In the United States, criminals have managed to organize a nation-wide illicit cartel and confederation. This organization is dedicated to amassing millions of dollars from usury and the illicit sale of lottery tickets, chances on the outcome of horse races and athletic events, and the sale or manipulation of sexual intercourse, narcotics, and liquor. Its presence in our society is morally reprehensible because any citizen purchasing illicit goods and services from organized criminals contributes to an underground culture of fraud, corruption, violence, and murder. Nevertheless, criminal organizations dealing only in illicit goods and services are no great threat to the nation. The danger of organized crime arises because the vast profits acquired from the sale of illicit goods and services are being invested in licit enterprises, in both the business sphere and the governmental sphere.

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It is when criminal syndicates start to undermine basic enonomic and political traditions and institutions that the real trouble begins. And the real trouble has begun in the United States.

It is one thing to make money in an illegal gambling enterprise, but it is another thing to achieve business monopoly by means of a simple weapon—a gun. It is one thing to amass a fortune in usury, but it is another thing to bribe a government official in order to get a construction contract. It is one thing to control gambling and most other illegal activities in a neighborhood, but it is another thing to demand, with a gun, a share of the butcher's profits, the baker's profits, the doctor's fees, and the banker's interest rates.

While organized criminals do not yet have control of all the legitimate economic and political activities in any metropolitan or other geographic area of America, they do have control of *some* of those activities in many areas. Members of crime syndicates have invested in a wide variety of businesses, and they are not operating those businesses legally, as the Kefauver Committee showed over a decade ago. They continue to invest, and they continue to monopolize by force. Further, rulers of crime syndicates have strong interests in the governmental process, and they are "represented," in one form or another, in legislative, judicial, and executive bodies all over the country. They have gone beyond buying licenses to gamble from law-enforcement officials and minor city officials and now are concerned with influencing legislation on matters ranging from food services to garbage collection.

We recognize a danger. We cannot be sure of the degree of the danger any more than the observer of the beginnings of any other kind of monopoly can be sure of the degree of danger. If a large retail firm lowers its prices to a level such that its small independent competitors go bankrupt, that is free enterprise. If, after its competitors are forced out of business, the large firm raises its prices above those existing when it had competitors, thus forcing consumers to pay a tribute, that is exploitive monopolistic practice. By analogy, rulers of crime syndicates are beginning to drive legitimate businessmen, labor leaders, and other supporters of the ideology of free competition to the wall. They have estab-

256-177 O - 67 - 3

lished, by force, intimidation, and even more "legal" methods, monopolies in several relatively small fields such as distribution of vending machines, the supplying of linen to night clubs, and the supplying of some forms of labor.

A former Special Attorney in the Organized Crime and Racketeering Section of the U.S. Department of Justice accurately has pointed out that "when organized crime embarks on a venture in legitimate business it ordinarily brings to that venture all the techniques of violence and intimidation which are employed in its illegal enterprises." [1] Accordingly, consumers and taxpayers unknowingly pay tribute to them. This situation is more dangerous than was the situation in the 1920's and 1930's when the monopolies controlled by organized criminals were primarily monopolies on only the distribution of illicit goods and services. The real danger is that the trend will continue to the point where syndicate rulers gain such a degree of control that they drive supporters of free enterprise and democracy out of "business" and then force us to pay tribute in the form of traditional freedoms. Syndicate rulers are among the most active monopolizers in the American economy.

It is difficult to determine the point at which antitrust action should be taken against the fictitious large retail firm noted in the example above. It is also difficult to determine the point at which the danger to American freedom posed by despotic rulers of crime syndicates is clear and present enough to justify strong defensive and retaliatory action. Nevertheless, if a significant proportion of society's rewards go to those who openly violate the law, and if those who obey the law come to feel that criminal behavior pays more than honesty, then we are in danger. We agree with Senator Kennedy who, when acting as Counsel for The Permanent Subcommittee on Investigations of the U.S. Senate Committee on Operations (McClellan Committee), became convinced that if we do not on a national scale attack organized criminals, with weapons and techniques as effective as their own, they will destroy us.

The extent of the danger can, interestingly enough, be determined by looking at Sicily as well as by looking at America. Because the Sicilian Mafia has been the subject of discussion and investigation, if not study, for almost a century, Americans can readily learn more about it than they can about the activities of organized criminals in their own country. While we are confident that American organized crime is not merely the Sicilian Mafia transplanted, the similarities between the two organizations are direct and too great to be ignored.

For at least a century, a pervasive organization of criminals called the Mafia has dominated almost all aspects of life—economic, political, religious, and social—in the western part of the island of Sicily. This organization also has been influential, but not dominating, in the remainder of Sicily and in southern Italy. In the early part of this century, thousands of Sicilians and southern Italians became American immigrants. The immigrants brought with them the cultural traits of their homeland, and included in those traits are psychological attitudes toward a wide variety of social relationships. At the same time, the immigration established an obvious and direct route for further diffusion of the customs of Sicily to the United States. Because the American farm land had been more or less settled by the time the Sicilians and Italians arrived, they tended to settle in the large cities of the Eastern seaboard, where they lived together in neighborhoods. The fact that they lived together enabled them to retain for some time many of the customs of the old country, unlike, say, the Scandinavians who scattered through the upper midwest. A certain "clannishness" contributed to the retention of the custom of "clannishness." Further, the custom of "clannishness" probably was accentuated by the move to a strange land.

In these early Sicilian and Italian neighborhoods, discussion of the workings of the Mafia and the "Black Hand" was commonplace. Violence was attributed to these organizations, and people feared the names. Men were shot on the streets but, out of fear, obvious witnesses refused to come forward. In Brooklyn, it became customary for housewives to say to each other, on the occasion of hearing the sounds of a murderer's pistol, "It is sad that someone's injured horse had to be destroyed." Fear was present, just as it had been in Italy and Sicily. No one can be sure that this fear was a product of the old world Mafia, rather than merely the work of hoodlums who capitalized on the fear of the Mafia that existed back home.

During national prohibition in the 1930's, the various bootlegging gangs across the nation were largely composed of immigrants and the descendants of immigrants from many countries. An organization known as "Unione Siciliano" was involved. In 1930–1931, near the end of prohibition, the basic framework of the current structure of American organized crime, to be described in the next section, was established as a result of a gangland war in which an alliance of Italians and Sicilians was victorious. During this war, the Italian-Sicilian alliance was referred to as "the Mafia," and the criminal operations of this establishment later were referred to as the operations of "the Mafia," just as crimes in Italian and Sicilian neighborhoods were in the 1920's attributed to "the Mafia" and the "Black Hand."

The Italian-Sicilian apparatus set up as a result of the 1930–1931 war continues to dominate organized crime in America, and it is still called "the Mafia" in many quarters. There remains, however, the question whether this organization is the Mafia of Sicily and southern Italy transplanted to this country or whether it arose primarily as a response of hoodlums to their new cultural setting, some of the hoodlums being Italian or Sicilian immigrants knowledgeable about how to set up and control an illicit organization. There are several reasons why this question is important.

First, it is a fact that the great majority, by far, of Italian and Sicilian immigrants and their descendants, have been both fine and law-abiding citizens. They have somehow let criminals who are Italians or Sicilians, or Americans of Italian or Sicilian descent, be identified with them. Criminals of Italian or Sicilian descent are

[1] Earl Johnson, Jr., "Organized Crime: Challenge to the American Legal System," *Journal of Criminal Law, Criminology and Police Science,* 53: 399–425, December, 1962, and 54: 1–29, January, 1963. At 53: 406.

called "Italians" or "Sicilians," while bankers, lawyers, and professors of Italian or Sicilian descent are called "Americans." More Americans know the name "Luciano" than know the name "Fermi." If the criminal cartel or confederation is an importation from Sicily and Italy, it should be disowned by all Italian-Americans and Sicilian-Americans because it does not represent the real cultural contribution of Italy and Sicily to America. If it is an American innovation, the men of Italian and Sicilian descent who have positions in it should be disowned by the respectable Italian-American and Sicilian-American community on the ground that they are participating in an extremely undesirable aspect of American culture.

Second, many of the Italian and Sicilian peasants who emigrated to America did so precisely to escape Mafia despotism. These persons certainly did not bring the Mafia with them. Were they once more dominated? Are any of them, or their descendants, now members of an illicit crime syndicate?

Third, in the late 1920's Mr. Mussolini, Fascist Premier of Italy, had the Mafia of southern Italy and Sicily hounded to the point where some members found it necessary to migrate to escape from internal Mafia conflicts or from the official crackdown. The number entering America, legally or illegally, is unknown. Is it a mere coincidence that the Italian-Sicilian domination of American illicit crime syndicates and the confederation integrating them began shortly after Premier Mussolini's eradication campaign?

Fourth, if the American confederation is an import from Italy and Sicily and if it has retained its connections with the old country, then the strategy for eradicating it must be different from the strategy for eradicating a relatively new American organization. In other words, if it is but a branch of a foreign organization, then its "home office" abroad must be eliminated before control will be effective. Some American organized criminals themselves propagate the legend that their organization is a branch of the old Sicilian Mafia; this legend helps perpetuate the notion that the current conspiracy is ancient and therefore quite impregnable. If, on the other hand, the confederation is of recent American origin, then an all-out campaign by American law-enforcement agencies working in the United States is called for.

Fifth, there is a tendency for members of any society or group to look outside themselves for the cause whenever it finds itself confronted with a serious problem or, especially, with an evil. In some cases, "looking outside" means attributing problems to the characteristics of individuals rather than to the characteristics of the society or group itself. March and Simon have suggested, for example, that business managers tend to perceive conflict as if it were an individual matter, rather than an organizational matter, because perceiving it as an organizational problem would acknowledge a diversity of goals in the organization, thereby placing strain on the status and power systems.[2] By the same token, the behavior of cold-blooded hired killers, and of the enforcers and rulers who order the killings, is likely to be accounted for solely in terms of the depravity or viciousness of the personnel involved, rather than in terms of organizational roles, including the roles of the victims. In other cases, looking outside the society or group for the cause of an evil means looking to another society or group. As Tyler has said, "When such a scapegoat can be found, the culture is not only relieved of sin but can indulge itself in an orgy of righteous indignation."[3] If the Italian and Sicilian Mafia is in fact responsible for organized crime in the United States, then identifying it as the cause of our troubles is more science than scapegoatism. On the other hand, if the American confederation is a response to conditions of American life, then those conditions should be studied with a view to deciding whether they can be changed in such a way that the structure and subculture of organized crime will change.

The problem of assigning a name to the American confederation of criminals is in part a problem of answering the questions listed above. In a series of conferences at Oyster Bay, New York, some of the nation's leading experts on organized crime struggled to find a name for the organization, and as they did so, they indirectly responded to the above questions by saying that American confederation should not be confused with the Sicilian Mafia. The Conference Group reviewed the names commonly used by the public and by some members of the confederation. All of them were rejected.

"Mafia" was rejected specifically because it is a Sicilian term referring to a Sicilian organization, while many participants in the American conspiracy are not Sicilian.

The term "Cosa Nostra" as describing everyone at all levels of organized crime also was rejected. The phrase incorrectly implies that all members of the conspiracy are Italian or Sicilian and, further, the term is unknown outside New York. The Conference Group did not say so in its reports, but the term is not even widely known in New York. Sergeant Ralph Salerno of the New York City Police has been processing cases of organized crime for twenty years. He has listened to hundreds of conversations between Italian-Sicilian criminals, and he has interviewed dozens of informants and informers. Other than the 1963 testimony before the McClellan Committee, he has only twice (once before and once after the McClellan hearings) heard the words "Cosa Nostra" used to refer to the organization itself. If two members hear of an event relevant to their operations, one might say, "Questa e una cosa nostra," but this is to say "This is an affair of ours," not "I am a member of 'our thing' or 'our affair'."

The Conference Group noted that in Chicago the members sometimes refer to themselves as "the syndicate," sometimes as "the outfit," but these terms were rejected because they are local. Thus the Sicilian and Italian terms were rejected because they tend to stress the relationship to the "outside," while the Chicago terms were rejected because they do not stress this relationship.

"The organization" is sometimes used by members and, while this term does not imply anything about a relationship between the American organization and the Sicilian and Italian Mafia, it was rejected because it is "not very

[2] James G. March and Herbert A. Simon, *Organizations* (New York: Wiley, 1958), pp. 129–131.

[3] Gus Tyler, "The Roots of Organized Crime," *Crime and Delinquency*, 8: 325–338, October, 1962, p. 334.

descriptive," meaning that it does not denote the relationship between the various branches in the United States.

The Conference Group accepted "confederation" as the best term. It should be noted that this term refers primarily to the organization of a *government*. The word "cartel" refers primarily to the organization of a *business*. The Conference Group concluded:

> All of these terms are generally applied to a single loosely knit conspiracy, which is Italian dominated, operates on a nation-wide basis, and represents the most sophisticated and powerful group in organized crime. Practically all students of organized crime are agreed that this organization does not represent the total of organized crime, but there has been almost no attempt to name those organizations which constitute the remainder.[4]

Although the anthropological controversy about "diffusion versus independent invention" has largely been resolved, a look at the principal questions raised in the controversy shows that a cultural complex like organized crime could exist in both Sicily and America even if there had been no contact between the two nations. "In essence," explains Melville J. Herskovits, "the matter turns on the inventiveness of man; whether when in distant parts of the world we find similar artifacts or institutions or concepts, we must assume these to have been invented only once and diffused to the regions where they are observed, or whether we may deduce that they had originated independently in these several regions." [5] The more extreme forms of "diffusionism" hold that, regardless of the distance or time between two cultural traits or complexes, these cultural elements had a single place of origin. Persons holding this view certainly would find great support in the facts that Italian immigrants used extortion to corner the New York artichoke market in the 1930's and that Italian immigrants used extortion to corner the tomato market in Melbourne in the 1950's. The appearance of the cultural trait in New York and Melbourne appears to be an obvious case of diffusion from Italy.

The matter is not so simple, however. Anthropologists also have noted that common needs and common conditions in widely-separated societies will result in the invention of similar things, including ideas, even if there are no contacts between the two inventors. The "common conditions" may even be conditions of nature, which at once make for resemblances in cultural forms and limit these cultural forms. For example, anyone in need of a watercraft must fit the raw materials to the natural requirements of buoyancy and balance, with the result that the possibilities of variation in form from craftsman to craftsman, even if separated by great differences of time or space, are limited. Further, establishing that diffusion has taken place is not enough. A cultural trait or complex spread by diffusion might be accepted by one culture and rejected by another. It is accepted, in form modified by the needs and conditions of the receiving culture, only if that culture creates a "place" for it to appear. In the illustration used above, both New York and Melbourne necessarily established a place for monopoly by extortion to appear.

There is a remarkable similarity between both the structure and the cultural values of the Sicilian Mafia and the American confederation, as we shall show in later sections. This does not mean that the Mafia has diffused to the United States, however. Whatever was imported has been modified to fit the conditions of American life. A place has been made for organized crime to arise in the United States and a place has been made for the Mafia in Sicily. Later we will show that there is a significant similarity between the structure, values and even objectives of prisoners and organized criminals, but there is no evidence that these cultural traits necessarily diffused from organized criminals to prisoners or that they necessarily diffused from prisoners to organized criminals. A man steeped in the traditions of organized crime can easily adjust to the ways of prisoners, and prisoners can easily adjust to the ways of organized crime, possibly because the conditions producing prisoner traditions are similar to the conditions producing the traditions of organized criminals. Similarly, a man steeped in the traditions of the Sicilian and Italian Mafia can easily find his way around American organized crime, and the behavior of American criminals returning to Italy and Sicily has shown that the reverse is also true. As a matter of fact, if the problem of language were not present, a man could with only slight difficulty move between the Sicilian Mafia and an American prison, leaving American organized crime out of the picture altogether. Further, it is highly probable that any active participant in, say, the Norwegian or French underground movement during the World War II occupation by the Nazis could move with ease in any of the other three organizations.

It is commonplace to suggest that organized crime exists in America because "weak government" cannot or will not enforce the laws prohibiting the purchase and sale of various illicit goods and services. We believe that the reverse is true, that all four of the organizations mentioned above are products of *strong* government which has lost (or failed to attain) the consent of the governed, and that similarities in their structure and cultural values could have arisen without any contact between them. In all four cases, a rank-oriented system of illegal government is present, and in all four cases the subcultural values stress loyalty, manliness, intimidation, and, above all, secrecy from wielders of legitimate authority.[6] Sicilians lived under conditions very similar to "occupation" for about a thousand years, and they learned to evade the government in power; prisoners are held against their will in an authoritarian setting; Norwegian and French underground members were dedicated to harassing the Nazis and to easing the pangs of occupation.

The American organized crime case is not so simple, for America is in no sense occupied by an alien government. Yet the similarity is there, for on matters pertaining to the purchase and sale of the illicit goods and services on which organized crime thrives, the consent of a large minority of the governed is withheld. In

[4] *A Theory of Organized Crime Control: A Preliminary Statement*, mimeographed paper prepared by the technical staff and consultants of the New York State Identification and Intelligence System, May, 1966, p. 10.

[5] Melville J. Herskovits, *Man and His Works* (New York: Alfred A. Knopf, 1956), p. 499.

[6] *Cf.* Tan Joe Bah, "Secret Societies in Singapore," *FBI Law Enforcement Bulletin*, 34: 7–16, January, 1965.

the United States, the crime confederation is not now dedicated to escaping all the demands of civilized government. It is as yet dedicated only to maintaining immunity from the criminal law process, especially in the areas in which respectable citizens demand illicit goods and services. Perhaps it is this similarity to unofficial underground governments that stimulates law enforcement officers to refer to American organized criminals as an "enemy." While this appellation is correct, in view of the fact that there is organized defection from the rules of the governing body, it is incorrectly used as a rallying cry for prosecution of organized criminals. If organized criminals could be handled as enemies in time of war, rather than as citizens with the rights of due process, they could have been wiped out long ago.

Nevertheless, it is not concern for due process in its pure form which permits organized crime to thrive in the United States. The American confederation thrives because a large minority of citizens demands the illicit goods and services it has for sale.[7] The unofficial governments found among prisoners, among Sicilian peasants, and among the participants in underground movements are signs that a strong government might nevertheless be limited in its means for achieving its control objectives. The unofficial government represented by the American confederation suggests that our strong government is similarly limited. A prison administrator is admonished to control inmates, but he is limited in what he can do to and with inmates by the values of his society and by the need for inmate help in production, maintenance, and even security tasks. In occupied countries, the alien government must try to maintain security measures which will minimize the chances that it will be overthrown, but at the same time it cannot use security measures so strict that the natives cannot perform at least the minimal tasks necessary to economic production and social order. All the loyal citizens cannot be incarcerated or shot.

American government officially wants organized crime eradicated, but it limits itself by respecting the wishes of a large minority which demands the "right" to purchase illicit goods and services and by following traditional concepts of due process in trying to prosecute the sellers of these goods and services. In this game, everyone wins. Those who insist, for example, that gambling be outlawed win by displaying the evidence, in the form of an anti-gambling statute, of opposition to gambling. Those who insist on gambling, gamble in spite of the statute. And those who have the capital and the muscle necessary to meet the competition, can provide the illicit gambling services and reap huge profits because they are protected by the morality which got the anti-gambling statute passed in the first place. A government administered by men with strong attitudes about the immorality of vice, and with strong attitudes in opposition to abandoning due process in order to eradicate vice, is strong government.

Before returning to observations of Mafia control in western Sicily, let us elaborate on our observation that in America we have lost the consent of a large minority of the governed on the question of whether organized crime should be permitted to thrive. In 1931, Walter Lippmann expressed concern that in our large urban areas the legitimate processes of democratic government were being undermined by the wealth put into the hands of prohibition gangsters by respectable citizens demanding the illicit goods the gangsters had for sale.[8] Now, thirty-five years later, we are concerned that the demands for the illicit goods and services provided by the suave criminals who replaced the prohibition gangsters will eventually dominate commerce as well as government, as it does in Sicily.

The basic distinction between ordinary criminals and organized criminals in the United States turns on the fact that the ordinary criminal is wholly predatory, while the man participating in crime on a rational, systematic basis offers a return to the respectable members of society. If all burglars were miraculously abolished, they would be missed by only a few persons to whose income or employment they contribute directly—burglary insurance companies, manufacturers of locks and other security devices, police, prison personnel, and a few others. But if the confederation of men employed in illicit businesses were suddenly abolished, it would be sorely missed because it performs services for which there is a great public demand. The organized criminal, by definition, occupies a position in a social system, an "organization," which has been rationally designed to maximize profits by performing illegal services and providing legally forbidden products demanded by the members of the broader society in which he lives. Just as society has made a place for the confederation by demanding illicit gambling, alcohol and narcotics, usurious loans, prostitution, and cheap supply of labor, the confederation makes places, in an integrated set of positions, for the use of the skills of a wide variety of specialists.

It is true, of course, that criminals who do not occupy positions in any large scale organization also supply the same kinds of illicit goods and services supplied by the confederation. Perhaps a large proportion of the persons demanding illicit goods and services believe that they are being supplied by criminals who are unorganized and who, for that matter, are not very criminal. The existence of such a widely held belief would account for the fact that the public indignation which becomes manifest at the time of an exposure of the activities of members of the confederation—such as a Senate Hearing, an Apalachin meeting, a gangland killing—is sporadic and short-lived. A gray-haired old lady who accepts a few horse racing bets from the patrons of her neighborhood grocery store is performing an illegal service for those patrons, just as is the factory worker who sells his own brand of whiskey to his friends at the plant. Law violators of this kind do not seem very dangerous. They are not, in fact, much of a threat to the social order, and they tend to be protected in various ways by their society. The policeman is inclined to overlook their offenses or merely to insist that they do not occur in his precinct; the judge is likely to invoke the mildest punishment which the legislature has established; and the jailer is likely to

[7] *Cf.* Herbert A. Bloch, "The Gambling Business: An American Paradox," *Crime and Delinquency*, 8: 355-364, October, 1962.

[8] Walter Lippmann, "Underworld: Our Secret Servant," *Forum*, 85: 1-4, and 85: 65-69, January and February, 1931.

differentiate such offenders from "real criminals" in the way he differentiates traffic offenders from "real criminals."

We do not argue that such "mom and pop" kind of pandering to the demands of the community is necessarily insidious, though by no means do we condone it. What is insidious is the fact that the providers cannot be individual entrepeneurs for long. The nature of their business is such, as we will show later, that they must join hands with others in the same business. Nowadays, moreover, free enterprise does not exist in the field of illicit services and goods—any "mom and pop" kind of small business soon takes in, voluntarily or involuntarily, a confederation man as a partner. By joining hands, the suppliers (a) cut costs, improve their markets, and pool capital, (b) gain monopolies on certain of the illicit services or on all of the illicit services provided in a specific geographic area, whether it be a neighborhood or a large city,[9] (c) centralize the procedures for stimulating the agencies of law enforcement and administration of justice to overlook the illegal operations, and (d) accumulate vast wealth which can be used to attain even wider monopolies on illicit activities, and on legal businesses as well. In the long run, then, the "small operation" corrupts the traditional economic and political procedures designed to insure that citizens need not pay tribute to a criminal in order to conduct a legitimate business. The demand, and the profits, are too great to be left in the hands of "mom and pop" operators. As the Kefauver Committee reported about the demand for gambling services, "The creeping paralysis of law enforcement which results from a failure to enforce gambling laws, contributes in dealing with employees or competitors. If their firms crime." [10]

Being outlawed, the big illicit businesses which have grown up to meet the demands of the public cannot be regulated by law. The executives of illicit firms cannot call upon legitimate government for help or protection in dealing with employees or competitors. If their firms are to survive, they must devise substitutes for the services ordinarily provided by government. The leaders of the American confederation have devised these substitutes, and in doing so they have transformed their business organization into an illicit government. Enforcing "the law" of this private government involves further violation of our criminal laws, and not just the laws outlawing the sale of illicit goods and services. Crimes of violence are committed for the purpose of maintaining "legal" order in the illicit government which is the confederation. The wealth acquired from millions of two-dollar bets made daily with what might appear to be "mom and pop" bookies is protected by perpetration of the most horrendous crimes known to man. The wealth thus protected and the coercive power amassed to protect it are then used to corrupt the very legal and economic order which gives the two-dollar bettors their freedom.

The potential danger of an illicit government in the United States can be observed by examining the control the Mafia exercises in western Sicily. This illict government originated in peasant communities, where face-to-face relations between neighbors predominated. It adapted, and continues to adapt, as Sicily becomes more industrialized and urbanized. At first it provided law and order where the official government failed to do so. It collected taxes, which were payments for protection against bandits. In the latter part of the nineteenth century, for example, one Mafia group governed a cluster of eleven mountain villages; the head and his assistants had a private police force of about 130 armed men. The leaders were well-established citizens, landowners and farmers, who supervised all aspects of local life, including agricultural and economic activities, family relations and public administration.

Like contemporary rulers of organized crime units in the United States, the despots soon demanded absolute power. No one dared offend the chief's sense of honor. The lines between tax and extortion, and between peace enforcement and murder, became blurred, as they always do under despots. Today, "an overall inventory of Mafia activities leaves no doubt that it is a criminal organization, serving the interests of its membership at the expense of the larger population." [11] This illicit government has extended its influence from farms and peasant villages to the cities of western Sicily, where it now dominates commerce and government. Sicily has given the Mafia a place. The following three quotations show the extent to which all economic, professional, political and social life is dominated:

> [In 1961] the *mafioso* was recognizable too by his uncanny success in everything he touched. The Mafia doctor got all the patients, and could always find a hospital bed in a hurry. The Mafia advocate had all the briefs he could handle, and his clients usually won their cases. Government contracts always seemed to go to the contractor who was a man of respect, although his tenders were usually the highest and he paid lower wages than the trade union minimum. By tradition, members of the Mafia did not then seek election to Parliament, but everybody knew that the political boss who arranged for a candidate's election was *mafioso*.[12]

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> There are the cattle and pasture Mafie; citrus grove Mafie; water Mafie (who control scarce springs, wells, irrigation canals); building Mafie (if the builder does not pay, his scaffolding collapses and his bricklayers fall to their death); commerce Mafie; public works Mafie (who award contracts); wholesale fruit, vegetable, flower, and fish markets Mafie, and so forth. They all function more or less in the same way. They establish order, they prevent pilfering, each in its own territory, and provide protection from all sorts of threats, including the legal authorities, competitors, criminals, revenue agents, and rival Mafia organizations. They fix prices. They arrange contracts. They can see to it, in an emergency, that violators of their own laws are surely punished with death. This is rarely necessary.

[9] "It is somewhat startling to learn that the syndicates are particularly happy with the consolidation of the nine police departments into the Suffolk County Police Department, as they feel that protection is easier to arrange through one agency than through many. The intensive campaign against gamblers instituted by this Department commencing January 1 had the astounding side effect in solving the recruitment problem of the syndicate, as our drive successfully stampeded the independents into the arms of the syndicate for protection, and the syndicate can now pick and choose which operators they wish to admit." Charles R. Thom, Commissioner of Police of Suffolk County, *Statement Before the New York State Commission of Investigation on April 22, 1960* (mimeographed), p. 2.

[10] Special Committee to Investigate Organized Crime in Interstate Commerce (Kefauver Committee), *Third Interim Report*, U.S. Senate Report No. 307, 82nd Congress, 1951, p. 37.

[11] Robert T. Anderson, "From Mafia to Cosa Nostra," *American Journal of Sociology*, 61: 302-310, November, 1965. At 304.

[12] Norman Lewis, *The Honored Society* (New York: G. P. Putnam's Sons 1964), p. 84.

> Most of the time the fact that they can condemn any man to death is enough to keep everybody toeing the line.[13]
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> [By 1945] a great gathering of vulturine chiefs had collected to wet their beaks at the expense of farmers, whose produce they bought dirt cheap on the spot and carried to market in the Mafia's own beautifully decorated carts—or later, trucks. In the market only those whose place had been "guaranteed" by the Mafia were allowed to buy or sell at prices the Mafia fixed. The Mafia wetted its beak in the meat, fish, beer, and fruit businesses. It moved into the sulphur mines, controlled the output of rock salt, took over building contracts, "organized labor," cornered the plots in Sicily's cemeteries, put tobacco smuggling on a new and profitable basis through its domination of the Sicilian fishing fleets, and went in for tomb robbing in the ruins of the Greek settlement of Selimunte . . . The Mafia gave monopolies to shopkeepers in different trades and then invited them to put up their prices—at the same time, of course, increasing their Mafia contribution . . . The most obvious of the Mafia's criminal functions—and one that had been noted by the Bourbon attorney general back in the twenties of the last century—now became the normally accepted thing. The Mafia virtually replaced the police force, offering a form of arrangement with crime as a substitute for its suppression. When a theft, for instance, took place, whether of a mule, a jeweled pendant, or a motorcar, a Mafia intermediary was soon on the scene, offering reasonable terms for the recovery of the stolen object . . . The Mafia intermediary, of course, wetted his beak at the expense of both parties. The situation was and is an everyday one in Sicily.[14]

The public demand for protection against Sicilian bandits, and for other services not provided by the established government, created an illicit government which, in the long run, exploited all its members and the very public that created it. The American demand for illicit goods and services has created an illicit government.

DETERMINANTS OF NATIONAL AND LOCAL STRUCTURES

The structure of the nationwide cartel and confederation which today operates the principal illicit businesses in America, and which is now striking at the foundations of legitimate business and government as well, came into being in 1931. Further, even the skeleton structure of the local units of the confederation, the "families" controlling illicit businesses in various metropolitan areas, came into being in 1931. These structures resemble the national and local structures of the Italian-Sicilian Mafia, but our organization is not merely the old world Mafia transplanted. The social, economic and political conditions of Sicily determined the shape of the Sicilian Mafia, and the social, economic and political conditions of the United States determined the shape of the American confederation.

To use an analogy with legitimate business, in 1931 organized crime units across the United States formed into monopolistic corporations, and these corporations, in turn, linked themselves together in a monopolistic cartel. To use a political analogy, in 1931 the local units formed into feudal governments, and the rulers of these governments linked themselves together in a nation-wide confederation which itself constitutes a government. Feudalism was the system of political organization prevailing in Europe from the ninth to the fifteenth centuries. Basically agricultural, the system meant that a vassal held land belonging to a lord on condition of homage and service under arms. The servant deferred to the lord and in other ways paid homage to him; the lord, in turn, protected the servant. The system was "hereditary" in the sense that the lord had custody of the heirs' property.

The structure of the Sicilian Mafia resembles that of ancient feudal kingdoms, and the Mafia probably is a lineal descendant of feudalism. The structure of the American confederation of crime resembles feudalism also, as it resembles the structure of the Sicilian Mafia. Like feudal lords and Sicilian Mafia chieftains, the rulers of American, geographically-based, "families" of criminals derive their authority from tradition in the form of homage and "respect." They allocate territory and a kind of license to do business in return for this homage. Nevertheless, the feudal local governments formed in 1931, and the confederation between them, are American innovations.

Certain American criminals, law-enforcement officials, political figures, and plain citizens have known from the beginning that a nation-wide confederation was established in 1931. Some of them have denied the existence of the apparatus because they are members of it. Others have for over thirty years been trying to convince the American public that the nation-wide apparatus does in fact exist. We shall quote three such attempts to convince, occurring about a decade apart.

In a series of articles appearing in 1939, the former attorney for an illicit New York organization, a man who had occupied a position of "corrupter" for the organization, but who later testified for the State, observed that a nation-wide alliance between criminal businesses in the United States was in operation. This was not the first time such an allegation was made, but it dramatically foreshadowed statements which have been made in more recent years. We quote at some length because we will later discuss the gangland war resulting in centralization of control:

> When I speak of the underworld now, I mean something far bigger than the Schultz mob. The Dutchman was one of the last independent barons to hold out against a general centralization of control which had been going on ever since Charlie Lucky

[13] Luigi Barzini, *The Italians* (New York: Atheneum 1964), pp. 259-260.

[14] Lewis, *op. cit., supra* note 12, pp. 43-45.

became leader of the Unione Siciliani in 1931 . . . The "greasers" in the Unione were killed off, and the organization was no longer a loose, fraternal order of Sicilian blackhanders and alcohol cookers, but rather the framework for a system of alliances which were to govern the underworld. In Chicago, for instance, the Unione no longer fought the Capone mob, but pooled strength and worked with it. A man no longer had to be a Sicilian to be in the Unione. Into its highest councils came such men as Meyer Lansky and Bugs Siegel, leaders of a tremendously powerful mob, who were personal partners in the alcohol business with Lucky and Joe Adonis of Brooklyn. Originally the Unione had been a secret but legitimate fraternal organization, with chapters in various cities where there were Sicilian colonies. Some of them were operated openly, like any lodge. But it fell into the control of the criminal element, the Mafia, and with the coming of prohibition, which turned thousands of law-abiding Sicilians into bootleggers, alcohol cookers and vassals of warring mobs, it changed.

It still numbers among its members many old-time Sicilians who are not gangsters, but anybody who goes into it today is a mobster, and an important one. In New York City the organization is split up territorially into districts, each led by a minor boss, known as the *'compare,'* or godfather . . . I know that throughout the underworld the Unione Siciliana is accepted as a mysterious, all-pervasive reality, and that Lucky used it as the vehicle by which the underworld was drawn into co-operation on a national scale.[15]

More than a decade after this statement appeared in a popular magazine of the time, many members of the public (and some law enforcement officers) still had no notion that an illicit cartel performed some types of crime across the nation. If they heard of "the Mafia," or "the syndicate," or "the outfit," or "the mob," they did not believe what they heard, or did not believe in its importance. They were shocked when in 1951 the Kefauver Committee was able to draw the following four conclusions from the testimony of the many witnesses who had appeared before it.

(1) There is a Nation-wide crime syndicate known as the Mafia, whose tentacles are found in many large cities. It has international ramifications which appear most clearly in connection with the narcotics traffic.

(2) Its leaders are usually found in control of the most lucrative rackets in their cities.

(3) There are indications of a centralized direction and control of these rackets, but leadership appears to be in a group rather than in a single individual.

(4) The Mafia is the cement that helps to bind the Costello-Adonis-Lansky syndicate of New York and the Accardo-Guzik-Fischetti syndicate of Chicago as well as smaller criminal gangs and individual criminals throughout the country. These groups have kept in touch with (Lucky) Luciano since his deportation from this country.[16]

In the next decade, investigating bodies were able to overcome some of the handicaps of the Kefauver Committee, which "found it difficult to obtain reliable data concerning the extent of Mafia operation, the nature of Mafia organization, and the way it presently operates." [17] While *all* such handicaps will not be overcome for some years to come, there no longer is any doubt that several regional organizations, rationally constructed for the control of the sale of illicit goods and services, are in operation. Neither is there any doubt that these regional organizations are linked together in a nation-wide cartel and confederation.

In 1957 about seventy-five of the nation's leading illicit businessmen were discovered at a meeting in Apalachin, New York. They came from all parts of the country, and most of them had criminal records relating to the kind of offense customarily called "organized crime." Beside their illicit businesses, at least nine of them were in the coin-machine business; 16 were in the garment industry; 10 owned grocery stores; 17 owned bars or restaurants; 11 were in the olive oil and cheese importing business; nine were in the construction business. Others were involved in automobile agencies, coal companies, entertainment, funeral homes, ownership of horses and race tracks, linen and laundry enterprises, trucking, waterfront activities and bakeries.[18] No one has been able to prove the nature of the conspiracy involved, but no one believes that the men all just happened to drop in on the host at the same time. Two of the men attending the meeting had met at a somewhat similar meeting of criminals in Cleveland in 1928. The discovery of the Apalachin conference convinced many officials: that a nation-wide apparatus does in fact exist and that law-enforcement intelligence is inadequate; that the procedures for studying the organization controlling the sale of illicit goods and services in the United States, and governing the lives of the participants, are inadequate; and that the procedures for disseminating hard facts about organized crime to law-enforcement agencies and the public are inadequate.

One response to the discovery of the Apalachin meeting was increased investigative action by the U.S. Attorney General, the Federal Bureau of Narcotics, the Federal Bureau of Investigation, the Internal Revenue Service, and several state and local agencies. In 1960 there were 17 attorneys in the Organized Crime and Racketeering Section of the United States Department of Justice; in 1963 there were 60. Beginning in about 1961 the investigating agencies began to receive information about the existence of the criminal confederation now commonly labelled "Cosa Nostra," a large-scale criminal organization complete with a board of directors and a hierarchial structure extending down to the street level of criminal activity. The McClellan Committee and a nation-wide television audience in 1963 heard Mr. Joseph Valachi, an active member of the confederation, describe the skeleton of the

[15] J. Richard Davis, "Things I Couldn't Tell Till Now," *Collier's*, July 22, July 29, August 5, August 12, August 19, and August 26, 1939. The quote is from pp. 35–36 of the August 19th issue.

[16] *Third Interim Report, op. cit., supra* note 10, p. 150. See also Sid Feder and Burton B. Turkus, *Murder, Inc.* (New York: Permabooks, 1952), pp. 86–115.

[17] *Id.* at p. 149.

[18] Select Committee on Improper Activities in the Labor or Management Field, *Final Report*, U.S. Senate Report No. 1139, 86th Congress, 1960, pp. 487–488.

structure of the organization, its operations, and its membership. These data, and supplementary data, enabled Senator (then Attorney General) Kennedy to testify as follows before the Committee:

> Because of intelligence gathered from Joseph Valachi and from informants we know that Cosa Nostra is run by a commission and that the leaders of Cosa Nostra in most major cities are responsible to the commission. We know that membership in the commission varies between 9 and 12 active members and we know who the active members of the commission are today.
>
> We know, for example, that in the past two years, at least three carefully planned commission meetings had to be called off because the leaders learned that we had uncovered their well-concealed plans and meeting places.
>
> We know that the commission makes major policy decisions for the organization, settles disputes among the families and allocates territories of criminal operations within the organization.
>
> For example, we now know that the meeting at Apalachin was called by a leading racketeer in an effort to resolve the problem created by the murder of Albert Anastasia. The racketeer was concerned that Anastasia had brought too many individuals not worthy of membership into the organization. To insure the security of the organization, the racketeer wanted these men removed. Of particular concern to this racketeer was that he had violated commission rules in causing the assault, the attempted assassination of Frank Costello, deposed New York rackets boss, and the murder of Anastasia. He wanted commission approval for these acts—which he received.
>
> We know that the commission now has before it the question of whether to intercede in the Gallo-Profaci family gangland war in New York. Gang wars produce factionalism, and continued factionalism in the underworld produces sources of information to law enforcement. Indications are that the gangland leaders will resolve the Gallo-Profaci fight . . .
>
> Such intelligence is important not only because it can help us know what to watch for, but because of the assistance it can provide in developing and prosecuting specific cases . . . Thus we have been able to make inroads into the hierarchy, personnel, and operations of organized crime. It would be a serious mistake, however, to over-estimate the progress Federal and local law enforcement has made. A principal lesson provided by the disclosures of Joseph Valachi and other informants is that the job ahead is very large and very difficult.[10]

Now, three years later, and almost 11 years since the Apalachin meeting, the job ahead is still "very large and very difficult." While law-enforcement officials now have detailed information about the criminal activities of individual men of Italian and Sicilian descent, and others, who are participating in illicit businesses and illicit governments, knowledge of the structure of their confederation remains fragmentary and impressionistic. Since the time of the Apalachin meeting, and especially since the McClellan Committee hearings, law-enforcement officers have shown conclusively that "families" of criminals of Italian and Sicilian descent either operate or control the operation of most of the illicit businesses—including gambling, usury, and the wholesaling of narcotics—in large American cities, and that these "families" are linked together in a nation-wide cartel and confederation. Nevertheless, some officials, and some plain citizens, remain unconvinced.

THE STRUCTURAL SKELETON

Since the McClellan Committee hearings, there has been a tendency to label the nation-wide cartel and confederation "Cosa Nostra" and then to identify what is known about its division of labor as the structure of "organized crime" in America. This tendency might be responsible for some of the misplaced skepticism about whether a dangerous organization exists. In the first place, calling the organization "Cosa Nostra" lets citizens believe that they are safe from organized criminals because their local bookie, lottery operator, or usurer is not of Italian or Sicilian descent. The term directs attention to membership rather than to the power to control and to make alliances. In the second place, using "Cosa Nostra" as a noun implies that the total economic and political structure involved is as readily identifiable as that of some other formal organization, such as the Elk's Lodge, the Los Angeles Police Department, or the Standard Oil Company. This is obviously not the case. We know very little. Our knowledge of the structure which makes "organized crime" organized is somewhat comparable to the knowledge of Standard Oil which could be gleaned from interviews with gasoline station attendants. Detailed knowledge of the formal and informal structures of the confederation of Sicilian-Italian "families" in the United States would represent one of the greatest criminological advances ever made, even if it were universally recognized that this knowledge was not synonymous with knowledge about all organized crime in America. Since we know so little, it is easy to make the assumption that there is nothing to know anything about.

But we do know enough about the structure to conclude that it is indeed an organization. When there is a board of directors or governors, a president, a vice-president, some works managers, foremen and lieutenants, and some workers and plain members, there is an organization.

As the former Attorney General's testimony before the McClellan Committee indicated, the highest ruling body in the confederation is the "Commission." This body serves as a combination board of business directors, legislature, supreme court, and arbitration board, but most of its functions are judicial, as we will show later. Members look to the Commission as the ultimate authority on organizational disputes. It is made up of the rulers of

[10] Permanent Subcommittee on Investigations of the Committee on Government Operations (McClellan Committee), *Organized Crime and Illicit Traffic in Narcotics*, Part I, 1963, pp. 6-8.

the most powerful "families," which are located in large cities. At present, nine of the many such "families" are represented on the Commission. Three of the "families" represented are in New York City, one in Buffalo, one in Newark, one in Boston, and one each in Philadelphia, Detroit, and Chicago. The Commission is not a representative legislative assembly or an elected judicial body—"families" in cities such as Baltimore, Dallas, Kansas City, Los Angeles, Pittsburgh, San Francisco, and Tampa do not have members on the Commission. The members of the council do not regard each other as equals. There are informal understandings which give one member authority over another, but the exact pecking order, if there is one, has not been determined.

Beneath the Commission are 24 "families," each with its "Boss." The "family" is the most significant level of organization and the largest unit of criminal organization in which allegiance is owed to one man, the Boss. (Italian words often are used interchangeably with each of the English words designating a position in the division of labor. Rather than "Boss," the words "Il Capo," "Don," and "Rappresentante" are used.) The Boss's primary function is to maintain order while at the same time maximizing profits. Subject to the possibility of being overruled by the Commission, his authority is absolute. He is the final arbiter in all matters relating to his branch of the confederation.

Beneath each Boss of at least the larger "families," is an "Underboss" or "Sottocapo." This position is, essentially, that of vice-president and deputy director of the "family" unit. The man occupying the position often collects information for the Boss; he relays messages to him; and he passes his orders down to the men occupying positions below him in the hierarchy. He acts as Boss in the absence of the Boss.

On the same level as the Underboss there is a position for a "Counselor" or adviser, referred to as "Consiglieri" or "Consulieri." The person occupying this position is a staff officer rather than a line officer. He is likely to be an elder member who is partially retired after a career in which he did not quite succeed in becoming a Boss. He gives advice to family members, including the Boss and Underboss, and he therefore enjoys considerable influence and power.

Also at about the same level as the Underboss is a "Buffer" position. The top members of the "family" hierarchy, particularly the Boss, avoid direct communication with the lower-echelon personnel, the workers. They are insulated from the police. To obtain this insulation, all commands, information, money, and complaints generally flow back and forth through the Buffer, who is a trusted and clever go-between. However, the Buffer does not make decisions or assume any of the authority of his Boss, as the Underboss does.

To reach the working level, a Boss usually goes through channels. For example, a Boss's decision on the settlement of a dispute involving the activities of the "runners" (ticket sellers) in a particular lottery game, passes first to his Buffer, then to the next level of rank, which is "Lieutenant" or "Capodecina" or "Caporegima." This position, considered from a business standpoint, is analogous to works manager or sales manager. The person occupying it is the chief of an operating unit. The term "Lieutenant" gives the position a military flavor. Although "Capodecina" is translated as "head of ten," there apparently is no settled number of men supervised by any given Lieutenant. The number of such leaders in an organization varies with the size of the organization and with the specialized activities in that organization. The Lieutenant usually has one or two associates who work closely with him, serving as messengers and buffers. They carry orders, information, and money back and forth between the Lieutenant and the men belonging to his regime. They do not share the Lieutenant's administrative power.

Beneath the Lieutenants there might be one or more "Section Chiefs." Messages and orders received from the Boss's buffer by the Lieutenant or his buffer are passed on to a Section Chief, who also may have a buffer. A Section Chief may be deputy lieutenant. He is in charge of a section of the Lieutenant's operations. In smaller "families," the position of Lieutenant and the position of Section Chief are combined. In general, the larger the regime the stronger the power of the Section Chief. Since it is against the law to consort for criminal purposes, it is advantageous to cut down the number of individuals who are directly responsible to any given line supervisor.

About five "Soldiers," "Buttons," or just "members" report to each Section Chief or, if there is no Section Chief position, to a Lieutenant. The number of Soldiers in a "family" varies; some "families" have as many as 250 members, some as few as 20. A Soldier might operate an illicit enterprise for a Boss, on a commission basis, or he might "own" the enterprise and pay homage to the boss for "protection," the right to operate. Partnerships between two or more Soldiers, and between Soldiers and men higher up in the hierarchy, including Bosses, are common. An "enterprise" could be a usury operation, a dice game, a lottery, a bookie operation, a smuggling operation, or a vending machine company. Some Soldiers and most upper-echelon "family" members have interests in more than one business.

"Family" membership ends at the Soldier level, and all members are of Italian or Sicilian descent. Between 2,000 and 4,000 men are members of "families" and, hence, of the confederation. But beneath the Soldiers in the hierarchy of operations are large numbers of employees and commission agents who are not necessarily of Italian-Sicilian descent, although some of them are Italian-Sicilian aspirants. These are the persons carrying on most of the work "on the street." They have no "buffers" or other forms of insulation from the police. They are the relatively unskilled workmen who actually take bets, answer telephones, drive trucks, sell narcotics, etc. In Chicago, for example, the workers in a major lottery business who operated in a Negro neighborhood were Negroes; the bankers for the lottery were Japanese-Americans; but the game, including the banking operation, was licensed, for a fee, by a "family" member. The entire operation, including the bankers, was more or less a "customer" of the Chicago "family," in the way

any enterprise operating under a franchise is a "customer" of the parent corporation.

The positions outlined above constitute the "organizational chart" of the American confederation as it is described by members. Two things are missing. *First,* there is no description of the many positions necessary to the actual street level operation of an illicit enterprise such as a bookmaking establishment or a lottery. While we cannot outline the basic structure of all these enterprises, we must at least mention three principal operations—lotteries, bookmaking, and narcotics distribution. Mr. Arthur Sage, District Inspector of the Detroit Police Department and supervisor of police work in vice, liquor and gambling in Detroit, presented to the McClellan Committee a chart showing the hierarchy of the lottery enterprise supervised by one Detroit Section Chief.[20] Over one hundred positions are involved, but they are not unique and, further, some personnel occupy more than one position. Included on the chart or mentioned in the testimony are about fifty positions for "pick-up men," divided into five groups, each reporting to a substation supervisor. After the bet slips are collected at the substation, presumably by the substation supervisor, one or more of the trusted employees plays the role of messenger by taking them to the main office. The main office is depicted as having six workers, but their roles are not specifically identified. Someone at the main office tabulates the amounts bet, and someone determines which slips are winners, a role described as "bookkeeper." Another trusted person takes the proceeds to the Section Chief, who in turn passes a share up through the hierarchy.

The positions just described are in reference to what might be called "curbstone betting." In the operation of off-track bets on horse races and other contests, a similar set of positions is essential. In some such enterprises a bookie, working on a commission basis, accepts bets verbally and telephones them to his supervisor. Other bookies accept bids from customers who telephone to place the bet. A bookie of this kind might employ six to ten telephone operators, and a similar number of "runners" to collect bets and pay winners. The substation and messenger positions are similar to those in lottery enterprises.

Narcotics enterprises are organized like any importing-wholesaling-retailing business. At the top level are importers of multi-kilo lots. At the next level are "kilo-men" who handle nothing less than a kilogram of heroin at a time. A kilo-man makes his purchase from an importer-supplier and receives delivery from a courier. He dilutes the heroin by adding 3 kilograms of milk sugar for each kilo of heroin. The product is then sold to "quarter-kilo men" and then to "ounce-men" and then to "deck-men," there being further adulteration at each stage in this process. Eventually, street peddlers dispense it in 5-grain packets called "bags" or "packs." The cost to the consumer is in excess of 300 times the cost of the original kilo.

Second, and more important, the structure described by members of the confederation is primarily the *formal* structure of the organization. The informants have not described, probably because they have not been asked to do so, the many *informal* positions any organization must contain. To put the matter in another way, there is no description of the many functional roles performed by the men occupying the formally-established positions making up the organization. Businessmen and managers know that identifying a position as that of, say, "Vice President" is rather meaningless unless there is a description of what the person occupying the position *does.* And what he does is a response to an informal position he occupies at the same time he occupies the formal one—he may be "expediter" or "troubleshooter" or "psychotherapist" as well as Vice President. In the confederation, one position of this kind is Buffer. This position has been identified by the New York policemen who watch "family" and confederation operations, not by the members themselves. The position is occupied by men who might also be occupying an "official," formal, position such as Underboss, Lieutenant, or even some lower position. Later we will discuss other informal positions of this kind, and the informal roles of the men who occupy them. "Corrupter," "Corruptee," "Enforcer," "Executioner," and "Money Mover" are some of these. Here we shall mention three informal or "unofficial" positions essential to the curbstone betting enterprise just described. The positions for "Lay-off Man," for "Large Lay-off Man," and for "Come Back Man" are essential to gambling enterprises, and the fact that they are included in the division of labor indicates why a gambling enterprise cannot be a "mom and pop" operation for long.

The division of labor essential to bookmaking does not stop at the street level. It is essential that the bookie insure himself against loss by making bets himself, in much the way a casualty insurance company re-insures a risk that is too great for it to assume alone. So that this is possible, the Lay-off Man position has been established. The bookie, sometimes called a "handbook operator," does not gamble. He pays the same odds as does the race track, but at the track these odds are calculated after deducting about fifteen to eighteen per cent of the gross, this amount going to the track operators for taxes, expenses, and profits. The bookie pockets the entire fifteen to eighteen per cent, less a percentage going to a "family" member for a license to operate, for corruption of police and political figures, and for "welfare" benefits such as bail and an attorney in time of need. However, since the bookie's customers do not necessarily bet on the same horses selected by betters at the track, the amount of money bet with him on losing horses sometimes is not enough to pay off those of his customers who have selected winners. He notes, before a race is run, that his books are out of balance. To get them in balance, he takes some of the money and makes a large bet with a Lay-off Man, who, like the bookie himself, operates on a percentage basis.

But when a number of bookies use the services of the same Lay-off Man, the latter's books may get out of balance also. Since he, like the bookie, is a commission agent rather than a gambler, he seeks a man occupying

[20] *Id.* at Part II, pp. 461–465.

a position at the third level up the enterprise hierarchy, the Large Lay-off Man. The men occupying this position reside in all parts of the country, but they keep in close touch with each other so that the over-all amount of money handled by each of them will be bet on the various horses in the same proportions as is the total amount bet at the track. When this is the case, the bookie, the "family" members who license him, the Lay-off Man, the Large Lay-off Man cannot lose—they simply split up the fifteen to eighteen per cent of the gross. One Large Lay-off Man takes in about $20 million a year, and his annual profit before expenses is about four per cent of the gross, or $800,000.

If, just before a horse race, it looks as if there is some possibility that the persons occupying positions for Large Lay-off Men might lose because their books are out of balance with the legitimate books at the track, they employ the services of a man occupying still another position in the division of labor, the Come Back Man. Persons occupying this position function in such a way that the legitimate track betters themselves re-insure the bets taken by Large Lay-off Men. The Come Back Man is an "odds changer" who stands by at the race track. Just before each race he opens a telephone line to a representative of the syndicated Large Lay-off Men. When the latter's books are out of balance with those at the track, the person occupying the position of Come Back Man is instructed to bet large amounts on specific horses, thus making the track odds approximately the same as the odds based on the proportions bet with the Large Lay-off Men on each of the horses. "Lay-off action," together with the "come back money" system, is a principal device used by rulers of "families" and of the confederation to control all gambling of any consequence in the United States. Another device is coercion—extortion, muscle, and murder.

The skeleton structure we have outlined is by no means the structure of the organization operating America's illicit businesses. Even the skeleton has more bones than those we have described, as our discussion of informal positions and roles indicates. The structure outlined is sufficient to demonstrate, however, that a confederation of "families" exists. Investigating agencies have, since the time of the Apalachin meeting, documented the fact that the apparatus is tightly knit enough to have a corporate chain of command. Moreover, the names of the men occupying the major positions have been known for at least five years. The next important task for these agencies is that of depicting the numerous functional positions, formal and informal, making up the structure of the organization whose authority structure has been sketched out. Some aspects of the structure can be deduced from studies of function; details can be learned only by close observation of the interaction of members with each other.

ORIGIN OF THE STRUCTURE

The fact that the authority structure we have outlined resembles the structure of the Sicilian-Italian Mafia does not lead to the conclusion that our confederation is merely the Mafia transplanted to new soil. As we indicated earlier, even when cultural elements are borrowed, they undergo changes, often of a fundamental nature, in response to the different cultural, social, and psychological surroundings to which they are introduced. "Cultural elements do not transfer mechanically as units from one ethnic setting to another so that their pathways of distribution are marked by persisting identities. Rather, diffusing elements are likely to undergo complicated changes of form and meaning as they enter new cultural settings." [21] Invention calls for combining elements or traits. The process is no different when one or more of the elements is borrowed from another cultural setting than it is when all the elements come from the same cultural setting.

The structure and values of the Sicilian Mafia could readily have been invented in the United States, independently of any contact with Sicily, just as they have been independently invented by prisoners in many parts of the world. But we know that there has been extensive contact between the United States and Sicily. Nevertheless, the things borrowed had to be "Americanized" in much the way the immigrants themselves became Americanized. A man whose grandfather came to America from England is by far more "American" than he is "English." Any importation from Sicily two or three generations ago is also by now far more "American" than it is "Sicilian." The importation of Italian and Sicilian culture traits, including high evaluation of relationships within the extended family, provided a fund of elements on which to innovate. Thus, while the American confederation may be a "lineal descendant" of the Mafia,[22] the similarities have definite limits set by the social and cultural setting of the two organizations. The confederation in the United States has responded to the changing technology and bureaucratization in America, and the Sicilian Mafia has responded to similar changes in the Sicilian cultural setting. Organized crime thrives in the United States because there is a place for it to thrive here, and that place must be eliminated. Such a place has been available in Sicily for years. By examining the organization which has been occupying the Sicilian place we can learn a great deal about the organization occupying the American place.

The early Sicilian Mafia groups were kin groups, with a hierarchy of authority relevant only to family affairs—the patriarch and his heirs. By the turn of the current century, each group had a chief and his assistants and a concept of "membership," which admitted "men of honor" even if they were not relatives. The face-to-face family-like group changed in the direction of a formal organization. A book published in 1900 indicated that one Mafia group, at least, had a structure almost identical to the structure of American "families," reported above as described by Mr. Valachi and other members of American "families." This group, founded in about 1870, consisted of about 150 members, who seized control from the more traditional, family-oriented, Mafia in a Sicilian city. Units were soon established in neighboring cities

[21] Felix M. Keesing, *Cultural Anthropology* (New York: Rinehart and Company, 1958), p. 121.

[22] Anderson, *op. cit., supra* note 11, at p. 310.

and villages. The head of the whole organization was called a *Capo,* and each jurisdiction was under the direction of a *Sottocapo.* Each *Sottocapo* in turn had an assistant, the *Consiglio Direttivo.* Membership meetings were held to judge members charged with breaking the code of the group.[23] Anderson, commenting on this development of bureaucracy in the Mafia, carries the description of the structure up to the "council" or Commission level: "The problem of succession to authority continues to be troublesome. Journalists tend to designate one or another chief as the head for all of Sicily. A high command on this level does not seem to have developed beyond irregular councils or autonomous *capi.*" [24]

The similarity to the skeletal structure said by Mr. Valachi and others to characterize what Mr. Valachi called "The Cosa Nostra" in the United States is obvious. Even more important might be the origins of the "family" concept of the Italian-Sicilian criminal units in the United States. In Sicily, the family tie is the strongest social relationship known. Villages are united by the fact that marriages are seldom made outside the village, making the village itself an extended kinship group. At the turn of the century there was a strong preference for cross-cousin marriages, despite the fact that such marriages were prohibited and therefore rare. More remote relatives did marry, and more frequently than in Italy. Since the Mafia began in rural villages, a clear line between the criminal band and the extended family was not drawn. It cannot be drawn even today:

> The first nucleus of the Mafia is the family. Some families have belonged to the "societa deli amici" from time immemorial, each father leaving the domain to his eldest son as naturally as a king leaves his kingdom to his heir. A father always takes part in confidential negotiations with the eldest son at his side. The latter never speaks. He looks, listens, and remembers everything, in case the older man were suddenly killed. Some new families emerge from nothing. Like all new people, they must struggle with the older families, survive, and slowly assert themselves. As the years go by, they accumulate henchmen, vassals, and property, establish solid relations with landowners, businessmen, politicians, policemen and other Mafia families. Their rank is determined, at first, by the number and fearlessness of their male members and, later, by the number of useful connections they establish. In one village several Mafia families can co-exist as long as they do not compete in the same field of activity: each of them must work its particular sector and all of them be ready to unite against a common threat.[25]

Barzini goes on to describe how powerful families in the same district agreed to peaceful coexistence, first by forming a stable union known as a *"cosca,"* then by establishing a *"consorteria"* with other units of the same kind, and then by constructing the society-wide Mafia. The word *"cosca"* comes from a corruption of the dialect term for artichoke—a composition of separate leaves forming a solid unit. But the alliance is not an alliance of equals. One family gathers lesser families around it, and the leader of the supreme family is the head of the *"cosca."* All families pursue identical or closely related activities, and the leader of the *"consorteria"* is everybody's leader. There is no election. One family becomes dominant, and its head becomes the ruler of all:

> Many *cosche* pursuing identical or similar activities often join an alliance called *consorteria.* The group also recognizes one *cosca* as supreme and its leader as everybody's leader. This happens spontaneously, almost gradually, when the *cosche* realize that one of them is more powerful, has more men, more friends, more money, more high-ranking protectors and relations than any of the others, could do untold damage to anybody defying its will and could benefit all those who collaborate and submit. All of the *consorterie* in Sicily finally form the *onorata societa,* or the Mafia. It is, as has been said, a fluid and incoherent association with vague boundaries.
>
> There are all sorts of degrees of affiliation: a family may operate as a unit without necessarily joining forces with other families, a *cosca* may carry on its business for years without joining other *cosche,* and a *consorteria* of *cosche* may dominate its territory independently of the island association. A sort of Mafia patriotism, however, unites all members: they know they owe all possible support to any *amico degli amici* who needs it, for whatever reason, even if they have never heard of him, provided he is introduced by a mutual *amico.*[26]

One could well substitute for the Mafia term "cosca" the term "consiglieri of six," which Mr. Valachi used to describe the body coordinating the six New York area "families" of organized criminals. The *consorteria* of Sicily resembles the "Commission" of America. And in America as in Sicily the alliances are not between equals. Further, the supremacy of one family and the leadership of its head is recognized by American criminal "families" everywhere, and especially in New York. The peace treaty ending the inter-family war fought in New York in the early 1930's abolished the previous system of "boss of all bosses," and replaced it with the "consiglieri of six" and eventually, the Commission. Nevertheless, the ruler of one of the six "families" established in the New York area by the treaty became dominant. Mr. Valachi testified, "They eliminated the boss of all bosses, but Vito Genovese is a boss of all bosses under the table." [27]

Many issues were at stake in the 1930–1931 war, and they cannot be analyzed here. It is relevant to note, however, that after joining together in what outsiders called "The Italian Society," Sicilian and other Italians seized territories formerly controlled by other criminal groups, especially Irish and Jewish groups. Almost simultaneously the members of the new alliance started fighting each other. This conflict did have the characteristics of "war" rather than "feud," for there were shifts in alliances of groups, transfers of allegiance on the part of individuals,

[23] Antonio Cutrera, *La Mafia e i mafiosi: origini e manifestazioni, studio di sociologia criminale* (Palermo: Alberto Reber, 1900) pp. 118–122, 132–141. See also Francis Marion Crawford, *Southern Italy and Sicily and the Rulers of the South* (London: Macmillan, 1900), Vol. II, pp. 363–385.

[24] *Op. cit., supra* note 11, at p. 308.

[25] Barzini, *op. cit.,* p. 260.

[26] *Op. cit., supra* note 11, at pp. 261–262.

[27] McClellan Committee, *op. cit., supra* note 19, at Part I, p. 88.

and a peace settlement. The war extended across the nation, and in one forty-eight hour period thirty to forty leaders of the existing Sicilian and Italian groups were killed. Most of them were men of the older generation, called "greaseballs," "handlebars," and "moustaches."

In the New York area, one important issue in the war was whether organized crime was to be dominated by the men born in the Castellammare area of Sicily or whether, instead, there was to be a "live and let live" policy with reference to activities of "families" made up of men born in other sections of Italy and Sicily. Prior to the war, there were two principal groups of organized criminals in the area, each of them with two factions. It is not clear whether each of the two groups constituted a "family," or whether this term would be better applied to each of the four factions. Our inclination is toward the latter, for the Castellammare men constituted one of the factions. Mr. Genovese, mentioned above, is not from Castellammare; he was born in Risigliano, Italy. As a consequence of the war, he eventually succedeed to the leadership of one of the six "families" that were stabilized at the peace table. His "family," first headed by Mr. Salvatore Lucania, has been dominant since 1931. Mr. Lucania was born near Palermo, but he came to the United States when he was nine or ten years old. He both engineered the war and, emerging victorious, wrote the peace treaty. The leaders of both of the two groups that were dominant in New York in 1930 were killed on Mr. Lucania's orders.

The six New York area families have lived peacefully with each other since 1931, and we see no reason why they cannot now be considered a "cosca," just as a similar arrangement in Sicily would be considered a "cosca." There have been numerous "executions" and two serious armed conflicts, one of them called the "Gallo-Profaci war," in the New York area since the decision for peace. However, these conflicts have been intra-family affairs, concerned principally with the family ruler's need to protect himself from his underlings, or with problems of succession to the throne. None of the "families," in New York or elsewhere, established after the 1930–1931 war have been made up exclusively of Sicilians or Sicilian-Americans.

The decision for peace in the New York area was accompanied by a decision for peaceful association with Italian-Sicilian "families" in other cities. This peace was and is insured by the Commission structure, invented by Mr. Lucania. Except in the New York area, the type of structure found in the Sicilian Mafia cannot be used in the United States, partly for reasons of geography. It is only about forty miles from Castellammare to Palermo, but it is 650 miles from New York to Detroit. Face-to-face interaction is impossible. Further, at the time of the peace treaty there were not—in Detroit, Boston, Buffalo, Philadelphia, and other cities—enough illicit businessmen to make up more than one "family," or else one family leader had dominated the arrangement almost from the beginning and was able to hold the reins of power. Whatever the cause, there now seems to be only one "family" in the cities outside New York. It is conceivable, however, that even in these cities the arrangement is something like that of a *"cosca,"* and that we consider it a "family" only because our police intelligence operations have not uncovered the real arrangement.

The nature of the current American structure also is affected by the balance of power existing at the end of the inter-family war, in 1931. There were no clear-cut or powerful families in Western cities at the time arrangements were made for mutual respect and cooperation between "families" across the nation, and this condition has affected the distribution of organized criminals in the United States ever since. In 1931, the perspective of criminals, like the perspective of businessmen and politicians, was that anything west of Chicago or south of Philadelphia was unimportant. Las Vegas wasn't even there. In Sicily, the Mafia, considered as alliances of *"consorterie,"* dominates the West but not the East, for reasons not yet explored. In the United States, the confederation is not as dominant in the West as in the East because at the critical period of decision-making there was no one in the West to make decisions. Because of conditions on the American scene, then, the structure of the United States is more like that of a *"cosca"* than like that of a *"consorteria"* or a *"Mafia."*

Now that the Western cities overlooked in the 1930's have become economically and politically important, they have been designated "open areas" by organized criminals. Nevada is the best example of open territory—anyone can operate there, and almost everyone does. Chicago is called an "open area" also, but this does not mean than anyone can move in. Chicago was not economically and politically weak in the early 1930's. At the time of the treaty, non-Italian—non-Sicilian syndicate groups of great wealth and power had to be accommodated. The area is "open" only in the sense that some of them still must be accommodated. Florida is similar to Chicago except that the Miami territory is controlled by a New York-Miami partnership.

But despite the geographic variations, the basic organized crime unit in both the United States and Sicily is the "family." It is conceivable that in America this arrangement began as a defense against predators, as in Sicily, and then developed into a rationally-devised division of labor for conducting illicit businesses. We know that legitimate businessmen are now paying tribute to hoodlum "labor relations experts," who don't know Samuel Gompers from Shirley Temple, because these same businessmen once asked the hoodlums to protect them from labor strife. Perhaps there were other predators that also needed to be controlled. It is likely, however, that the "family" arrangement was more or less a "second thought" in America, arising in response to inter-group warfare rather than in response to a need for protection against bandits. Whatever the cause of the American development, the arrangement now closely resembles the relationship between individual Sicilian families and the Sicilian Mafia.

There are differences, however. The principal differences arise in part because of the greater distances separating American "families," already discussed, and from

three other conditions in the United States. These are (1) the short period of time since the major thrust of the Italian-Sicilian immigration, (2) fragmentation of the native extended family by migration to the host country of only a part of that family, and (3) location of the immigrants in the urban areas of a rapidly-industrializing nation rather than in the rural areas of an agricultural nation.

The identification of family boundaries and Mafia unit boundaries in Sicily took centuries to develop. A duplicate organization in the United States would necessarily have had to develop since the turn of the century. There simply has not been time to develop in America a close-knit family relationship of Sicilian peasant villages. Moreover, the extended families of Sicily did not move in a body to the United States. Parts of many families, including a disproportionate number of males and young adults, joined the emigration. Even in the Sicilian neighborhoods of American cities the traditional Sicilian family affiliations could not be the primary basis of social interaction as they were at home. One device for establishing family relationships and, thus, restoring personal security, was creation of fictive families. We do not know the extent to which this device was used by respectable immigrants and their descendants. We know that it was, and is, used by organized criminals, thus making it necessary to refer to the "family" of an American ruler or organized criminals in quotation marks.

In Sicilian Mafia families it became necessary or convenient in about 1920 to supplement and extend family ties by taking in members who were not relatives. The conditions of immigration made it necessary for American "families" of organized criminals to *begin* with this arrangement. Membership in the "family" was extended to those Italians as well as to those Sicilians who demonstrated willingness to be dominated by a despot, even if not related to him by blood or marriage. Similarly, fictive kinship ties were extended to persons associated directly or indirectly with "family" members in religious ceremonies—God parents, God children, best men at the weddings of sons or nephews, classmates in a confirmation ceremony, brothers-in-law, brothers of sisters-in-law, brothers of sons-in-law or of sisters of sons-in-law, etc. While such alliances, like arranged marriages, are commonly used in peasant societies as means for extending the influences and increasing the wealth of a family, in the United States they were essential to *establishing* the criminal "family" rather than extending it. Later we will show that the need for technological experts in modern criminal operations has made it necessary for syndicate leaders to reconsider traditional membership criteria. A "family" might soon include men who are members because they are accountants and lawyers, not because they are related by blood or even by religious ceremony or residence of ancestors in Sicily or Italy.

It is true, however, that genuine family relationships play an important part in determining one's status in American "family" units—one cannot move very high in the organization unless he is somehow related to the Boss. Further, intermarriages between the sons and daughters of confederation members are common, and there are a few cases in which there have been three generations of alliances through marriage. The Detroit family seems to be especially old-fashioned and "Sicilian" in this respect. The "family" fiction helps keep peace within "families" and between "families," but it also creates problems. Perhaps the greatest of these is the procedure for succession. Because the family is not real, the "father" cannot leave his domain to his eldest son, or even to a relative close to him in the organization. Yet the "family" concept makes it impossible to establish an orderly procedure for selecting successors from among nonrelatives. When the ruler of a New York family recently disappeared for a year, armed conflict broke out between the members. One faction supported the son of the Boss as he made a bid to become Boss. The other faction supported a successor approved by the Commission, a man who happens to be the son-in-law of a Boss who is also a member of the Commission.

Similarly, allocation of membership is a problem. Because membership in a "family" can be given to nonrelatives, induction of members by a ruler gives him strength and therefore threatens the condition of peaceful coexistence. Perhaps that is why "the books have been closed" to membership for a decade. One New York leader was assassinated at least in part because he was expanding his membership in violation of the peace treaty, thus threatening to shake up the entire pattern of political deterrence. A new "family" will be able to develop in the United States only if a nucleus of men can gain control of some small criminal activity and then, over a period of years, gradually "accumulate henchmen, vassals, and property" and slowly "establish solid relations with landowners, businessmen, politicians, policemen and other . . . families." [28]

The fictitious "family" is an important integrating mechanism, useful to maintaining the identity, cohesion, and exclusiveness of the membership organization dominated by a boss. Some members of the upper socio-economic class in the United States use the same mechanism, and for the same purposes. In New England, at least, it is common for persons of high status to refer to each other as "cousin," even if there is no blood relationship between them. The pretense of blood relationship serves to maintain exclusiveness in the upper classes. Newly-rich persons, certainly including all the millionaires of organized crime, are unable to gain upper-class status simply because they are not one of the fictional blood relatives, the "cousins." The "family" figure performs the same function for criminal organizations. A man who suddenly makes a million dollars in a dice game or some other criminal operation cannot become "one of us" in organized crime, any more than a man who suddenly makes a million dollars at the race track can become "one of us" in the upper classes. He is not in the family. Securing a place in an organized crime "family" is as difficult as securing membership in upper-class society—it takes time to accumulate the necessary "respectability" and "connections." Should an upper-class person violate this principle by taking a newly-rich

[28] Barzini, *op. cit.*, *supra* note 13, p. 260.

person into the membership of his "cousins," he is likely to be "cut" by his friends. In organized crime, the word is "hit," the synonym for murder.

Earlier, we indicated that common needs and common conditions both make for resemblances in cultural forms and limit these cultural forms. This "law of limited possibilities," as it was called by the anthropologist Goldenweiser who formulated it, gives valuable insight into the fact that there is a condition of peaceful coexistence and cooperation between Mafia families in Italy and Sicily, and a similar condition of peaceful coexistence and cooperation between the various organized crime syndicates in the United States, whether these syndicates are organized as "families" or something else. Goldenweiser's "law" could even be extended to the politics of international diplomacy. There are three important similarities between the needs and conditions which produced the Sicilian "honored society" and the conditions which produced the American criminal confederation.

First, the closer the geographic proximity, the greater the need for defenses which will permit family survival. One such defense is armament, another is a peace treaty or an attitude of respect. In narrow geographic areas, territorial claims are likely to overlap, making conflict inevitable. Wasteful feud or war, followed by rational peace treaties which draw boundaries, are the result, although the "war" step is not inevitable. Boundaries can be geographical, but they also can relate to activities. Each unit can be bound to participate in only one kind of activity, as in Sicily, or all units can be bound to a specified share of the profits from all, or most, activities, the share being established by the degree of power at the time of the treaty, as in New York. In simple terms, it is efficient for criminal families of about equal strength living in close proximity to maintain their common strength against a common enemy (legitimate government) by maintaining the peace, whether these families are in New York or in western Sicily.

Second, the greater the similarity of the product or service provided by the criminal families, the greater the likelihood of a confederation between them. The focus here is on business rather than on political diplomacy or strength to wage war. It is economically advantageous for similar businesses to cut costs by avoiding duplication and by forming trade associations which limit the amount and kind of competition. Criminal businesses providing similar or identical products may require the same contacts, the same suppliers, and the same kinds of skilled workmen. Further, the corrupt official who issues "licenses" for illicit businesses in an area may demand that the favors asked of him and the payments made to him be centralized so as to avoid detection and misunderstanding, thus stimulating cooperation.

Third, alliances of groups in widely separated geographic areas are stimulated when the groups deal in goods or services which, by their nature, require coverage of large territories and the use of common carriers or communication systems. A "family" in one city has arrangements for protection which would be difficult for a traveler from another "family" to establish, even if the local "family" would permit him to operate in its territory. The importation and distribution of narcotics requires elaborate international connections and cooperation. Such connections and cooperation have existed between American and Sicilian syndicates, but they also have existed between Americans and Italians, Americans and Frenchmen, Americans and Turks, Americans and Lebanese, and many others. We have already shown how betting requires high-level financiers and a wide network of information and communication services.

Many other conditions which are common to Sicilian villages and American urban life could be described. The above sketch supports the notion that the structure of American organized crime is similar to the structure of the Sicilian Mafia not merely because of the Sicilian ancestry of some American criminals, but more importantly because the functions performed by the two organizations are similar. There is no question, of course, that experience in a Sicilian Mafia would be of great advantage to anyone setting out to devise a structure for the operation and control of illicit businesses in the United States. The well-trained officer of a foreign army can be of great assistance to any newly-established African nation which has made a place for an army in its political and economic structure.

THE CODE AND ITS FUNCTIONS

We have already indicated that the managers of the big American businesses selling illicit goods and services must also be governors. The illegal nature of the American crime cartel turns that cartel into a confederation, a governmental organization as well as a commercial organization. The formal division of labor which we have sketched out is the structure of a government as well as of a business. Even the titles used by the participants for two principal positions in the division of labor—Lieutenant and Soldier—are governmental titles rather than business titles.

The fundamental basis of any government, legal or illegal, is a code of conduct. Governmental structure is always closely associated with the code of behavior which its members are expected to follow. The legislative and judicial processes of government are concerned with the specification and the enforcement of this code, whether or not it is clearly set down in a set of rules precise enough to be called "law." A behavioral code, such as the Ten Commandments, becomes "law" only when it is officially adopted by a state, a political organization. Yet the the distinction between a state and other organizations such as a church, an extended family, or a trade union is quite arbitrary. The distinction is most difficult to maintain when attention is turned to societies where patriarchal power is found.[20] The problem can be illustrated by gypsies, who have no territorial organization and no written law, but who do have customs, taboos, and a semi-judicial council which makes decisions about the propriety of behavior and, on the basis of these decisions, assesses damages and imposes penalties. The prob-

[20] See E. Adamson Hoebel, *The Law of Primitive Man: A Study in Comparative Legal Dynamics* (Cambridge: Harvard University Press, 1954).

lem also can be illustrated by the "families" of Italian-Sicilian criminals in America, and by the confederation they have formed. Behavior in these "families," like behavior of members of the Sicilian Mafia, is controlled by a government which is substituting for the state, even if the code being enforced can in no sense be considered "criminal law" or "civil law."

THE CODE

We have been unable to locate even a summary statement of the code of conduct which is used in governing the lives of the members of American criminal "families." There are a number of summaries of the Sicilian Mafia's code of *"omerta"* or "manliness," and the popular assumption seems to be that such statements also summarize the code of American organized criminals. While this assumption is not in itself improper, the implication is that the American code was simply borrowed from the Mafia. This is not correct, any more than it is correct to believe that the "family" structure and the confederation structure were simply borrowed from the Mafia.

The matter is complicated, of course, by the fact that the code of conduct for "family" members is unwritten. The snippets of information we have been able to obtain have convinced us that there is a striking similarity between both the code of conduct and the enforcement machinery used in the confederation of organized criminals and the code of conduct and enforcement machinery which governs the behavior of prisoners. This is no coincidence for, as indicated earlier, both the prisoner government and the confederation government are responses to strong official governments which are limited in their means for achieving their control objectives. In order to maintain their status as governors of illegal organizations, the leaders of the two types of organizations must promulgate and enforce similar behavioral codes.

We will first discuss the code of prisoners and then will summarize the code of American organized criminals. One summary of the many descriptions of life in a wide variety of prisons has suggested that the chief tenets of the inmate code can be classified roughly into five major groups.[30] Sutherland and Cressey have shortened and re-written this summary of the code as follows:

> *First,* there are those maxims that caution: *Don't interfere with inmate interests.* These center on the idea that inmates should serve the least possible time while enjoying the greatest possible number of pleasures and privileges. Included are such directives as: *Never rat on a con; Don't be nosy; Don't have a loose lip; Keep off a man's back; Don't put a guy on the spot.* Put positively: *Be loyal to your class, the cons.*
>
> *Second,* a set of behavioral rules asks inmates to refrain from quarrels or arguments with fellow prisoners: *Don't lose your head; Play it cool; Do your own time; Don't bring heat.*
>
> *Third,* prisoners assert that inmates should not take advantage of one another by means of force, fraud, or chicanery: *Don't exploit inmates.* This injunction sums up several directives: *Don't break your word; Don't steal from cons; Don't sell favors; Don't be a racketeer; Don't welsh on debts. Be right.*
>
> *Fourth,* some rules have as their central theme the maintenance of self: *Don't weaken; Don't whine; Don't cop out* (plead guilty). Stated positively: *Be tough; Be a man.*
>
> *Fifth,* prisoners express a variety of maxims that forbid according prestige or respect to the guards or the world for which they stand: *Don't be a sucker; Skim it off the top; Never talk to a screw* (guard); *Have a connection; Be sharp.*[31]

Prison inmates as a group do not give the warden and his staff their consent to be governed. By withholding this consent and developing their own unofficial government they accomplish precisely what prison officials say they do not want them to accomplish—legally-obtained status symbols, power, and an unequal share of goods and services in short supply. Organized criminals, like prisoners, live outside the law, and in response to this outlaw status they, like prisoners, develop a set of norms and procedures for controlling conduct within their organization. The five general directives making up the prisoners' code are, in fact, characteristic of the code of good thieves everywhere.[32] Specifically, the chief tenets of this thieves' code as it is found among organized criminals can be summarized and briefly illustrated as follows:

1. *Be loyal to members of the organization. Do not interfere with each other's interests. Do not be an informer.* This directive, with its correlated admonitions, is basic to the internal operations of the confederation. It is a call for unity, for peace, for maintenance of the status quo, and for silence. We have already discussed the decision for peace, based on this directive, which followed the 1930–1931 war. The need for secrecy is obvious.

2. *Be rational. Be a member of the team. Don't engage in battle if you can't win.* What is demanded here is the corporate rationality necessary to conducting illicit businesses in a quiet, safe, profitable manner. The directive extends to personal life. Like a prisoner, the man occupying even the lowest position in a "family" unit is to be cool and calm at all times. This means, as examples, that he is not to use narcotics, that he is not to be drunk on duty, that he is not to get into fights, and that he is not to commit any crimes without first checking with his superiors. A leader of an Italian-Sicilian "family" in a large city, accompanied by a low-status member of the family, passed a law-enforcement officer on the street. The low-status man spat on the officer. The leader apologized profusely and, presumably, took punitive action against his worker. The low-status man was not, in the language of inmates, "playing it cool." The ruler of a different Italian-Sicilian "family" at one time temporarily stopped all lottery operations in his city because the business was drawing the attention of the

[30] Gresham M. Sykes and Sheldon L. Messinger, "The Inmate Social System," Chapter I in Richard A. Cloward, Donald R. Cressey, George H. Grosser, Richard McCleery, Lloyd E. Ohlin, Gresham M. Sykes and Sheldon R. Messinger, *Theoretical Studies in Social Organization of the Prison* (New York: Social Science Research Council, 1960), pp. 5–9.

[31] Edwin H. Sutherland and Donald R. Cressey, *Principles of Criminology*, Seventh Edition (Philadelphia: Lippincott, 1966), pp. 559–560.

[32] See John Irwin and Donald R. Cressey, "Thieves, Convicts and the Inmate Culture," *Social Problems*, 10: 142–155, Fall, 1962.

police to the even more lucrative criminal activities of the "family." As Tyler has observed:

> In this era of the "organization man," the underworld—like most institutions that prosper within an established culture—has learned to conform. Its internal structure provides status for those who would plod along in workaday clothes. In its external relations, it affects all the niceties of a settled society, preferring public relations and investment to a punch in the nose or pickpocketing.[33]

3. *Be a man of honor. Respect womanhood and your elders. Don't rock the boat.* This emphasis on "honor" and "respect" helps determine who obeys whom, who attends what funerals and weddings, who opens the door for whom, who takes a tone of deference in a telephone conversation, who rises when another walks into a room. Later we will show that emphasis on honor actually functions to enable despots to exploit their underlings.

4. *Be a stand-up guy. Keep your eyes and ears open and your mouth shut. Don't sell out.* A "family" member, like a prisoner, must be able to withstand frustrating and threatening situations without complaining or resorting to subservience. The "stand-up guy" shows courage and "heart." He does not whine or complain in the face of adversity, including punishment, because "If you can't pay, don't play." In his testimony before the McClellan Committee, Mr. Valachi reported that juvenile delinquents appearing in police stations or jails are watched and assessed to determine whether they possess the "manliness" so essential to membership in the Italian-Sicilian confederation of criminals. This tenet of the code will later be discussed in more detail, in the section on recruitment.

5. *Have class. Be independent. Know your way around the world.* Two basic ideas are involved here, and both of them prohibit the according of prestige to law-enforcement officials or other respectable citizens. One is expressed in the saying, "To be straight is to be a victim." A man who is committed to regular work and submission to duly-constituted authority is a sucker. When one "family" member intends to insult and cast aspersion on the competence of another, he is likely to say, "Why don't you go out and get a job?" The world seen by organized criminals is a world of graft, fraud, and corruption, and they are concerned with their own honesty and manliness as compared with the hypocrisy of corrupt policemen and corrupt political figures. A criminal who plays the role of Corrupter is superior to a criminal who plays the role of Corruptee.

Vague, general, and overlapping as the tenets of the code are, they form the foundation of the legal order of the confederation. One's standing in the status hierarchy depends in part on his ability to bring in profits, and in part upon his not being caught violating the code. Serious violators of the prohibitions against informing and against interfering with another criminal's interest are killed. Since conformity to or deviation from the code is so important in the lives of family members, it is probable that argot terms have been developed for various kinds of conforming and deviating behavior. We are not familiar with any such argot terms which are unique to the confederation, however. "Stand-up guy," "rat," "fink," "stool pigeon," and variants of these terms are used, but these terms are not significantly different from those used by the members of other systems, legal and illegal.

Both Strong and Schrag have suggested that groups characterize members in relation to the problems, lines of interest, and focal concerns of the group, and then attach distinctive names to these types.[34] Since the problems, focal concerns, and lines of interest of prisoners and members of the criminal confederation are almost identical, it would not be surprising if the distinctive names attached to some types of organized criminals were not similar to the distinctive names attached to some types of prisoners. Before turning to an examination of the functions the code has in the governing of confederation members, we would like to suggest that investigators with access to criminals' conversations should be able to find among confederation members the three principal deviant roles found among prison inmates. Our preliminary examination indicates that these roles are indeed present among organized criminals, despite the fact that we have heard no argot terms for them. We are convinced that the functions the code serves for the confederation will not really be understood until the relationships between the three informal roles are understood.

Prisoners who exhibit highly aggressive behavior against other inmates or against officials are likely to be called "toughs," "hoods," "gorillas" or some similar name, depending on the prison they are in. The terms are all synonyms, and they refer to men likely to be diagnosed as "psychopaths," who hijack their fellow inmates when the latter are returning from the commissary, who attack guards and fellow inmates verbally and physically, who run any kangaroo court, who force incoming inmates to pay for cell and job assignments, who smash up the prison at the beginning of a riot. Precisely the same type is found among organized criminals. Mr. Arthur Flegenheimer (Dutch Schultz), one of the last prohibition gangsters to hold out against "The Italian Society" that formed just prior to the 1930–31 inter-family war, exemplified this type. The following description of a murder committed by Mr. Flegenheimer was written by his lawyer, Corrupter, and Money Mover. It reveals the "tough" characters of both the murderer and the victim:

> Dutch Schultz was ugly; he had been drinking and suddenly he had his gun out. The Dutchman wore his pistol under his vest, tucked inside his pants, right against his belly. One jerk at his vest and he had it in his hand. All in the same quick motion he swung it up, stuck it in Jules Martin's mouth, and pulled the trigger. It was as simple and undramatic as that—just one quick motion of the hand. The Dutchman did that murder just as casually as if he were picking his teeth . . . Julie was the bigmouthed ape who ran the restaurant racket for Schultz. He had two big labor unions terrorized and in two years

[33] Gus Tyler, *Organized Crime in America* (Ann Arbor: University of Michigan Press, 1962), p. 116. See also Johnson, *op. cit., supra* note 1, at pp. 408–409.

[34] Samuel M. Strong, "Social Types in a Minority Group," *American Journal of Sociology*, 48: 563–573, March, 1943; Clarence Schrag, "Leadership Among Prison Inmates," *American Sociological Review*, 19: 37–42, February, 1954; and "A Preliminary Criminal Typology," *Pacific Sociological Review*, 4: 11–16, Spring, 1961.

> he had shaken down $2,000,000 from the eating places in the Broadway section, including Jack Dempsey's. Once I had seen Julie with his bare hands beat up a man horribly . . . Julie was saying that he had stolen only $20,000 and the Dutchman was insisting he had stolen $70,000 and they were fighting over the difference.[35]

Currently, "toughs" in criminal syndicates are likely to occupy the position provided for an "Enforcer" and one or more of the positions provided for "Executioner." Enforcers, who are not necessarily the men who actually inflict the punishment or commit the murder ordered by a Boss or the Commission, are high-status men whose function is something like that of penal administrators in legitimate government. They carry out punishments, including executions, ordered by a judicial authority. The process of "carrying out" a judicial order does not require that the penal administrator personally inflict the punishment or perform the execution. In the confederation of organized criminals there are positions for Executioners, including a position for "setting up" the victim, a position for the actual killer, and others. The men who occupy these positions resemble the prisoners called "toughs," "hoods," and "gorillas" by their fellow prisoners, both when they are performing their duties and when they are off duty.

In the criminal confederation, as in prison, the man who plays the role of the "tough" is both an asset and a threat to other types of leaders. He is a leader because he stands above the ordinary run of Soldiers or Buttons, and he is an asset because he readily follows orders to control by "muscle." But the fact that he controls by "muscle" also makes him a threat to whoever uses him. Raymond V. Martin, former Assistant Chief of the Brooklyn South Detectives, has described the "Gallo-Profaci war" that developed in 1961–62 when a faction of "toughs" in a Brooklyn "family" tried to overthrow their leaders because they believed they were being cheated.[36]

A second type of prisoner role is identified in prison argot as the "merchant," "peddler," or "con politician." Prisoners playing this role do favors for their fellow prisoners in direct exchange for favors from them, or in exchange for payment in cigarettes, the medium of exchange in most prisons. Many, if not most, of the "favors" involve distribution of goods and services which should go to inmates without cost—the "merchant" demands a price for dental care, laundry, food, library books, a good job assignment, etc. Thus the "merchant," like the "tough" or "gorilla," actually exploits other inmates while seeming to help make prison life easier for them.

The criminal confederation also has positions for "merchants" who make their way in the world by manipulating and "dealing" with their fellow criminals. One criminal occupational position occupied by "merchants" is that of loan-shark. While these persons loan money at usurious rates (now five per cent per week) to respectable victims outside the confederation, they also take advantage of their fellow-criminals' misfortunes by helping and assisting them, at usurious rates. Prison inmates make a distinction between the "real man" or "right guy" (to be discussed below) who might "score" for food occasionally, and the "merchant" who sells stolen food on a "route." The man who "scores" may distribute part of the loot to his friends, with no definite obligation to repay, but the man with the "route" gives nothing away. The loan-shark (sometimes called a "shylock," "shy" or "shell") by analogy, is the man with the "route"—he is out to make money wherever he can make it. Since loan-sharks stand by to loan money to gamblers in need, and since organized criminals are frequently gamblers in need, it may be presumed that usurious loans often are made to members of the organization. Here, as among prison "merchants," there is no discount to friends. In hearings on loan-sharking held by the New York State Commission of Investigation, Sergeant of Detectives Ralph Salerno of the Criminal Intelligence Bureau of the New York City Police Department testified, in effect, that the organized criminal's need for the services of the loan-shark makes it possible for the loan-shark to exploit him:

> It is a demonstration of power. You have something which, I think, is unique in criminal fields in loansharking to a height and to a degree in their own criminal circles that I have never seen duplicated anywhere. It seems to be an unwritten law that even if you are a criminal, even if you are a top guy, you always pay the shylock . . . You borrow money, you pay it back. [The members of the Gallo gang] weren't afraid of the shylock. But they didn't know when they might need him again. So they very diligently paid the shylock.[37]

The Buffer position in confederation "families" also is a position for a "merchant." As we indicated earlier, men occupying the position of "Buffer" are carefully selected and highly trusted by the Boss or by a Lieutenant. The duties of the Buffer are to be aware of all the operations of his immediate superior and to keep that superior officer informed, while at the same time keeping him insulated from police and prosecuting attorneys. In practice, however, these duties require him to gather information about his fellow criminals and to report his findings to a man who has the power of life and death over the underlings. Accordingly, in return for "favors," he allocates "favors," such as interviews with the Boss or Lieutenant, which in a different system the lower-status worker would be able to get for himself, free of charge.

The "right guy" or the "real man" is the third principal type of inmate role identified in prison argot. Men who play this role are the highest status men in any prison. This is no accident, for the prisoner's code of behavior summarized above is really the code of a "right guy," the epitome of the "good prisoner." Because the "right guy" in prison closely resembles the "stand-up guy" in confederated crime, it also may be said that the confederation code summarized earlier is the code of the "stand-up guys" who have the highest status in the hierarchy of a

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[35] Davis, *op. cit., supra*, note 15 at p. 9, July 22, 1939.

[36] Raymond V. Martin, *Revolt in the Mafia* (New York: Duell, Sloan and Pearce, 1963).

[37] New York State Commission of Investigation, *An Investigation of the Loan Shark Racket* (New York: Author, 1965).

"family" or of the confederation itself. If the Boss or Underboss of a "family" were asked to describe an ideal underling, or if a Soldier were asked to describe his Boss or Underboss, they probably would use many of the phrases used to describe the "right guy" in prison. The following is one such description. We quote at some length because later we will show how the "right guys" of organized crime, the Bosses and Underbosses, use the "right guy" code to protect themselves from both the police and underlings.

> A *right guy* is always loyal to his fellow prisoners. He never lets you down no matter how rough things get. He keeps his promises; he's dependable and trustworthy. He isn't nosey about your business and doesn't fall all over himself to make friends either—he has a certain dignity. The *right guy* never interferes with other inmates who are conniving against the officials. He doesn't go around looking for a fight, but he never runs away from one when he is in the right. Anybody who starts a fight with a *right guy* has to be ready to go all the way. When he's got or can get extras in prison—like cigarettes, food stolen from the mess hall, and so on—he shares with his friends. He doesn't take advantage of those who don't have much. He doesn't strong-arm other inmates into punking or fagging for him; instead, he acts like a man.
>
> In his dealings with the prison officials, the *right guy* is unmistakably against them, but he doesn't act foolishly. When he talks about the officials with other inmates, he's sure to say that even the hacks with the best intentions are stupid, incompetent, and not to be trusted; that the worst thing a con can do is give the hacks information—they'll only use it against you when the chips are down. A *right guy* sticks up for his rights, but he doesn't ask for pity: he can take all the lousy screws can hand out and more. He doesn't suck around the officials, and the privileges that he's got are his because he deserves them. Even if the *right guy* doesn't look for trouble with the officials, he'll go to the limit if they push him too far. He realizes that there are just two kinds of people in the world, those in the know skim it off the top; suckers work.[38]

If there were no violations of the code of organized criminals, everyone would be a "stand-up guy" or, to use the prisoner's term, a "right guy." For this reason, the Bosses, Underbosses and other high-status men promulgate both the code and its corollary, the notion that all members should be "stand-up guys" like themselves. Were the code never violated, every member would be a "stand-up guy" and the illicit government's operations would be a complete mystery to the police and other representatives of legitimate government. Further, if every member were a "stand-up guy" the Lieutenant would never be a threat to the Underboss, and the Underboss would never be a threat to the Boss. That is not the case. The code is violated, obviously, by men acting the role of "tough" and the role of "merchant," for they are exploiting fellow criminals and thereby interfering with their interests.

The fact that a code of conduct calling for honor and silence is violated, even frequently, does not mean that it is unimportant in the control of conduct. Our legitimate "code" regarding the right to private property has been put into the precise form of the criminal law, and the "code" as well as the law is violated whenever a larceny is committed. Nevertheless, this "code" determines, directly or indirectly, a broad range of social interactions among both honest and dishonest citizens. The important problem for one who would understand a society or group guided by a code is not that of determining whether the code is violated. It is the problem of determining the code's function in the preservation of order.

SOME FUNCTIONS OF THE CODE

We suggest that the code of honor and silence which asks every member of the confederation to be a "stand-up guy," and which underlies the entire structure of our criminal cartel, serves the same important function that the "rule of law" once served for absolute monarchs—protection of personal power. Although implementing the idea of "a government of law, not of men" is now viewed as basic to protection of man's freedom from tyrants, the idea was once used for maintaining the conditions of tyranny. One who displeased the monarch by revolting against him in the name of democracy was taking the law into his own hands. As democracy developed, so did the prohibitions against *ex post facto* legislation, ideas about the right of revolution, and similar systems of government by the law of the people rather than by the law of the monarch. Whether or not a "government by law" insures basic freedoms to a greater degree than does a "government by men" depends upon who makes, and enforces, the law. In organized crime, the rule of law is the rule of a despot.

The principal function of the code of organized criminals seems to be the same as the principal function of "the law" when the latter protected the monarch from the people. Since the Boss of a "family" has the most to lose if the organization is weakened through an attack by outsiders, he enthusiastically promotes the notion that an offense against one is an offense against all. Moreover, by promoting this idea he makes the subordinates his "boys," who henceforth are dependent upon his paternalism. A Boss who can establish that he will assist his followers when they are in need or when they have been offended has gained control over these men. They are obligated to reciprocate, in the name of "honor," thus enhancing his privileged position.

Those aspects of the code which prohibit appealing to outside authorities for justice while at the same time advocating great loyalty, respect and honor are probably most essential to the concentration of power in the hands of a few and, hence to exploitation of lower-status men by their leaders. The ruler of an organized crime unit, whether it be an entire Italian-Sicilian "family" or a

[38] Sykes and Messinger, *op. cit.*, note 30, at pp. 10-11.

thirty-man lottery enterprise, has three classes of enemies—law-enforcement agencies, outsiders who want his profits, and his underlings. Of these, the law-enforcement agencies seem to be the least threatening, for they are hampered by lack of enthusiasm on the part of the governments which support them, by the lack of coordinated intelligence information, and by a commitment to due process of law. The leader's organization has been rationally designed to insulate him from the law-enforcement process. Some evidence of this rationality is seen in the fact that the leaders order their lives so as to take full advantage of the legal safeguards guaranteed by the Constitution. They know the rules of evidence and exploit them to the fullest. A thirty-day jail sentence imposed on a Boss creates consternation on the streets because it demonstrates that the entire illicit government is in danger. The leaders promote a code of honor which makes it impossible for the police to get witnesses to testify against the leaders, a code of honor which is enforced by the death penalty.

More threatening than the police are competitors, who are sometimes called "Indians" by the members of the establishment. Puerto Rican groups in New York and Mexican-American groups in Los Angeles are now giving the confederation a little competition, especially in the narcotics business. Competition among members has been reduced by fair trade agreements, by arbitration and judicial procedures, and by the code which prohibits one criminal from interfering with the business of another. But competition from the outside must be reduced by other means. One method is assassination and another is the coercive power of the legitimate government—the illegal activities of competitive outsiders are reported to the police. It is not necessary that one be honorable with respect to outsiders. Although Tyler presents no evidence in support of his statement, he probably is correct when he says, "Police are glad to cooperate [with older ethnic groups] because the 'Indian' is a disturbance, a source of violence, a disruption to old ties, a threat to the monthly stipend." [39] If the technique of betrayal fails, the outsiders are threatened, maimed, or killed.

Most threatening of all to the governor of an organized crime unit such as a "family" are his own underlings, especially when the governor is old and the underlings are young. The charismatic qualities attributed to a leader by his contemporaries are not likely to be attributed to him by the next generation, including his own children. Oldsters are under almost constant threat from the younger generation, and if they are to survive, they must organize their defenses. As Bolitho observed over three decades ago, "The heraldic crest of the underworld is a double-cross. The ultimate secret of almost every criminal and gangster is that he is a traitor, willingly, or by force, or just by stupidity. It is also the chief trade secret of crime detection." [40] The first line of defense used by organized crime rulers against such double-crossers is the code of conduct we have summarized above. The second line of defense is a gun. As McCleery has said,

> Systems of power differ most significantly in the type and intensity of means employed to extract the consent of the governed . . . Just as responsible democratic government rests on freedom of communication and open access to officials, an authoritarian system of power requires procedures which retain initiative for the ruling class, minimize reciprocity, and prevent the communication of popular values to the ruling elite. Authoritarian control does not rest basically on the imposition of punitive sanctions. It rests, instead, on the definition, in a system of authority, of a role for the ruler which makes the use of punitive sanctions superfluous. Thus, the heart of custodial controls in traditional prisons lies in the daily regimentation, routines, and rituals of domination which bend the subjects into a customary posture of silent awe and unthinking acceptance.[41]

A "posture of silent awe and unthinking acceptance" is, after all, what inspires conformity to the criminal law in most members of democratic societies. A "sense of morality," or a "sense of duty," or a "sense of decency" keep the crime rate low. It is this kind of "sense" which constitutes "consent to be governed" in a democracy. Similarly, in the government of criminal organizations, a "posture of silent awe and unthinking acceptance" is the objective of rulers who would inspire in their subjects a different "sense of morality," "duty," or "decency." The code of honor asks the underlings to be honest, moral, and straightforward in their relationships with the men of high status whose positions of power would be severely threatened should the lower-status men subscribe only to the more general society's moral and legal code. Without honor, respect, and honesty there could not be, among the underlings, the "posture of silent awe and unthinking acceptance" which enables rulers to acquire vast fortunes through the hard work and even suffering (in the case of imprisonment) of the underlings.

Yet even a democratic government must constantly be seeking to maintain among its members the consent to be governed. Further, even in a democracy, government must constantly be seeking measures for the control of those members whose "sense of morality" and "decency" does not stop them from violating the criminal law. When an individual citizen's consent to be governed has been lost, as indicated by the fact that he has committed a crime, "force" must be used to coerce conformity. But force usually is not physical control; it is *ex post facto* infliction of pain for deviation. If such intentional infliction of suffering is to be accepted by the recipients and by citizens generally, it must be made "justly," in measures suitable to correcting deviation without stimulating rebellion. Maintaining "consent of the government" then, requires that punishments for deviation be accepted as legitimate by those being governed.

This is the basic meaning of "justice" in criminal cases. One who believes that criminals should be dealt with "justly" believes, among other things, that punishments can be inflicted on criminals without great danger of revolt or rebellion, providing sufficient *advance notice* is

[39] Tyler, *op. cit., supra* note 3, at p. 336.
[40] William Bolitho, "The Natural History of Graft," *The Survey*, 63: 138–140 *ff.*, April, 1931.
[41] Richard H. McCleery, "The Governmental Process and Informal Social Control," Chapter IV in Donald R. Cressey, Editor, *The Prison: Studies in Institutional Organization and Change* (New York: Holt, Rinehart and Winston, 1961), pp. 153–154.

given in the form of rules. Especially in the Western societies with long traditions of barring *ex post facto* legislation, elaborate systems for *warning* citizens that nonconformity of certain kinds will have punishment as its consequence stimulate rather docile acceptance of official punishments when they are in fact ordered by the courts and executed by prison officials and others. In other words, democratic states operate on the basic assumption that conformity can be maximized only if the punitive system has a rational base. If punishments were imposed irrationally or capriciously, the citizen would be unable to determine to which rules he should conform. Moreover, the infliction of punishments in an apparently arbitrary way would be viewed as "unjust" and would, then, contribute to divisiveness in the society.

An important function of the criminal law, so far as maintaining consent of the governed is concerned, is providing the "advance notice" necessary for justice. The carefully-stated and precisely-stated prohibitions stipulated in criminal laws give advance notice that wrongdoers will be punished, thus contributing to the maintenance of the consent of the governed even when the latter are punished. In addition, since it is not correct to assume that all criminal laws are perfectly clear, the police are utilized to give additional advance notice that whoever violates a criminal law risks punishment—police discretion often means that the police are to issue warnings that *further violations* will have punishment as a consequence. In the long run, then, the consent of the governed and, thus, a maximum degree of conformity, rests at least in part on a public belief that punishments will be imposed only for deliberate violations of regulations clearly stipulated in advance.

In this regard, the code of the "stand-up guy" is in organized crime the functional equivalent of the criminal law. As indicated, conformity to the code is expected of all members, and severe punishments are meted out to nonconformists. But there is one significant respect in which this code of honor differs significantly from the criminal law of democratic society: It is unwritten. Since the code is unwritten, it can be said by the rulers to provide for whatever the rulers want and to prohibit whatever the rulers do not want.[42] The rules of the criminal law, and even the rules contained in the procedural manuals of business firms, control the actions of high-status as well as low-status personnel. But the organized criminals' code, being oral, lacks the precision necessary to identifying the violations of high-status personnel who do not want them identified. Note, for example, that the code prohibits interference with the interests of fellows and asks that fellows be loyal to each other. As indicated earlier, this rule is somewhat comparable to the law of larceny, which asks that citizens not interfere with each other's rights to private property. But while the law of larceny is stated precisely, the rule for organized criminals is stated so imprecisely that very few underlings can appreciate the fact that the rulers are actually rule violators.

If an underling is told that he cannot establish a lottery enterprise in a certain part of town because a lottery operation already is being conducted there, he can rationalize the decision as an honorable one that is based on the principle that one should not interfere with the interests of a fellow organized criminal. But when the ruler makes an honorable decision that he henceforth will be in a kind of partnership with all bookmakers in a certain area, the bookmakers are not quick to note that both the ruler's decision and his action are in violation of the code. Similarly, if one criminal starts competing with another criminal, the ruler may find it expedient to have him killed, thus enforcing the rule against interfering with another criminal's interests. But in ordering the killing the ruler is by no means being guided by the code saying that one should not interfere with the interests of another. The "law of larceny" does not apply to him—the king can do no wrong.

Similarly, the lack of precision in the code enables the leader to run his "family" organization primarily on the basis of information received from informers, while at the same time enforcing with a gun the idea that informers are the lowest form of life. The role of the Buffer, which we described earlier, is partly the role of an informer. The Buffer, like the Underboss and other couriers, gets information about any defections or suspected defections in the organization from other informers and passes it on to his Boss, thus allowing the Boss to interfere with the interests of his fellow criminals.

The rulers' positions of power are also protected by the confederation's judicial system, which has been devised to give advance notice that violators of the code will be punished. There are two basic systems, one referring to conflicts in which both disputants are members of the same "family," the other to disputes between two men who each report, through a hierarchy of ranks, to a different Boss. In either case, the distinction between tort and crime is unclear. One who claims that another is interfering with his criminal interests is at once a plaintiff in a civil suit and a complainant in a criminal case. If two members of the same "family" are quarreling, it is expected that they will follow the admonition to settle their differences quietly, without violence, so as not to antagonize the citizenry. If they cannot come to an agreement, one of them lodges a complaint with their Lieutenant, who makes a judgment on the matter. The accused is sometimes permitted to present his defense, sometimes not, depending on the conclusiveness of the evidence and the seriousness of the charge. The judgment has the function of the warning given to the general public by the criminal law. Thus, it is advance notice to all concerned that henceforth the arrangements will be as adjudicated. If one of the parties to the quarrel does not heed the "notice," he is punished or executed by the man making the decision, not by the man with whom he has been quarrelling. The punishment can be a public reprimand, a slap in the face, a roughing up, or a beating. Reprimands and corporal punishments are administered in the presence of the offender's close friends and associates, as a demonstration of his weakness. Economic sanctions are also involved, through a system of guilt by association—"If he has done something

[42] Compare a Nazi law of June 28, 1935: "Whoever commits an action which the law declares to be punishable or which is deserving of punishment according to the fundamental idea of a penal law and the sound perception of the people, shall be punished. If no determinate penal law is directly applicable to the action, it shall be punished according to the law, the basic idea of which fits it best." This law is discussed in Lawrence Preuss, "Punishment by Analogy in Nationalist Socialist Penal Law," *Journal of Criminal Law and Criminology*, 26: 847, March–April, 1936.

so bad that Johnny slaps him, he will bring heat, so I don't want to be a business associate of his."

When the disputants are members of different "families," the procedure is essentially the same. Each is required to report his problem to his Lieutenant. The two Lieutenants confer at a meeting called a "sit down," and if they can come to an agreement, they issue a "notice" regarding subsequent arrangements. If they cannot come to an agreement, they refer the case to each of their Bosses, who then meet, reach an agreement, and issue the notice. If the two Bosses cannot agree, the matter is a very serious one and it is referred to the Commission, which issues the notice. The notice gives the adjudicating body (be it Lieutenant, Boss or Commission), but not the disputants, the "right" to order the execution of violators.

By giving the rulers of the illegal government the power to assist and reward him, then, the member also gives the rulers the right to kill him. This is the basic meaning of "illicit government," when viewed from the perspective of the participants. Because the operations of bookmakers and other low-echelon personnel are illegal, these men cannot call upon the police and courts for prosecution of criminal activities in which they are victims. The strong emphasis in the code on being loyal, on being rational, on being honorable, and on being inconspicuous, is an emphasis which gives the rulers a monopoly on violence. The code denies to the individual his right to legitimate use of the coercive power of the state, while at the same time conferring upon his superiors the "right" to use illegitimate power to control him. This is one of the most insidious aspects of organized crime, especially because representatives of the legitimate government are induced, for a fee, to subscribe to the same code. A policeman or political figure who plays a role in organized crime transfers his allegiance from one government to another. Sometimes the allegiance of entire police departments and of all the political figures in a ward are transferred in this way. Corrupt officials, like other organized criminals, both deny and are denied access to the judicial processes of legitimate government, while at the same time condoning, in the name of honor, the coercive power of totalitarian government.

In summary, the "men of honor" and "stand-up guys" who have assumed positions of power in the confederation of criminals have done so with the assistance of a code of conduct stipulating that no underling should interfere with their interests, that underlings should not go to the police for protection, that underlings should be "stand-up guys" who go to prison in order that the Bosses may amass fortunes. All the processes of government within organized crime are devoted to enforcing the code so that profit can be maximized. The code, in turn, is the code of a despot bent on securing conformity to his demand that he be left alone to enrich himself at the expense of men who shower him with honor and respect. The leaders are men who have secured their high status and wealth by virtue of a code which gives them exploitive authoritarian power, and they are bent on enforcing the mandates and injunctions of the code so that their power to exploit is maintained.

THE MAFIA CODE

Since there is great similarity between the structure of the Italian-Sicilian Mafia and the structure of the American confederation of criminals, it should not be surprising to find great similarity in the values, norms, and other behavior patterns of the members of the two organizations. As mentioned earlier, any organizational structure, at least in its governmental aspects, is related to the kind of code of behavior members are expected to follow. The code of behavior of the Mafia and the code of behavior of American organized criminals, in turn, are likely to be similar because not any code will do if an organization is to operate outside the law for any length of time. Two succinct summaries of the Mafia code show the resemblance to the code of American organized criminals. One statement was made in 1892; the other in 1900.

> 1. Reciprocal aid in case of any need whatever. 2. Absolute obedience to the chief. 3. An offense received by one of the members to be considered an offense against all and avenged at any cost. 4. No appeal to the state's authorities for justice. 5. No revelation of the names of members or any secrets of the association.[43]

> 1. To help one another and avenge every injury of a fellow member. 2. To work with all means for the defense and freeing of any fellow member who has fallen into the hands of the judiciary. 3. To divide the proceeds of thievery, robbery and extortion with certain consideration for the needy as determined by the *capo*. 4. To keep the oath and maintain secrecy on pain of death within twenty-four hours.[44]

The two statements differ very little. The first spells out the dictatorial character of the government, and the second mentions criminal activities. These variations could well be the consequence of the perspectives of the two summarizers, rather than differences in codes themselves. Both statements indicate that the Mafia creed asks the members for the same kind of behavior asked by the American organized criminals' creed—loyalty, honor, secrecy, honesty, and consent to be governed, which may mean consent to be executed. Except for the last item, these are the attributes of honorable men everywhere, and even honorable men agree, as a part of their citizenship, to the death penalty for traitors. Tyler only exaggerated slightly when he said the rules very well might have been written for the Three Musketeers (one for all and all for one), for the Industrial Workers of the World (an injury to one is an injury to all), for the Irish Republican Army, for the Mau Mau, for the Hatfields or the McCoys, or for delinquent gangs struggling over turf or waging a battle against officialdom.[45] The code expresses hostility toward

[43] Ed Reid, *Mafia* (New York; New American Library, 1964), p. 31. The same rules appear in *The Chambers Journal* of 1892.

[44] Cutrera, *op. cit., supra* note 23; cited by Anderson, *op. cit., supra* note 11, at p. 308.

[45] Tyler, *Organized Crime in America, op. cit., supra* note 3, at p. 333.

the authority in power while at the same time recognizing the need to acknowledge its might.

Despite the clear evidence that the Sicilian Mafia has a structure similar to that of any rationally devised bureaucracy, authorities are not convinced that the organization was, or is, much more than an informal agreement to abide by the behavioral code. Mosca reports that a Sicilian-Italian dictionary of 1868 defines the Mafia as a neologism denoting any sign of bravado, a bold show, while a dictionary of 1876 defines it as a word of Piedmontese origin somewhat equivalent to "gang." [46] Thus, in the nineteenth century the term was defined both as an attitude and as a group of men. This pattern has been carried forward by Barzini, who says that in one of its meanings the word should be spelled with a lower-case "m," while in the other meaning the word should be capitalized.

> The lower-case mafia is a state of mind, a philosophy of life, a conception of society, a moral code, a particular susceptibility, prevailing among all Sicilians . . . They are taught in the cradle, or are born already knowing, that they must aid each other, side with their friends and fight common enemies even when the friends are wrong and the enemies right; each must defend his dignity at all costs and never allow the smallest slights and insults to go unavenged; they must keep secrets, and always beware of official authority and laws . . . A Sicilian who does not feel these compulsions should no longer consider himself a Sicilian . . . Mafia, in the second and more specialized meaning of the word, is the world-famous illegal organization. It is not strictly an organized association, with hierarchies, written statutes, headquarters, ruling elite and an undisputed chief. It is a spontaneous formation like an ant-colony or a beehive, a loose and haphazard collection of single men and heterogeneous groups, each man obeying his entomological rules, each group uppermost in its tiny domain, independent, submitted to the will of its own leader, each group locally imposing its own rigid form of primitive justice. Only in rare times of emergency does the Mafia mobilize and become one loose confederation.[47]

The notion that the Mafia is more of an attitude than an organization was also taken by Premier Mussolini's Chief of Police, Cesare Mori, who was in charge of the drive against the Sicilian Mafia in the 1920's:

> The Mafia, as I am describing it, is a peculiar way of looking at things and of acting which, through mental and spiritual affinities, brings together in definite, unhealthy attitudes men of particular temperament, isolating them from their surroundings into a kind of caste. It is a potential state which normally takes concrete form in a system of local oligarchies closely interwoven, but each autonomous in its own district.[48]

In this short statement, there are at least six words or phrases ("caste," "potential state," "concrete form," "system," "oligarchies," "autonomous") which refer to structural or organizational aspects of the Mafia, not to attitudes. This kind of oversight could occur in two ways. First, many writers are not aware that there can be organization without the written rules, formal procedures and organizational charts similar to those of a governmental bureau or department. Second, police must necessarily be more interested in capturing individual criminals than in worrying about the structure of organizations. Since attitudes belong to individuals, while "hierarchies" belong to organizations, even Mussolini's prefect of police overlooked some of the evidence he needed to help him in his organized crime drive. A number of men—with common attitudes, a hierarchy of authority and power, a system for accepting or rejecting applicants, and a system for policing the behavior of the participants—is an organization, even if the goals are not precisely stated. Formal fraternal organizations invent positions, roles and rituals in order to maximize the commitment of the members, and in that way they develop attitudes of brotherhood and kinship. The Sicilian Mafia started with brotherhood and kinship and developed the structure necessary to a government and business organization as well as to a fraternity.

In the previous sections we have stressed the notion that the code of "*omerta*," like the code of "right guys" everywhere, supports extra-legal principalities by making it seem chivalrous to comply with the wishes of strong men seeking out their own interests in a particular territory. The basic principle of justice in the Sicilian Mafia, as in American organized crime, is deterrence from deviation by means of the threat of certain, swift, uniform and severe punishment. Another principle, usually overlooked because it does not mesh with observations of the "typical" American gangster of the 1920's and early 1930's, is humility and "understatement" in relationships of power. Again there is an analogy with American upper-class culture, which decries ostentation. A Mafia Don in Sicily, a ruler of a New York "family" of organized criminals, and a New England blueblood have one thing in common—they are all "above" the petty rules which demand conspicuous consumption for those who would climb the social ladder.

In the Sicilian Mafia, a man's rank is determined by the amount of fear he can generate, but the man with the clearest halo of fear around him is not distinguishable, in manner of living, from those who fear him. His manner is majestic, but humble. When in 1943 American soldiers met the Mafia chief of the area being invaded, if not of all Sicily, they probably expected to find him well manicured, diamond studded, and dressed in a $400 silk suit and alligator shoes. They found an old illiterate man, dressed in his shirt sleeves and suspenders, whose whole game seemed to be that of de-emphasizing appearances. He did not change even when the Allies nicknamed him "General Mafia." In almost direct contrast, a bandit enlisted by this Mafia chief to help in a political fight a few years later was a twenty-three year

[46] Gaetano Mosca, *Encyclopedia of the Social Sciences* (New York: Macmillan, 1933), Vol. X, p. 36.
[47] Barzini, *op. cit.*, *supra* at pp. 253-251.
[48] Cesare Mori, *The Last Struggle with the Mafia* (London: Putnam, 1933), pp. 39-40.

old "tough" who came to a meeting bedecked with a calendar wristwatch, a golden belt buckle, and a diamond solitaire ring. He was said to dress better than businessmen or lawyers, and the press referred to him as "the King of Montelepre."

The same kind of understatement on the part of the leaders, and the same kind of contrast with the demeanor of the underlings, is found in American organized crime. Mr. Vito Genovese, head of a New York "family" and, before his current incarceration, leader of the nine-man All-American "Commission," had at the time of the Apalachin meeting in 1957 been invested with charismatic qualities by his followers. He was almost revered, while at the same time being feared, like an Old Testament divine. Even his name had a somewhat sacred quality, with the result that he was sometimes referred to as "a certain party," rather than by name. There was, in short, more than the kind of envy, awe, or even fear commanded by an ordinary immigrant who has accumulated twenty-five to thirty million dollars. Yet at the time of the Apalachin meeting Mr. Genovese lived in a modest house in Atlantic Highlands, New Jersey, drove a two-year-old Ford, and owned not more than ten suits, none of which had been purchased for more than about a hundred dollars. On the dusty top of a dresser in his bedroom stood cheap plaster statues of saints. His children and eight grandchildren visited him frequently, and he personally cooked meals for them.

The contrast with the demeanor of underlings who ostentatiously display their new-found wealth is obvious. The police in one city were unaware of the importance of a man who was in fact a highly placed Underboss until they were able to observe his participation in a meeting. First a dozen men, known to be quite high-ranking, arrived in their air-conditioned automobiles, some of them with chauffeurs. Their manners and style of dress were not "flashy," but they were impeccable. After they had been assembled for a few minutes, a small man, dressed in a shiny-seated black suit and carrying a bag of his wife's home-made peppers, entered the room. All those in attendance jumped to their feet and whipped off their hats. The man addressed the group in Italian, haranguing them about their behavior on a particular issue. After speaking for about fifteen minutes he left the room abruptly and walked to the nearest subway station, where he took the next train home. The meeting broke up upon his departure, the remainder of the group driving off in their expensive automobiles.

> Ostentatious display of wealth or power is generally frowned upon in the brotherhood. Big houses such as Joe Barbara's are rare. A mafioso may have a substantial fortune tucked away, as a good many have, but the ancient tradition requires him to live an outwardly modest life. He has his Cadillac or his Chrysler, bought for cash, and almost always at least one mistress; the number depends on his standing in the brotherhood. Home, however, is often a two-family house with overstuffed furniture, antimacassars on the chairs, five-and-ten ceramics and all the other trappings of a stuffy middle-class European household. Here he is the soul of respectability—an affectionate husband, a kind father, usually temperate and a faithful worshipper at his church.[49]

Lewis attributes the fashion of understatement in the demeanor of Sicilian Mafia leaders to linguistic confusion arising out of the similarity between the words *"omerta"* and *"umila"*—manliness and humility. "Many illiterate Sicilians have combined the two words to produce a hybrid of mixed pagan and Christian significance. The virtuous man is in Mafia fashion 'manly' and silent, and as a Christian humble." [50] The matter probably is not so simple, even in Sicily. Certainly the incidence of great humility among top American rulers is much less than the incidence among Sicilian Mafia leaders in the past. Humble men like the two described above are rare, either inside or outside American criminal organizations.

The similarities in the behavior of some American rulers and the typical Sicilian Mafia ruler make it tempting to conclude that the Americans have merely transplanted a Sicilian behavior pattern, complete with the confusion of manliness and humility. The differences, as indicated by the lavish displays of wealth on the part of other American leaders, challenge this conclusion. A more plausible explanation can be found in the observation that most of the American men have not yet "arrived." Since their power and positions of high status are not yet secure, they behave more like the newly-rich than like the old New England families constituting the upper class. One can afford to neglect a personal display of power only if his position of power is secure. On the other hand, ostentatious display is a sign that one is only climbing the status ladder, as indicated in the behavior of underlings everywhere.

Taken as a group, American rulers of organized crime are still on the way up, as compared with Sicilian Mafia rulers. The former are non-joiners. As respectable citizens have moved to the suburbs, they have moved with them. They live quiet lives with their families. They do not participate extensively in the activities of the residential communities where they live. Perhaps their non-participation is not all a matter of choice. Probably some of them are excluded from sailing weekends and debutante balls not because of their illegal activities but because they do not have the social graces and social background which make them eligible to participate. As the old leaders attempt to show exclusiveness by means of understatement, the new leaders are as yet excluded by means of understatement. But some of them are making the adjustment; they have reached the top of the illegitimate social ladder and are using the wealth and status acquired there to get them near the top of the legitimate social ladder. One New York leader even went to a psychiatrist to try to overcome his inferiority feelings about his inadequacy in social situations. As such feelings are overcome among the rulers—as they gain more power, as they extend their influence to wider and wider circles of economic, social, and political activities—they will attain the self-confidence and poise necessary to refrain from displaying one's wealth to the world.

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[49] Frederic Sondern, Jr., *Brotherhood of Evil: The Mafia* (New York: Farrar, Straus and Cudahy, 1959), p. 55.

[50] *Op. cit.*, note 13, at p. 37.

American leaders are not far away from this condition. They do not have the "humility" that requires them to dress and act like Sicilian peasants, because they have not seized power over Sicilian peasants, as the humble rulers of the Sicilian Mafia have done. But most of them do have the "humility" that requires them to dress and act like American businessmen, rather than like characters in a "B" movie about Chicago gangsters, because they have seized, and are continuing to seize, power from American businessmen. As we will show later, underlings in American organized crime are beginning to follow the Bosses because the latter are men of wealth, rather than revering them as divines or fearing their guns. The danger to America is that respectable businessmen will follow the same men, on the assumption that they are deserving of respect because they are wealthy. As time goes on, Bosses and underlings alike will try to facilitate our support by adopting the system of understatement used by American upper-class citizens, rather than the system of understatement used to impress working-class groups, as Mr. Genovese did, and, before him, the crime bosses now given the derogatory title, "the moustaches."

We repeat that immigrants living together in close association are likely to retain their homeland characteristics, especially those of a psychological nature, for greater periods of time than are immigrants who scatter through a city or nation. After about fifty years in America, Sicilian and Italian groups have been absorbed by the culture of America. Their need and their desire to interact and cooperate with groups and individuals outside their own circle in order to gain a larger share of the good things of American life have been factors in this acculturation process. This generalization applies to those Sicilian-Americans and Italian-Americans who occupy positions in criminal organizations as well as those who do not. What appear to be Sicilian Mafia behavior patterns can be seen in the behavior of those older American organized criminals who came from Sicily or Italy. But the same behavior patterns can also be seen in the behavior of Americans who are not of Sicilian or Italian extraction, be they organized criminals, unorganized criminals, or completely respectable citizens. The Mafia behavior patterns observed among organized criminals are, at most, adaptations of old behavior patterns to the American scene. They might even be independent inventions. They are not importations. They are essential to any established order, authority, or institution. American organized crime is dominated by men of Sicilian and Italian origin, but it is a lineal descendant not a branch of the Sicilian Mafia.

PATTERNS OF AUTHORITY AND RECRUITMENT

The internal arrangement for governing organized crime is not democratic. It is authoritarian. There are no general elections. The rights of the members are the rights given them by a dictator. Even a dictator, however, must establish and maintain the consent of the governed, and for that reason alone there always are cracks in the totalitarian monolith. No known process of recruitment and indoctrination will produce a sense of decency and morality—a sense of honor—so deep that there will be absolute obedience to the indoctrinator, even when the indoctrination is supplemented by the threat of death for nonconformists. Yet the leaders of organized crime keep trying, and the fact that organized crime continues to flourish is evidence that they have some degree of success.

They succeed in part because they are controllers of a large business enterprise, as well as the rulers of an illicit government. Perhaps the principal advantage they have over legitimate government is an almost unlimited supply of funds to be offered as rewards for effective business behavior. Democratic government cannot offer a reward of economic wealth to any citizen who is not disloyal to it. Totalitarian government, which controls economic life and social life as well as political life, can do so. Maybe it is for this reason that young men eagerly seek membership in criminal syndicates, even if they know that the probability of getting killed on orders from a "stand-up guy," a "man of honor," is high. There are few members of organized crime who have not at some time feared that they might be the subject of the next "hit," and "social life" among organized criminals consists at least in part of devising protective devices which amount to insurance against being killed by one's best friends. One of these devices is absolute obedience to the ruler.

Yet the fact that a Boss heads an organization which is a business as well as a government also poses serious administrative problems for him. Most of all, the business character of his enterprise makes it necessary for him to recognize and reward technical competencies. Men with highly prized skills cannot be "ordered" to perform in certain ways, as a dictator demanding absolute obedience would have them do. The patterns of authority, influence, recruitment, decision-making, and communication established for totalitarian government are different from the patterns established for productive and profitable business enterprise.

Authority in organizations can be divided into two major types. One type rests on rank, or simply incumbency in a high-status position. Persons occupying higher ranks initiate rules rather arbitrarily, "for the good of the system." These rules are implemented primarily by imposition of punishments for violation. ("I cannot make you do it, but I control the agents of power who can make you wish you had done it.") In a system of rank authority, subordinates consent to being governed by persons of higher rank, but they do not necessarily believe that these persons possess superior knowledge. They accept the system because they have been taught that it is their duty to do so and because it is painful to do otherwise. Ideally, judgments of the rationality or morality of action based on orders from above are not to be made. If they are made, they are to be set aside, and the re-

action is to be to the *position* of the person giving the command.

The second type of authority is the authority of the "expert." It rests on possession of technical knowledge and skill rather than on rank. Here, the subordinate "believes in" the rules he is expected to follow, as he does in a system of rank, but he defers to the expert knowledge of his superiors because he expects that their knowledge will somehow be used for his benefit. The system of "expert authority" is democratic in the sense that the subordinate confers "superiority" on some of his fellows because he is convinced that they can help him. A doctor's orders to his patients, a foreman's instructions for simplifying a work task, and a stock broker's instructions to his clients are all examples of technical authority.

Both types of authority are likely to be present in any organization. While the system of authority in totalitarian government is ideally one of rank, the system in complex business enterprises is ideally one of expertise. When the two systems get intermingled, as they do in the criminal organization which is both a confederation and a cartel, one cannot be sure that subordinates obey orders because of a sense of duty, because of the fear of consequences of disobedience, because of anticipation of personal benefit, or because of some combination of these.

We believe that the history of organized crime since 1931 shows a tendency to shift from a system in which rank authority was dominant to a system in which authority based on expertise is becoming equally important. The trend, then, seems to be away from totalitarian government bent on securing and maintaining conformity to a code and toward economic enterprise. Currently, however, both the structure and the operations of illicit enterprises point to the indecision and disorder brought about by attempting to maximize both patterns at the same time.

We have seen that the term "Button" or "Button Man" is used to refer to the lowest-echelon workers who are also members of confederation "families." Some writers believe that the term developed from the idea that these positions are on the lowest level of a system of rank authority. Men occupying the position carry out the orders of a hierarchy of leaders who merely "push the button." While there is no way of knowing whether or not this derivation is correct, it is clear that the term "Soldier," also used to refer to lower-echelon men, symbolizes the worker's obligation to follow orders handed down by men of higher rank. If Soldiers did in fact react automatically to orders from above, which would mean that they never got aspirations and ambitions of their own, then a crime syndicate would be a perfect example of a rank-oriented system of government. We know that such perfection is not present, however. Even legitimate military organizations and similar tightly knit chains of legitimate command operating in multi-group societies like ours are not able to maintain absolute control over the behavior of subordinates. Systems of "total power" resting on the authority of rank always become something less than "total" at least in part because the authority of the expert cannot be eliminated. We indicated earlier that unofficial governments like the Sicilian Mafia, underground movements, prisoner organizations, and the confederation of American organized criminals arise because the strong official government needs the "expert" illicit services which some of its citizens demand. We see no reason why the same process should not occur in illicit governments, with power shifting to the experts when the illicit operation demands.

The rulers of organized crime have from the beginning found it necessary to recognize and reward the special kinds of technical competence possessed by men occupying the various positions making up the organization. When the system of rank authority is dominant, these technical competencies are concerned either with establishing order or maintaining order. "Autonomy within limits" [51] is granted to indoctrinators, recruiters and trainers ("stand-up guys"), and to Enforcers and Executioners. When the problem is one of making profits, the rulers must grant some autonomy to occupants of even the low-echelon positions calling for skills such as those of the drug wholesaler, the lottery operator, and the bookie. When the illicit business becomes big, and when the profits of illicit business are invested in licit businesses run illicitly, there must be some acknowledgment of the authority of the accountant, the lawyer, the Corrupter and the Corruptee.

Such experts cannot be dictated to about technical procedures by which they are to achieve their tasks, so decisions as to actual work procedures are necessarily left to them. This does not mean that complete autonomy is granted, however. Since the operations of organized crime still must be kept secret, conformity to the code of conduct continues to be essential. Autonomy must therefore be limited, even in technical areas. For example, an accountant who nowadays becomes a member of a syndicate soon stops practicing the profession of "accounting" and starts practicing "illegal accounting." His membership makes him a "citizen" who must follow the mandates and obey the injunctions of the organization's code. His skills as an accountant, then, must be used in activities of direct interest to, and under the direct control of, the Boss who has the power of life and death over him. The basis of his decision-making is transformed from "technical" or "expert" to "technical within the framework of a system of ranks."

In any organization, the patterns of communication and the pattern of decision-making are closely related to the pattern of authority. The amount and kind of communication among the participants are consistent with the expectation regarding the kind of decision-making at each point. A special pattern of decision-making, in turn, is closely associated with each of the two authority patterns described above. When a principal goal of the organization is security or secrecy, each subordinate has an area or activity to control, and each supervisor has the duty of controlling subordinates. Further, when secrecy is a problem, as it has been for organized criminals, possession of highly developed technical skill is not as important as evidence of "rightness"

[51] Alfred H. Stanton and M. S. Schwartz, *The Mental Hospital* (New York: Basic Books, 1954), pp. 260–267.

and possession of "muscle" which can be used to coerce conformity. Generally speaking, members of "families" have been expected to place themselves almost completely at the disposal of the rulers, to be used as the latter see fit. In order to maintain the conditions of restriction necessary to protecting the ruler's positions of power, and in order to keep operations secret from the police, low-level employees were denied, and still are denied, extensive opportunities to make decisions. Because of the illegal character of organized crime, a leader's fame and fortune can be seriously damaged if improper decisions are made at the lower levels. Decision-making is therefore concentrated at the top of the hierarchy.

Communications to the outside world must be through "channels." Organizations concerned with security must be arranged so that the leader, be he warden of a prison, chief of police, or ruler of a crime syndicate, can control the messages going to the outside world. If anyone on the inside may make speeches about the organization, anyone can weaken the security control needed by the leader. Communication to the outside must be channeled through the man in charge, and arrangements for minimizing decision-making at the lower levels must be made. In organized crime, lower-echelon men have been permitted to make only those types of decisions, and to make only those communications to the outside, which prior study by the rulers has shown to be of no danger to operational security.

The concentration of decision-making at the top and the stress on communication through channels can be observed in internal communications as well. A key figure here is the Buffer, who also plays the role of courier. Although the men playing this role have established such a close relationship with the Boss that their pronouncements often are taken as commands, the Boss expects them to make a minimum number of decisions about their work. In his affairs with the men on the street, the ideal Buffer is a kind of robot who asks questions, carefully observes the conduct of the persons in his charge, and reports rule violations and suspected rule violations, as well as other information, to his governor for action. He then carries the ruler's decisions back to the men at the operating level. Viewed from the perspective of the lower-echelon men, he could be considered a paid "rat," "fink," or "stool pigeon," for his business is that of informer. Yet, paradoxically, he is engaged to report on, among other things, any signs that the men in his charge might be "rats," "finks," or "stool pigeons." Since the organization is illegal, it must be authoritarian; and since it is authoritarian, it must restrict decision-making and control communication channels.

Similarly, the Enforcer must be permitted to make a minimum number of nontechnical decisions. Like the Buffer, he is expected to behave something like an archetypal traffic policeman, who merely cites violators and leaves any decision-making about guilt to the courts. He has no authority to punish or to make decisions about punishment. The power to punish is centralized in officers and a board which can maintain an over-all view of organizational activities. Too many errors would occur if decision-making about infliction of punishments were permitted to occur on the lower levels, where the perspective on organizational activities is rather narrow. Moreover, if the Enforcer were permitted freedom to decide who should be punished or executed, he might decide to execute his superiors.

This system in which the Enforcer is not permitted to make decisions about imposing punishments is useful to the top-echelon men who order the punishments, for it gives the lower-echelon men the impression that they are controlled by an impersonal organization or "system," rather than by an individual. An execution becomes impersonal when it is known that the executioner will be executed if he tries to give the condemned man a "break." It really is not impersonal, however, if a solitary man at the top makes the decision. Confusion is introduced among lower-echelon men by the custom of calling an organized crime unit "the mob," "the organization," "the syndicate" or "the family." Such terms, like restriction of decision-making among Enforcers, perpetuate the myth that killings are impersonal. Things might be much different if lower-echelon men stopped calling the unit controlling them a "syndicate" and started calling it "Mr. Jones' system for extorting from me a part of the profits of my illegal business." The code is designed to insure that this change in terminology does not occur. Moreover, the monetary rewards for participation are high. A belief in order is supplemented by an opportunity to become wealthy.

Because the rulers of "families" also are the controllers of the business enterprises of their private governments, they have available to them one important control device not ordinarily available to the heads of legitimate rank-oriented systems such as an army, a police department or a prison. The device is money. Bosses can offer tremendous financial opportunities to persons who will become, and remain, subordinate to them, thus increasing their own incomes. Etzioni has pointed out that the means distributed among various organizational positions for control purposes can be exhaustively classified into three analytical categories: physical, material, and symbolic. The application of physical means for control purposes is *coercive power;* the use of material means for control purposes is *utilitarian power;* and the use of symbols, including symbols of prestige and esteem as well as love and acceptance, is *identitive power.*[52] Organized criminals use all three kinds of power, as do the administrators of most other organizations. Identitive power is found in inducements to be "right," loyal, and honorable; utilitarian power in the allocation of money in huge amounts; and coercive power in the allocation of punishments.

In organized crime, manipulating and balancing the use of these three kinds of power is a complex operation because both governmental operations and business operations are involved. The former requires use of much coercive power and identive power while the latter, by definition, requires a stress on monetary reward. Of necessity, conformity to the code must be maintained by means of a system of rank authority, with its emphasis on

[52] Amitai Etzioni, "Organizational Control Structure," Chapter 15 in James G. March, Editor, *Handbook of Organizations* (Chicago: Rand McNally, 1965), pp. 650-651.

punishments for nonconformity (coercive power). Yet, also of necessity, expertise which contributes to increased profits must be rewarded with money and prestige (utilitarian power and identive power).

Punishment is the response to deviation from form, and financial rewards are the response to furthering organizational ends, in this case the maximizing of profits. Since all members of organized crime "families" now must be conformists while some of them also are good profit makers, there are fluctuations between the use of coercion as a response to rule violation (especially violation of rules prohibiting underlings to join with others to take a larger share of the profits) and the use of rewards for making contributions to the flow of profits. These fluctuations make understandable the seemingly strange fact that organized criminals are at once well integrated into a somewhat impervious society of "honor" while at the same time they maim and kill each other with a frequency unheard of in legitimate organizations.

If one's duty is only to be loyal to a code of conduct, then it is impossible for him to earn rewards for *outstanding* or *extraordinary* performance. He is either loyal or he is not. Thus, an organized criminal who maintains the code of silence cannot logically be rewarded for doing so; he can only be punished for not maintaining it. Yet in at least two respects reward and punishment become confused in this area, just as they do in areas of legitimate behavior. First, a criminal might be rewarded by his ruler for doing his duty under extraordinarily difficult circumstances, such as maintaining silence under protracted questioning by the police. Such "hero awards" are sometimes given by legitimate society to persons who have only done their duty, but under difficult circumstances. For example, a policeman whose duty it is to catch criminals might be rewarded for capturing an especially dangerous or notorious criminal. Second, rewards are given for not having been punished. If one's duty is to be a "stand-up guy," then by definition a "stand-up guy" is one who is not caught being something else. Evidence of failure to do so as expected, which means that a rule has been violated, is evidence of *refusal* to do as expected, and it results in punishment for the violator. Rewards, primarily in the form of a larger share of the profits, cannot be awarded as inducements to be a "stand-up guy." That is one's duty. They can be awarded only to persons who have not been punished for failing to do their duty. Thus, a man who has a number of bad conduct reports may be barred from the reward of a lottery operation of his own, but a man who has no bad conduct reports has only behaved as he is supposed to have behaved. In either case, the man's destiny is in the hands of his paternalistic boss, who gives him what he wants to give him.

Except in the case of "hero awards," then, increased income, promotions, and symbols of status are now given for *satisfactory* performance of the duty of conforming to the code. So far as the code is concerned, the member's duty is to be "on duty," and status symbols are therefore withheld from those who show evidence of not being on duty. As indicated above, in the administration of this negative system for evaluating members, publicly administered reprimands and minor punishments are used in accumulating evidence regarding unsatisfactory performance. These actions serve as advance notice that continuation of undesirable behavior will be *more severely* punished by bodily harm or death.

Further, just as the reprimands given by a prison's disciplinary court are viewed by inmates as "black marks" against the chances for parole, so indications of a Boss's disfavor are viewed by organized criminals as "black marks" against the opportunity for advancement and job security. They are signs that performance with regard to the organization's integrating code has been unsatisfactory and that, therefore, the culprit's profits should not be increased. No matter what the degree of a member's expertise, it is impossible for him to be a "better criminal" than one of his colleagues. He might be wealthier than his colleagues, and he might possess more status symbols than they do, but these are not rewards for being a good criminal who obeys the code. They are rewards for being a good businessman who at the same time is not a bad criminal.

We are now witnessing the passing of the days when the rulers of organized crime had to devote most of their time and intelligence to insuring that their members were not bad criminals. Either the rulers are becoming so respectable, and thereby insulated from law-enforcement processes, that strict conformity is no longer essential, or they are securing such a degree of conformity that defection is no longer much of a problem. There has been a gradual shift from the use of coercive power to emphasis on the use of the other two types as well. Since governments tend to monopolize coercive power, any shift from coercion to material reward would mean that the criminal organization is becoming less like a government and more like a big business, a cartel. This seems to be the case.

During the period of national prohibition, the illicit governments controlling persons engaged in the production and distribution of alcohol were ruled primarily by men who, in prison life, would be called "toughs," "hoods," or "gorillas." Wild and somewhat public violence, principally against members of rival gangs, was the order of the day. Further, within individual syndicates, executions of nonconformists were sometimes performed almost capriciously in an effort to maintain rank authority. As time has passed, control has been shifting to men playing the role prisoners label "merchant," "peddler," or "politician" and to men whose role is similar to the type prisoners call "the real man" or "the right guy." The judicial process functioning on both the "family" level and the Commission level, discussed above, now makes it "illegal" for even a Boss to exercise his power totally.

Further, huge investments in licit as well as illicit businesses have made it necessary to create a position called Money Mover, outside the system of rank. Men occupying this position cannot be "ordered" in the way a Soldier could once be ordered. The Money Mover is a kind of "treasurer," but, significantly he works for the "family," or some part of it, rather than for the Boss. He is an expert who goes into a vague kind of partnership with any

family member who needs his expertise. In the course of the McClellan Committee hearings Mr. John F. Shanley, then head of the Central Investigation Bureau of the New York City Police Department, identified and described the role of the Money Mover. In doing so, he performed what social scientists call a "functional analysis," which is a way of working backward from observation of function to description of structure. He testified as follows:

> *The Money Mover.* The main objective of these families is the efficient amassing of money. Huge amounts of cash from illegal sources pose two problems. Its true ownership must be hidden, and it must be put to work. The greedy overlords consider the need to put the money to work quickly equal in importance to the need to hide its ownership. The money mover provides this service.
>
> Money movers, reasonably skilled in finances, are family members and, although not at policy level in systematized crime, are important and trustworthy. The money mover handles cash for a clique rather than an individual. He may, for instance, handle the Profaci or the Genovese "house." There may be more than one money mover for each family.
>
> The cash is given him through a conduit, and the profits return to the thugs the same way. The money mover knows broadly whose money it is. But, it is probably not possible to go beyond him in tracing the specific origins, as he does not know.
>
> The money mover is apt at insulating himself. He has fury at his service. He has excellent and widespread connections. And he has as a partner an astute, unethical businessman. He and his partner merge two basic abilities: brains and brawn. The partner invests through corporations, other partners, and as an individual. Importing, real estate, trust funds, books, stocks and bonds, are typical undertakings. Both the money mover and his partner enjoy some return, but the bulk of the profits go to the mob. The object is to invest in legitimate situations, but anywhere a quick buck can be made without too much risk is not overlooked.[53]

Loan-sharks often play the role of Money Mover, and in this regard they have become at least as important as "toughs." Their expertise is needed. Similarly, the experts occupying a "family's" positions for Corrupter and Corruptee cannot be "ordered," in a rank-system of authority, to perform their duties according to a detailed set of procedural rules.

Yet today the system of rank authority is still present, and Money Movers, loan-sharks, Corrupters, and Corruptees continue to occupy positions which are closely integrated with positions for Enforcers and Executioners. The pattern of authority is somewhat of an anachronism. The rulers continue to ask subordinates to give them absolute loyalty, to be "on duty" at all times, to display "respect," and to receive, in return, rewards allocated on a paternalistic basis. By means of the "code of honor," underlings are asked to subordinate all their individual desires to the welfare of the organization. Not too many years ago, such a system of rank authority pervaded the army, the police, and prison administration, and similar legitimate organizations concerned with security. By becoming a member of such a hierarchical organization, the individual soldier, policeman or guard necessarily gave up a good measure of freedom. He could not participate in some activities available to the ordinary citizen: he might be required to live in prescribed housing, to pay his bills promptly, to keep out of bars, to be in bed at a certain time at night. He was required to obey whatever commands his superior officers gave. In legitimate governmental organizations, this system of rank authority is rapidly giving way to authority based on expertise, perhaps because the society's needs for maintaining security have changed. It would be most surprising if it did not also gradually give way in illegitimate governmental organizations, as these organizations gain power and respectability, thus diminishing the need for secrecy.

At least one "family" already seems to have introduced something resembling a democratic legislative process, which is not unexpected when an illicit government is surrounded by the legitimate processes and procedures of a democratic social order. A few years ago a New York "family" agreed to implement, in an "unemployment insurance" program, the tenet of the confederation code asking for loyalty and mutual aid. It was decided, in some kind of legislative process about which nothing is known, that the "family" would compensate any member who goes to jail or prison. The wives and children of any imprisoned member are supported, and the member receives a kind of "bonus" when he is released. A year or two after the decision was made, and implemented by assessment of a "tax," a Lieutenant was overheard bragging to his friends, "I introduced that bill." Whether or not the Lieutenant was factually correct, and whether or not the legislative process was as formal as the word "bill" implies, the man was revealing his belief that a democratic government process was operating.

RECRUITMENT

If it is to survive, every organization must have an institutionalized process for inducting new members and inculcating them with the values and ways of behaving in the social system. In the Italian-Sicilian confederation and cartel, the process of admitting new members is called "opening the books." It is reasonably certain that the books were "open" until about 1958 and that they have been "closed" since that time. Taken literally, this would indicate that no new members have been admitted for about a decade. It is tempting to take such a literal position, for it carries the assurance that the "family" cartel and confederation organization is on the way out, that an important decline in membership and influence will occur as soon as the current leaders, who tend toward old age, die or are deposed. This is not the case. While it may be true that the "books are closed," it also is true that in some neighborhoods all three of the essential ingredients of an effective recruiting process are in opera-

[53] McClellan Committee, *supra* note 19, at Part I, p. 70.

tion: inspiring aspiration for membership, training for membership, and selection for membership. Some recruits are deliberately sought out and trained on the assumption, implicit or explicit, that without the induction of youngsters the organization will founder. Other recruits, usually mature college graduates, are sought out because they possess the expert skills needed for modern large-scale business operations. Both kinds of recruits must now remain for years in a kind of probationary status because inducting them into a "family" might change the balance of power between "families," thus disturbing the peace.

The most successful recruitment processes are those which do not appear to be recruiting techniques at all. These are the processes by which membership becomes highly desirable because of the rewards and benefits the prospective members believe it confers on them. Some boys grow up knowing that it is a "good thing" to belong to a certain club or to attend a certain university, and they know it is a "good thing" because men they emulate have or have had membership. Other boys grow up knowing that it is a "good thing" to become a member of a criminal "family," for the same reason. Because the activities of the cartel and confederation are illegal, it is necessary for aspirants to abandon some of the values of conventional society as they learn to aspire to membership. They do so because they grow up in social situations in which the desire for membership comes naturally and painlessly. It is still an honor to be taken into the society of "stand-up guys," and, moreover, not all the best things in life are free.

It has long been known that in a multi-group type of society such as that of the United States, conflicting standards of conduct are possessed by various groups. Discovery of the processes leading to the invention of criminal subcultures which conflict with the standards of conventional groups is now the focus of the research of many social scientists. It has for some time been acknowledged that the condition of conflicting standards, which anthropologists and sociologists call "normative conflict," is not distributed evenly through the society. Simply stated, persons growing up in some geographic or social areas have a better chance than do others to come into contact with norms and values which support legitimate activities, in contrast to criminal activities, while in other areas the reverse is true. Individuals who come into intimate association with legitimate values will use legal means of striving for "success," while individuals having such associations with criminal values will use illegitimate means. McKay has referred to the acquisition of desires for membership in either non-criminal or criminal groups as an "educational" process, and he has pointed out that in many neighborhoods alternative educational processes are in operation, so that a child may be educated in either conventional or criminal means of achieving success.[54]

Martin has referred to these alternative processes for education in the values of conventional society and the values of the society of organized crime by reporting that in some neighborhoods of South Brooklyn boys grow up under two "flags." One is the flag of the United States, symbolizing conventional institutions, traditions, and culture, and the other is the flag of organized crime, symbolizing traditions quite different from conventional American ones.[55] For syndicate members, recruitment of boys who grow up under the "syndicate flag" is no real problem, for the boys have in a sense recruited themselves. Helpful, however, is what Martin calls the "legend" of the importance of syndicate men in political, economic, and social affairs. A story about the virtues of the members of a social group need not be true in order to be effective; it can be wholly false or it can be an elaboration of some incident that occurred in the past, as most legends are. A "stand-up guy" can be made into a revered hero, even if that "stand-up guy" also kills and "works over" his devoted subjects. A powerful illicit cartel can, similarly, become so respectable, once it has undermined legitimate political and economic processes, that aspirants do not even have to experience any psychological conflict as they transfer their allegiance from conventional society to criminal society in order to achieve its economic rewards.

In his testimony before the McClellan Committee, Mr. Valachi argued, in effect, that in the 1930's the boys who were to become recruits to Italian-Sicilian "families" of organized criminals trained themselves. As they participated in boys' criminal activities such as burglary, they were observed by the syndicated criminals in the neighborhood, who paid special attention to the behavior of the boys when they were jailed. A boy who revealed nothing about himself or his criminal associates was a likely candidate for membership; other boys were not. Thus, the recruits trained themselves to adhere to a code which put them under the domination of the recruiters. This process is still in operation. It is old fashioned and inefficient, however. Syndicate members now deliberately set out to help boys obtain skills that will be valuable to the syndicate. These include skill in crime and personal values about silence, honor, and loyalty—values which make them controllable, as ex-convicts who cannot find legitimate employment are controllable. On the streets of Brooklyn the important attribute sought is the orientation of the "stand-up guy":

> Some hoodlums are assigned to recruiting . . . He learns which kids are good prospects and which are not. Like a telephone company public-relations man enrolling Amherst seniors or a California airplane plant personnel manager looking over graduate engineers from M.I.T., he wants the best and the smartest. He also wants the strongest, the meanest, and the most vicious. He starts testing boys at sixteen or seventeen. They are put into teams of six, eight, or ten for training. There are rules to be followed by the trainees and rewards to be won. Mob injunctions begin with *omerta,* the heart of the syndicate code of honor. Silence on pain of death; say nothing, know nothing. Drink if you wish, but don't get drunk. Avoid narcotics; they are all right to sell, no good to use. The rewards

[54] Henry D. McKay, "The Neighborhood and Child Conduct," *Annals of the American Academy of Political and Social Science,* 261: 32–42, January, 1949.

[55] *Op. cit., supra* note 36, at p. 60.

include money, status, and release from the yoke of morality . . . Eventually, the mob men plan burglaries for the recruits. There are techniques to be taught.[56]

Nowadays, being a "stand-up guy" and being skilled in the perpetration of lower-class crimes like robbery and burglary is not enough, however.[57] One must have the business skills of a purchasing agent, an accountant, a lawyer, or an executive. No longer do these skills come "automatically" as one climbs the ladder from the shop floor to the executive office of legitimate business. Neither do they come "automatically" in organized crime if slum boys are recruited because they are "honorable" and skilled in burglary. College training is needed. "Family" members are now sending their sons to college to learn business skills, on the assumption that these sons will soon be eligible for "family" membership. One particular college has in its student body an over-representation of the sons and other relatives of "family" members. Accounting and business administration are the favorite major subjects of the males.

Not everyone who wants to participate in the businesses conducted by crime syndicates can do so. One cannot "just decide" to become a "family" member, or to participate in business affairs controlled by a "family," any more than he can "just decide" to become a professional baseball player, a policeman, or a banker. His desires must be matched by his competence, and by the desires of those who control membership in the profession he wants. Until recently, "competence" was judged by estimates of loyalty and a certain toughness made evident in the condition of being "right." But the procedures for selecting men for highly desired positions are always more stringent than those for positions which are less desirable. Martin tells how the selection process operates on the streets of South Brooklyn:

> From a safe distance the mob instructors observe the operation [of a burglary] and prepare for a subsequent critique of the job . . . A team that shows capacity for avoiding trouble is allowed eventually to operate on its own, though it must still get mob clearance on each job. Frightened kids are weeded out, tougher ones move closer to the day when they join the syndicate and achieve the good life.[58]

Again we point out that the skills now needed and sought are not merely those necessary to "avoiding trouble." Relatively unskilled men will always be needed to conduct street operations, and these men must of necessity be honorable and, thus, exploitable. But because organized crime is becoming increasingly respectable there is less "trouble" to avoid. The pattern of authority can therefore shift from "rank" to "expertise." The man who relies alone on the old fashioned virtues of honor and obedience will not go far in the organized crime of the future, because these virtues are not essential when the organization is so powerful that it need not be kept secret. Identive power is still prevalent, but we are witnessing a shift from respect for a patriarch to respect for a "stand-up guy," regardless of age. Respect for men of rank is still an important control device, but the deference now seems to be as much to a man of wealth as to "the old man," as much to a leader of a business as to a governor.

As organized crime has gained power and respectability by moving out of bootlegging and prostitution and into gambling, usury, and control of legitimate businesses, the need for secrecy and security has decreased and the need for expertise has increased. If this trend continues, the pattern of extreme totalitarian control will change. Even now, neither the multimillionaire Boss nor the millionaire Soldier is able to handle alone the complicated problems of business organization and finance. In criminal life as in non-criminal life, fewer and fewer jobs are simple and routine. Soon there will be no place in the higher levels of organized crime for high school dropouts. As the technical competence of even lower-echelon members increases, decision-making will be decentralized, and individual freedom of action will expand. There already are signs that each member's frontiers of action are expanding. They probably will continue to expand as organized crime continues to move away from profit and control by violence and toward profit and control by fraud.

Perhaps, however, we should expect a new wave of violence in organized crime before the lines between membership and non-membership become blurred by the increasing need for workers with the kind of business skills which only legitimate society can provide. As the shift to the authority of the expert occurs and, concurrently, as decision-making is decentralized, opportunities for the present unskilled participants to achieve positions of power will decrease.

In legitimate life, government officials, and others, are urging that each individual citizen must be given his rights as a member of society and as a human being, to justice, to a living wage, to human dignity. Most respectable citizens are now demanding those rights, primarily in the form of opportunities to achieve, and they are rejecting governments which will not or cannot make the opportunities available. We expect that within the next decade the disrespectable citizens who are the underlings of organized crime will similarly demand, from the unofficial governments that rule them, their opportunities to achieve. We can expect them to grow tired of a system which denies equal opportunities to low-status personnel, even if everyone in the system is relatively rich. If these men begin demanding their rights we will witness in the ranks of organized crime rebellions comparable in principle to the current rebellions of Negroes.

A PROPOSAL FOR STUDY

One who tries to accumulate data on organized crime experiences somewhat the same frustrations as does a policeman seeking to eliminate it. Not the least of these is the frustration stemming from the fact that "organized crime" is not against the law. What is against the law

[56] *Id.* at pp. 61-62.
[57] *Cf.* Daniel P. Moynihan, "The Private Government of Crime," *Reporter*, July 6, 1961, pp. 14-20.
[58] *Supra* note 36, at p. 62.

is: smuggling, selling narcotics and untaxed liquor, gambling, prostitution, usury, murder, conspiracy, etc. Careful studies of "homicide in America" can be undertaken because police and other governmental agencies routinely maintain files on homicide, inadequate as they may be for research purposes. But attempts to conduct comparable studies of "organized crime in America" will necessarily lead to frustration because, not being a legal category, there is no way routinely to assemble information about the subject. Even the "Organized Crime" sections of the Department of Justice, of the Federal Bureau of Investigation, and of large metropolitan police departments must be concerned more with accumulating evidence that an individual violated a law than with the structure and functioning of any businesses or other organizations in which that individual participates. In the last analysis, what law-enforcement agencies want, and need, to know is that a suspect's behavior has been in violation of a specific criminal law. Whether an individual's specific crime is later described in social terms as "organized crime," "property crime," "dishonorable crime," "nasty crime," or some other type of crime not specified in the criminal law is not of much relevance to them.

One who would study an illicit cartel or even an illicit small business must, then, surmount the fact that illicit businesses are not, as such, illicit. Except when conspiracy statutes are violated, it is not against the criminal law for an individual or group of individuals to rationally plan, establish, develop, and administer a division of labor for the perpetration of crime. None of the laws pertaining to legitimate businesses or cartels apply. This is more than a "problem of definition." It is a fact of life which permits directors of criminal business organizations to remain immune from arrest, prosecution, and imprisonment unless they themselves violate specific criminal laws such as those prohibiting the sale of narcotics. It is the problem of organized crime.

Stated in different terms, if "organized crime" is to be controlled, legislatures must in the long run be able to define it as precisely as burglary or larceny or murder are now defined in criminal statutes. Once defined, the behavior involved can be prohibited by criminal law, as behavior defined as burglary is prohibited. Law-enforcement agencies then could take effective steps to bring offenders to trial for committing organized crime, not merely for committing the crimes that are organized, such as gambling. Currently, even experienced law-enforcement officers disagree on definitions and, accordingly, on the incidence of organized crime in their own communities. If one policeman tells another that he has been working on a case of "organized crime" he might be understood as saying that he has been investigating a forgery or shoplifting ring, a troupe of pickpockets, or even a juvenile gang, although he means to say that he has been investigating illicit gambling operations in his community or even that he has been gathering evidence regarding a conspiracy among "family" leaders to commit murder.

Numerous attempts to define the phenomenon in social and behavioral terms, rather than in legal terms, have been made. These definitions have been useful in making decisions about the allocation of law-enforcement personnel and resources, but their authors have not squarely faced the problem of making participation in "organized crime" a crime. For example, if a police chief establishes a vice squad or even an intelligence division, then the criminal activities processed by this unit are likely to be defined, for administrative purposes, as "organized crime." On this ground, police departments with both a narcotics division and an organized crime division are likely to operate on the assumption that the illegal distribution of narcotics is not organized crime.

What is needed is detailed and precise specification, by social scientists, law-enforcement personnel, and legislators working together, of the formal and informal structures of illicit governments and businesses. This will not be an easy task. Defining illicit businesses in organizational terms will be at least as difficult as identifying the formal and informal structures of large corporations. But not until this task has been accomplished will legislative bodies be able to proceed with the process of (a) specifying that a person committing a crime while occupying a position in an illicit division of labor shall be subject to different procedures in criminal law administration than a person committing the same crime while not participating in such a division of labor, or (b) declaring development of and participation in such divisions of labor a violation of criminal law. We are not unduly optimistic. Given the scarcity of hard facts about the organization of organized crime, even five researchers working together over a period of five years might not accomplish the task.

The prior efforts of social scientists to define a category of crime in non-legal terms are not very helpful in defining organized crime precisely enough to outlaw the category of behavior itself, for two reasons. First, one who would define organized crime must be concerned with formal and informal structure because that is what "organization" means. This problem does not confront persons attempting to define other types of crime. Second, as our analysis of the organized criminal's behavioral code has shown, the structure of organized criminal businesses cannot readily be discussed without reference to the attitudes of the criminals involved. The rules, agreements, and understandings that form the foundation of social structure appear among individual participants as attitudes. As a criminal participates in a division of labor rationally designed to maximize the profits from crime, he assumes anti-legal attitudes of such character that it is possible to say that he is engaged in a "continuous" or "self-perpetuating" conspiracy. Whether a person is properly labelled an "organized criminal" depends in part on whether he exhibits these attitudes.

The sociological work on the definition of "white-collar crime" can be used to illustrate both the advantages and problems of dealing with social categories of crime

256-177 O - 67 - 5

rather than with the specific crimes involved. Sutherland defined white-collar crimes as crimes committed by persons of respectability and high social status in the course of their occupations.[59] This definition has had an important effect on criminological theory because it called attention to offenders and offenses frequently overlooked by persons studying crime. It was customary, for example, to attribute criminality to social and personal pathologies, but invention of the "white-collar crime" concept challenged this kind of theory by identifying a category of criminals who are "persons of respectability and high social status," and, hence, not the victims of personal and social pathologies. But because the concern was for the social status of offenders, rather than for a type of crime such as fraud or abortion (both sometimes committed by persons of "respectability and high social status" in the course of their occupations), an accurate measure of the frequency of white-collar crime is impossible. Statistics and other data are not routinely compiled on "white-collar crime" by law-enforcement agencies, or even quasi law-enforcement agencies such as the Interstate Commerce Commission, because "white-collar crime" is not itself an offense. The data compiled are data about specific offenses such as fraud, abortion, and violations of various statutes regulating business and professional practices, not about "white-collar crime."

Another illustration of the advantages and disadvantages of combining specific types of crimes into social categories is found in Cressey's work on "criminal violation of financial trust." [60] This term was invented when it was discovered, in connection with a study of embezzlement, that some men committed to prison for "embezzlement" had in fact committed some other offense, and that some men committed for forgery, larceny by bailee, and confidence game had in fact committed embezzlement. The new category avoided the error of extending a legal concept beyond its legal meaning (*e.g.*, calling all the behavior "embezzlement"), and at the same time it provided a rigorous definition of the behavior being studied. But, like "white-collar crime," the fact that the category is not a legal entity makes it all but impossible to assemble data on the incidence of the criminal behavior included in the category.

The problem of defining, studying, and then controlling organized crime is not as simple as the problems encountered by Sutherland and by Cressey. Organized criminals do not have identifying personal characteristics as do white-collar criminals. Organized crimes, ranging from gambling to murder, do not have a characteristic in common, as do crimes involving the violation of positions of financial trust which were accepted in good faith. The behavior in which we are interested involves some but not all criminal conspiracies, some but not all cases of illegal gambling, some but not all cases of assault and murder, some but not all cases of prostitution and bootlegging, some but not all cases of burglary, larceny and robbery, and some but not all cases of almost any other kind of crime.

It is helpful to specify that an organized crime is any crime committed by a person occupying a position in an established division of labor designed for the commission of crime. This means that the organized criminal's activities are coordinated with the activities of others by means of rules, in the same way that the activities of a cashier are coordinated with the activities of a stockroom clerk, a salesperson, and an accountant in a retail firm. The organized criminal, thus, has his criminal obligations, duties, and rights specified for him in somewhat the same way that a public employee's obligations, duties and rights are specified in a "job description" and other sets of rules. He occupies a position in a set of positions which exist independently of any current incumbent.

This preliminary definition of the "organized crime" category does not differentiate among the positions existing in the division of labor used by small working groups of criminals, in the division of labor used by small illicit businesses, and in the division of labor characterizing illicit cartels. The deficiency must remain until much more is known about the formal and informal structures of each of these kinds of criminal organizations. Before "organized crime," as such, can be outlawed, we must be able to identify in some detail the division of labor to be prohibited. Examination of the proceedings of a recent series of meetings of some of the nation's leading authorities on organized crime provides some important clues in regard to the division of labor, or in other words the formal and informal structure, of the relevant organizations. The members of these Oyster Bay Conferences on Combating Organized Crime seem to have paid more attention to the attempt to define "organized crime" than to the attempt to identify the structure of illicit organizations. Nevertheless, they did identify three critical positions in the division of labor of America's illicit cartel and confederation. One of these is the position of "fixer" or Corrupter, the second is the position of Corruptee, and the third of Enforcer.

The members of the Conference Group did not use the terms "corrupter," "corruptee" and "enforcer." In one publication they listed the following characteristics of the "most highly developed forms" of organized crime: (1) Totalitarian organization. (2) Immunity and protection from the law through professional advice, or fear, or corruption, or all, in order to insure continuance of their activities. (3) Permanency and form. (4) Activities which are are highly profitable, relatively low in risk, and based on human weakness. (5) Use of fear against members of the organization, the victims and, often, members of the public. (6) Continued attempt to subvert legitimate government. (7) Insularity of leadership from criminal acts. (8) Rigid discipline in a hierarchy of ranks.[61]

In another publication, the Conference Group made the following seven statements about the characteristics of the type of organization which they are working to combat: (1) Organized crime is a *business venture.* (2) The principal tool of organized crime is *muscle.* (3) Organized crime seeks out every opportunity to *corrupt or have influence* on anyone in government who can or

[59] Edwin H. Sutherland, *White Collar Crime* (New York: Dryden Press, 1949).
[60] Donald R. Cressey, *Other People's Money* (Glencoe, Ill.: The Free Press, 1953), pp. 19-22. See also Jerome Hall, "Some Basic Questions Regarding Legal Classifications for Professional and Scientific Purposes," *Journal of Legal Education*, 5: 329-342, 1953.

[61] *Combating Organized Crime*, Report of the 1965 Oyster Bay, New York, Conferences on Combating Organized Crime (Albany: Office of the Counsel to the Governor, 1965), pp. 19-24.

may in the future be able to do favors for organized crime. (4) *Insulation* serves to separate the leaders of organized crime from illegal activities which they direct. (5) *Discipline* of a quasi-military character. (6) An interest in *public relations.* (7) *A way of life* in which members receive services which outsiders either do not receive or receive from legitimate sources.[62]

These lists of identifying items do not characterize organized crime in all of its manifestations, and they are not unique to organized crime. Moreover, some of them refer to the attitudes and values of participating members, some to modes of operation, some to objectives, and some to the divisions of labor, the structure, of illicit businesses. The latter is of most relevance, because, as indicated, structure means organization, and information about organization is needed for control. By emphasizing "immunity," "protection," "corruption," "low risk," etc., the Conference Group suggested that two positions in the structure of illicit business are those of Corrupter and Corruptee. While some small working groups of criminals also possess these positions, such groups can operate without them for long periods of time. The business of gambling and selling illicit products and services cannot. The position of "Corrupter" is as essential to an illicit business as the position of "negotiator" is to a labor union.

Next, the Conference Group's stress on "totalitarian organization," "fear," "rigid discipline," and "muscle" suggests that the structure of criminal businesses necessarily contains a position for Enforcer. We know of no other form of coordinated American criminality that contains this position. As we showed earlier, an Enforcer is a penal administrator analogous to a prison warden or the man charged with making the arrangements for imposing the death penalty. We also showed that the presence of a position for an Enforcer gives the illicit organization the character of government rather than of business. Here, we only emphasize that the divisions of labor for small working groups of criminals do not contain the position of Enforcer. The members of a pick-pocket troupe or a check-passing ring are likely to take punitive action against any member who holds out more than his share of the spoils or who betrays the troupe to the police. The members of a gypsy band that engages in a wide variety of criminal activities are likely to censure, condemn, and even ostracize a member who cheats his fellows or who informs the police about their crimes. But none of these groups has been rationally organized in advance to enforce specific rules prohibiting dishonesty and informing to the police. Accordingly, they do not recruit persons to, or train persons for, a well-established position of Enforcer. We believe that only the illicit division of labor customarily called "organized crime" contains a position to be occupied permanently or temporarily by persons whose duty it is to maintain organizational integration by making arrangements for the maiming and killing of members who do not conform to organizational "law."

If the positions of Corrupter, Corruptee, and Enforcer are in fact essential to the operation of the business of gambling, prostitution, usury, distribution of narcotics and untaxed liquor, and extortion, then identification of a defendant as an "organized criminal" becomes clearly *a matter of identifying the structure of the illicit business in connection with which he has committed his crime.* An organized crime becomes any crime committed by a person occupying, in an established division of labor, a position designed for the commission of crime, *providing* that such division of labor also includes at least one position for a Corrupter, one position for a Corruptee, and one position for an Enforcer. We are still a long way from the precision necessary to make such specification in a statute, and we therefore are a long way from effective legislative control of what has traditionally been called "organized crime."

Our view is that an "organized criminal" is one who has committed a crime while occupying an organizational position for committing that crime. This view has been taken in a round-about way by one of the nation's leading legislative experts on organized crime, Senator John L. McClellan. His position is found in Senate Bill 2187, co-authored with Senator Frank J. Lausche and introduced in the 89th Congress on June 24, 1965—"A bill to Outlaw the Mafia and Other Organized Crime Syndicates." Despite its title, the bill is designed to outlaw *membership* in specified types of organizations. Among the listed activities of these organizations, significantly, are the tendencies to corrupt and coerce. Although Attorney General Katzenbach raised questions about the Constitutionality of the bill, its theoretical value should not be overlooked. The preamble to the bill—"Findings and Declaration of Fact"—attempts to describe in precise legal terms the characteristics of the organizations in which membership is outlawed. The attempt flounders because there is confusion of organizational structure, organizational goals, and values of members of the organization. Nevertheless, the second, fourth and fifth points outlined below validate our argument that description of organizational structure, including description of positions of Corrupter, Corruptee, and Enforcer, are essential to understanding and controlling organized crime.

First, the preamble defines the objectives of the organizations in which membership shall be a felony: "There exist in the United States organizations, including societies and syndicates, one of which is known as the Mafia, which have as their primary objective the disrespect for constituted law and order."

Second, the preamble describes the types of crime the members of the organizations perpetrate as they express their disrespect for constituted law and order. These are the types of offenses customarily called "organized crime": "The members of such organizations are recruited for the purpose of carrying on gambling, prostitution, traffic in narcotic drugs, labor racketeering, extortion, and commercial type crimes generally, all of which are in violation of the criminal laws of the United States and of the several States."

Third, the preamble acknowledges that members of such organizations share a code of conduct, one essential part of which is secrecy about membership and about

[62] *A Theory of Organized Crime Control, op. cit., supra* note 4, at pp. 18-21.

organizational structure: "These organizations, such as the Mafia, are conducted under their own code of ethics which is without respect for moral principles, law, and order . . . Secrecy as to membership and authority within such organizations is a cardinal principle." It is somewhat of a contradiction to specify that the value system of an organization is void of respect for moral principles, law, and order, for an organization is, by definition, an orderly arrangement of positions. Further, as we have shown, members of criminal organizations place a great deal of stress on honor and honesty in their dealings with each other, a form of "moral principle." The framers of the bill obviously here had in mind specific *kinds* of moral principles, such as those proscribing *all* murders, not just certain of them.

Fourth, the preamble recognizes the essential alliance between such organizations and the public officials whose duty it is to prevent and repress crime: "The existence of these organizations is made easier through the use of bribery and corruption of certain public officials." In the terminology we have been using, the organizations include Corrupter and Corruptee positions for which men are recruited or trained.

Fifth, the authors of the bill explicitly recognize that a coercive system of justice is used in an attempt to maximize conformity to organizational authority and ethics: "Discipline and authority within such organizations are maintained by means of drastic retaliation, usually murder, and . . . similar methods are employed to coerce non-members." At least one position for an Enforcer of organizational order is a part of the division of labor.

Other sections of the bill provide additional useful descriptions of various aspects of organizational structure and value systems. All five of the points listed above are elaborated in the bill's definition of the Mafia as "a secret society whose members are pledged and dedicated to commit unlawful acts against the United States or any State thereof in furtherance of their objective to dominate organized crime and whose operations are conducted under a secret code of terror and reprisal not only for members who fail to abide by the edicts, decrees, decisions, principles, and instructions of the society in implementation of this domination of organized crime, but also for those persons, not members, who represent a threat to the security of the members or the criminal operations of the society."

The words "organized crime" as used in the above statement presumably refer, as in the second point above, to crime committed as an occupant of a position in a rational division of labor making up any "organization having for one of its purposes the use of any interstate commerce facility in the commission of acts which are in violation of the criminal laws of the United States or any State, relating to gambling, extortion, blackmail, narcotics, prostitution or labor-racketeering."

It should not by any means be assumed that illicit organizations consist of only the three positions described as Corrupter, Corruptee and Enforcer. Dozens of other positions are integrated with these three to make up an illicit business and government. The formal structure has only been sketched out; much less is known about the informal structure—even the operational processes of illicit enterprises—than is known about legitimate organizations of comparable size. A common assumption seems to be that "everybody knows" how a business is organized and therefore how it operates, whether that business is dealing in an outlawed commodity or not. But "everybody" does not know about the formal and informal divisions of labor of even legitimate business enterprises, let alone illegitimate ones. In the last decade alone social scientists have made thousands of studies of legitimate organizations. Variations in the effectiveness and efficiency of different kinds of divisions of labor—and in the conditions under which these arise, persist, and change—have been studied in many settings, ranging from broad administrative systems to specific factories and firms. The theory and research results stemming from these studies would be directly applicable to illicit enterprises if even the most rudimentary scientific data on them were collected and systematized.

Collection of such data cannot proceed very far without the cooperation of law-enforcement agencies, especially those operating on the Federal level. Because the operations of organized crime units are illegal, the participants are unwilling to let them be studied. Most of what is now known about organized crime is in the files of the Federal Bureau of Narcotics, the Federal Bureau of Investigation, the Internal Revenue Service, and various legislative investigating committees. But law-enforcement and investigating agencies necessarily must be more concerned with collecting evidence which will result in the incarceration of individuals than with evidence about the structure and operations of illicit organizations. They are interested in putting criminals in prison, whether the criminals are occupying positions in an illicit division of labor or not. Since prosecuting attorneys do not put organizations behind bars, the evidence produced for them, and for grand juries, tends to emphasize individual conduct and tends to neglect the relationships between the conduct of one criminal and another.

Therefore, more than an opening of police files to researchers is essential, although this would be an important first step. New questions, different from those traditionally raised by police and prosecutors must be asked, and new evidence relating to the answers to those questions must be assembled. Moreover, researchers must learn more of the things police officers know but do not file in their reports, and must have access to the informants available to law-enforcement agencies. Just as information on the economic, political, and social organization of a foreign nation can be obtained by means of interviews with defectors, so information on the economic, political and social organization of the "families" operating in the United States can be obtained by conversations with informants. The American confederation of criminals will not be controlled until it is understood, and it will not be understood until its division of labor has been specified in detail so that it can be attacked as an organization.

WINCANTON: THE POLITICS OF CORRUPTION

by John A. Gardiner, with the assistance of David J. Olson

Contents

INTRODUCTION [1]

This study focuses upon the politics of vice and corruption in a town we have chosen to call Wincanton, U.S.A. Although the facts and events of this report are true, every attempt has been made to hide the identity of actual people by the use of fictitious names, descriptions and dates.

Following a brief description of the people of Wincanton and the structure of its government and law enforcement agencies, a section outlines the structure of the Wincanton gambling syndicate and the system of protection under which it operated. A second section looks at the corrupt activities of Wincanton officials apart from the protection of vice and gambling.

The latter part of this report considers gambling and corruption as social forces and as political issues. First, they are analyzed in terms of their functions in the community—satisfying social and psychological needs declared by the State to be improper; supplementing the income of the participants, including underpaid city officials and policemen, and of related legitimate businesses; providing speed and certainty in the transaction of municipal business. Second, popular attitudes toward gambling and corruption are studied, as manifested in both local elections and a survey of a cross-section of the city's population. Finally, an attempt will be made to explain why Wincanton, more than other cities, has had this marked history of lawbreaking and official malfeasance, and several suggestions will be made regarding legal changes that might make its continuation more difficult.

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WINCANTON

In general, Wincanton represents a city that has toyed with the problem of corruption for many years. No mayor in the history of the city of Wincanton has ever succeeded himself in office. Some mayors have been corrupt and have allowed the city to become a wide-open center for gambling and prostitution; Wincanton voters have regularly rejected those corrupt mayors who dared to seek reelection. Some mayors have been scrupulously honest and have closed down all vice operations in the city; these men have been generally disliked for being too straitlaced. Other mayors, fearing one form of resentment or the other, have chosen quietly to retire from public life. The questions of official corruption and policy toward vice and gambling, it seems, have been paramount issues in Wincanton elections since the days of Prohibition. Any mayor who is known to be controlled by the gambling syndicates will lose office, but so will any mayor who tries completely to clean up the city. The people of Wincanton apparently want both easily accessible gambling and freedom from racket domination.

Probably more than most cities in the United States, Wincanton has known a high degree of gambling, vice (sexual immorality, including prostitution), and corruption (official malfeasance, misfeasance and nonfeasance of duties). With the exception of two reform administrations, one in the early 1950's and the one elected in the early 1960's, Wincanton has been wide open since the 1920's. Bookies taking bets on horses took in several

[1] This study, part of a larger investigation of the politics of law enforcement and corruption, was financed by a grant from the Russell Sage Foundation. All responsibility for the contents of this report remains with the senior author. The authors wish gratefully to acknowledge the assistance of the people and officials of Wincanton who will, at their request, remain anonymous. The authors wish particularly to acknowledge the assistance of the newspapers of Wincanton; Prof. Harry Sharp and the staff of the Wisconsin Survey Research Laboratory; Henry S. Ruth, Jr., Lloyd E. Ohlin, and Charles H. Rogovin of the President's Commission on Law Enforcement and Administration of Justice; and many National, State, and local law enforcement personnel. The authors shared equally in the research upon which this report is based; because of the teaching duties of Mr. Olson, Mr. Gardiner assumed the primary role in writing this report. Joel Margolis and Keith Billingsley, graduate students in the Department of Political Science, University of Wisconsin, assisted in the preparation of the data used in this report.

millions of dollars each year. With writers at most newsstands, cigar counters, and corner grocery stores, a numbers bank did an annual business in excess of $1,300,000 during some years. Over 200 pinball machines, equipped to pay off like slot machines, bore $250 Federal gambling stamps. A high stakes dice game attracted professional gamblers from more than 100 miles away; $25,000 was found on the table during one Federal raid. For a short period of time in the 1950's (until raided by U.S. Treasury Department agents), a still, capable of manufacturing $4 million in illegal alcohol each year, operated on the banks of the Wincanton River. Finally, prostitution flourished openly in the city, with at least 5 large houses (about 10 girls apiece) and countless smaller houses catering to men from a large portion of the State.

As in all cities in which gambling and vice had flourished openly, these illegal activities were protected by local officials. Mayors, police chiefs, and many lesser officials were on the payroll of the gambling syndicate, while others received periodic "gifts" or aid during political campaigns. A number of Wincanton officials added to their revenue from the syndicate by extorting kickbacks on the sale or purchase of city equipment or by selling licenses, permits, zoning variances, etc. As the city officials made possible the operations of the racketeers, so frequently the racketeers facilitated the corrupt endeavors of officials by providing liaison men to arrange the deals or "enforcers" to insure that the deals were carried out.

The visitor to Wincanton is struck by the beauty of the surrounding countryside and the drabness of a tired, old central city. Looking down on the city from Mount Prospect, the city seems packed in upon itself, with long streets of red brick row houses pushing up against old railroad yards and factories; 93 percent of the housing units were built before 1940.

Wincanton had its largest population in 1930 and has been losing residents slowly ever since.[2] The people who remained—those who didn't move to the suburbs or to the other parts of the United States—are the lower middle class, the less well educated; they seem old and often have an Old World feeling about them. The median age in Wincanton is 37 years (compared with a national median of 29 years). While unemployment is low (2.5 percent of the labor force in April 1965), there are few professional or white collar workers; only 11 percent of the families had incomes over $10,000, and the median family income was $5,453. As is common in many cities with an older, largely working class population, the level of education is low—only 27 percent of the adults have completed high school, and the median number of school years completed is 8.9.

While most migration into Wincanton took place before 1930, the various nationality groups in Wincanton seem to have retained their separate identities. The Germans, the Poles, the Italians, and the Negroes each have their own neighborhoods, stores, restaurants, clubs and politicians. Having immigrated earlier, the Germans are more assimilated into the middle and upper middle classes; the other groups still frequently live in the neighborhoods in which they first settled; and Italian and Polish politicans openly appeal to Old World loyalties. Club life adds to the ethnic groupings by giving a definite neighborhood quality to various parts of the city and their politics; every politician is expected to visit the ethnic associations, ward clubs, and voluntary firemen's associations during campaign time—buying a round of drinks for all present and leaving money with the club stewards to hire poll watchers to advertise the candidates and guard the voting booths.

In part, the flight from Wincanton of the young and the more educated can be explained by the character of the local economy. While there have been no serious depressions in Wincanton during the last 30 years, there has been little growth either, and most of the factories in the city were built 30 to 50 years ago and rely primarily upon semiskilled workers. A few textile mills have moved out of the region, to be balanced by the construction in the last 5 years of several electronics assembly plants. No one employer dominates the economy, although seven employed more than 1,000 persons. Major industries today include steel fabrication and heavy machinery, textiles and food products.

With the exception of 2 years (one in the early 1950's; the other 12 years later) in which investigations of corruption led to the election of Republican reformers, Wincanton politics have been heavily Democratic in recent years. Registered Democrats in the city outnumber Republicans by a margin of 2 to 1; in Alsace County as a whole, including the heavily Republican middle class suburbs, the Democratic margin is reduced to 3 to 2. Despite this margin of control, or possibly because of it, Democratic politics in Wincanton have always been somewhat chaotic—candidates appeal to the ethnic groups, clubs, and neighborhoods, and no machine or organization has been able to dominate the party for very long (although a few men have been able to build a personal following lasting for 10 years or so). Incumbent mayors have been defeated in the primaries by other Democrats, and voting in city council sessions has crossed party lines more often than it has respected them.

To a great extent, party voting in Wincanton follows a business-labor cleavage. Two newspapers (both owned by a group of local businessmen) and the Chamber of Commerce support Republican candidates; the unions usually endorse Democrats. It would be unwise, however, to overestimate either the solidarity or the interest in local politics of Wincanton business and labor groups. Frequently two or more union leaders may be opposing each other in a Democratic primary (the steelworkers frequently endorse liberal or reform candidates, while the retail clerks have been more tied to "organization" men); or ethnic allegiances and hostilities may cause union members to vote for Republicans, or simply sit on their hands. Furthermore, both business and labor leaders express greater interest in State and National issues—taxation, wage and hour laws, collective bargaining policies, etc.—than in local issues. (The attitude of both business and labor toward Wincanton gambling and corruption will be examined in detail later.)

Many people feel that, apart from the perennial issue

[2] To preserve the anonymity of the city, it will only be stated that Wincanton's 1960 population was between 75,000 and 200,000.

of corruption, there really are not any issues in Wincanton politics and that personalities are the only things that matter in city elections. Officials assume that the voters are generally opposed to a high level of public services. Houses are tidy, but the city has no public trash collection, or fire protection either, for that matter. While the city buys firetrucks and pays their drivers, firefighting is done solely by volunteers—in a city with more than 75,000 residents. (Fortunately, most of the houses are built of brick or stone.) Urban renewal has been slow, master planning nonexistent, and a major railroad line still crosses the heart of the shopping district, bringing traffic to a halt as trains grind past. Some people complain, but no mayor has ever been able to do anything about it. For years, people have been talking about rebuilding City Hall (constructed as a high school 75 years ago), modernizing mass transportation, and ending pollution of the Wincanton River, but nothing much has been done about any of these issues, or even seriously considered. Some people explain this by saying that Wincantonites are interested in everything—up to and including, but not extending beyond, their front porch.

If the voters of Wincanton were to prefer an active rather than passive city government, they would find the municipal structure well equipped to frustrate their desires. Many governmental functions are handled by independent boards and commissions, each able to veto proposals of the mayor and councilmen. Until about 10 years ago, State law required all middle-sized cities to operate under a modification of the commission form of government. (In the early 1960's, Wincanton voters narrowly—by a margin of 16 votes out of 30,000—rejected a proposal to set up a council-manager plan.) The city council is composed of five men—a mayor and four councilmen. Every odd-numbered year, two councilmen are elected to 4-year terms. The mayor also has a 4-year term of office, but has a few powers not held by the councilmen; he presides at council sessions but has no veto power over council legislation. State law requires that city affairs be divided among five named departments, each to be headed by a member of the council, but the council members are free to decide among themselves what functions will be handled by which departments (with the proviso that the mayor must control the police deparment). Thus the city's work can be split equally among five men, or a three-man majority can control all important posts. In a not atypical recent occurrence, one councilman, disliked by his colleagues, found himself supervising only garbage collection and the Main Street comfort station! Each department head (mayor and councilmen) has almost complete control over his own department. Until 1960, when a $2,500 raise became effective, the mayor received an annual salary of $7,000, and each councilman received $6,000. The mayor and city councilmen have traditionally been permitted to hold other jobs while in office.

To understand law enforcement in Wincanton, it is necessary to look at the activities of local, county, State, and Federal agencies. State law requires that each mayor select his police chief and officers "from the force" and "exercise a constant supervision and control over their conduct." Applicants for the police force are chosen on the basis of a civil service examination and have tenure "during good behavior," but promotions and demotions are entirely at the discretion of the mayor and council. Each new administration in Wincanton has made wholesale changes in police ranks—patrolmen have been named chief, and former chiefs have been reduced to walking a beat. (When one period of reform came to an end in the mid-1950's, the incoming mayor summoned the old chief into his office. "You can stay on as an officer," the mayor said, "but you'll have to go along with my policies regarding gambling." "Mr. Mayor," the chief said, "I'm going to keep on arresting gamblers no matter where you put me." The mayor assigned the former chief to the position of "Keeper of the Lockup," permanently stationed in the basement of police headquarters.) Promotions must be made from within the department. This policy has continued even though the present reform mayor created the post of police commissioner and brought in an outsider to take command. For cities of its size, Wincanton police salaries have been quite low—the top pay for patrolmen was $4,856—in the lowest quartile of middle-sized cities in the Nation. Since 1964 the commissioner has received $10,200 and patrolmen $5,400 each year.

While the police department is the prime law enforcement agency within Wincanton, it receives help (and occasional embarrassment) from other groups. Three county detectives work under the district attorney, primarily in rural parts of Alsace County, but they are occasionally called upon to assist in city investigations. The State Police, working out of a barracks in surburban Wincanton Hills, have generally taken a "hands off" or "local option" attitude toward city crime, working only in rural areas unless invited into a city by the mayor, district attorney, or county judge. Reform mayors have welcomed the superior manpower and investigative powers of the State officers; corrupt mayors have usually been able to thumb their noses at State policemen trying to uncover Wincanton gambling. Agents of the State's Alcoholic Beverages Commission suffer from no such limitations and enter Wincanton at will in search of liquor violations. They have seldom been a serious threat to Wincanton corruption, however, since their numbers are quite limited (and thus the agents are dependent upon the local police for information and assistance in making arrests). Their mandate extends to gambling and prostitution only when encountered in the course of a liquor investigation.

Under most circumstances, the operative level of law enforcement in Wincanton has been set by local political decisions, and the local police (acting under instructions from the mayor) have been able to determine whether or not Wincanton should have open gambling and prostitution. The State Police, with their "hands off" policy, have simply reenforced the local decision. From time to time, however, Federal agencies have become interested in conditions in Wincanton and, as will be seen throughout this study, have played as important a role as the local police in cleaning up the city. Internal Revenue Service

agents have succeeded in prosecuting Wincanton gamblers for failure to hold gambling occupation stamps, pay the special excise taxes on gambling receipts, or report income. Federal Bureau of Investigation agents have acted against violations of the Federal laws against extortion and interstate gambling. Finally, special attorneys from the Organized Crime and Racketeering Section of the Justice Department were able to convict leading members of the syndicate controlling Wincanton gambling. While Federal prosecutions in Wincanton have often been spectacular, it should also be noted that they have been somewhat sporadic and limited in scope. The Internal Revenue Service, for example, was quite successful in seizing gaming devices and gamblers lacking the Federal gambling occupation stamps, but it was helpless after Wincantonites began to purchase the stamps, since local officials refused to prosecute them for violations of the State antigambling laws.

The court system in Wincanton, as in all cities in the State, still has many of the 18th century features which have been rejected in other States. At the lowest level, elected magistrates (without legal training) hear petty civil and criminal cases in each ward of the city. The magistrates also issue warrants and decide whether persons arrested by the police shall be held for trial. Magistrates are paid only by fees, usually at the expense of convicted defendants. All serious criminal cases, and all contested petty cases, are tried in the county court. The three judges of the Alsace County court are elected (on a partisan ballot) for 10-year terms, and receive an annual salary of $25,000.

GAMBLING AND CORRUPTION: THE INSIDERS

THE STERN EMPIRE

The history of Wincanton gambling and corruption since World War II centers around the career of Irving Stern. Stern is an immigrant who came to the United States and settled in Wincanton at the turn of the century. He started as a fruit peddler, but when Prohibition came along, Stern became a bootlegger for Heinz Glickman, then the beer baron of the State. When Glickman was murdered in the waning days of Prohibition, Stern took over Glickman's business and continued to sell untaxed liquor after repeal of Prohibition in 1933. Several times during the 1930's, Stern was convicted in Federal court on liquor charges and spent over a year in Federal prison.

Around 1940, Stern announced to the world that he had reformed and went into his family's wholesale produce business. While Stern was in fact leaving the bootlegging trade, he was also moving into the field of gambling, for even at that time Wincanton had a "wide-open" reputation, and the police were ignoring gamblers. With the technical assistance of his bootlegging friends, Stern started with a numbers bank and soon added horse betting, a dice game, and slot machines to his organization. During World War II, officers from a nearby Army training base insisted that all brothels be closed, but this did not affect Stern. He had already concluded that public hostility and violence, caused by the houses, were, as a side effect, threatening his more profitable gambling operations. Although Irv Stern controlled the the lion's share of Wincanton gambling throughout the 1940's, he had to share the slot machine trade with Klaus Braun. Braun, unlike Stern, was a Wincanton native and a Gentile, and thus had easier access to the frequently anti-Semitic club stewards, restaurant owners, and bartenders who decided which machines would be placed in their buildings. Legislative investigations in the early 1950's estimated that Wincanton gambling was an industry with gross receipts of $5 million each year; at that time Stern was receiving $40,000 per week from bookmaking, and Braun took in $75,000 to $100,000 per year from slot machines alone.

Irv Stern's empire in Wincanton collapsed abruptly when legislative investigations brought about the election of a reform Republican administration. Mayor Hal Craig decided to seek what he termed "pearl gray purity"—to tolerate isolated prostitutes, bookies, and numbers writers—but to drive out all forms of organized crime, all activities lucrative enough to make it worth someone's while to try bribing Craig's police officials. Within 6 weeks after taking office, Craig and District Attorney Henry Weiss had raided enough of Stern's gambling parlors and seized enough of Braun's slot machines to convince both men that business was over—for 4 years at least. The Internal Revenue Service was able to convict Braun and Stern's nephew, Dave Feinman, on tax evasion charges; both were sent to jail. From 1952 to 1955 it was still possible to place a bet or find a girl. But you had to know someone to do it, and no one was getting very rich in the process.

By 1955 it was apparent to everyone that reform sentiment was dead and that the Democrats would soon be back in office. In the summer of that year, Stern met with representatives of the east coast syndicates and arranged for the rebuilding of his empire. He decided to change his method of operations in several ways; one way was by centralizing all Wincanton vice and gambling under his control. But he also decided to turn the actual operation of most enterprises over to others. From the mid-1950's until the next wave of reform hit Wincanton after elections in the early 1960's, Irv Stern generally succeeded in reaching these goals.

The financial keystone of Stern's gambling empire was numbers betting. Records seized by the Internal Revenue Service in the late 1950's and early 1960's indicated that gross receipts from numbers amounted to more than $100,000 each month, or $1.3 million annually. Since the numbers are a poor man's form of gambling (bets range from a penny to a dime or quarter), a large number of men and a high degree of organization are required. The organizational goals are three: have the maximum possible number of men on the streets seeking bettors, be sure that they are reporting honestly, and yet strive so to decentralize the organization that no one, if arrested, will be able to identify many of the others. During the "pearl gray purity" of Hal Craig, numbers writing was

completely unorganized—many isolated writers took bets from their friends and frequently had to renege if an unusually popular number came up; no one writer was big enough to guard against such possibilities. When a new mayor took office in the mid-1950's, however, Stern's lieutenants notified each of the small writers that they were now working for Stern—or else. Those who objected were "persuaded" by Stern's men, or else arrested by the police, as were any of the others who were suspected of holding out on their receipts. Few objected for very long. After Stern completed the reorganization of the numbers business, its structure was roughly something like this: 11 subbanks reported to Stern's central accounting office. Each subbank employed from 5 to 30 numbers writers. Thirty-five percent of the gross receipts went to the writers. After deducting for winnings and expenses (mostly protection payoffs), Stern divided the net profits equally with the operators of the subbanks. In return for his cut, Stern provided protection from the police and "laid off" the subbanks, covering winnings whenever a popular number "broke" one of the smaller operators.

Stern also shared with out-of-State syndicates in the profits and operation of two enterprises—a large dice game and the largest still found by the Treasury Department since Prohibition. The dice game employed over 50 men—drivers to "lug" players into town from as far as 100 miles away, doormen to check players' identities, loan sharks who "faded" the losers, croupiers, food servers, guards, etc. The 1960 payroll for these employees was over $350,000. While no estimate of the gross receipts from the game is available, some indication of its size can be obtained from the fact that $50,000 was found on the tables and in the safe when the FBI raided the game in 1962. Over 100 players were arrested during the raid; one businessman had lost over $75,000 at the tables. Stern received a share of the game's profits plus a $1,000 weekly fee to provide protection from the police.

Stern also provided protection (for a fee) and shared in the profits of a still, erected in an old warehouse on the banks of the Wincanton River and tied into the city's water and sewer systems. Stern arranged for clearance by the city council and provided protection from the local police after the $200,000 worth of equipment was set up. The still was capable of producing $4 million worth of alcohol each year, and served a five-State area, until Treasury agents raided it after it had been in operation for less than 1 year.

The dice game and the still raise questions regarding the relationship of Irv Stern to out-of-State syndicates. Republican politicians in Wincanton frequently claimed that Stern was simply the local agent of the Cosa Nostra. While Stern was regularly sending money to the syndicates, the evidence suggests that Stern was much more than an agent for outsiders. It would be more accurate to regard these payments as profit sharing with coinvestors and as charges for services rendered. The east coasters provided technical services in the operation of the dice game and still and "enforcement" service for the Wincanton gambling operation. When deviants had to be persuaded to accept Stern's domination, Stern called upon outsiders for "muscle"—strong-arm men who could not be traced by local police if the victim chose to protest. In the early 1940's, for example, Stern asked for help in destroying a competing dice game; six gunmen came in and held it up, robbing and terrifying the players. While a few murders took place in the struggle for supremacy in the 1930's and 1940's, only a few people were roughed up in the 1950's and no one was killed.

After the mid-1950's, Irv Stern controlled prostitution and several forms of gambling on a "franchise" basis. Stern took no part in the conduct of these businesses and received no share of the profits, but exacted a fee for protection from the police. Several horse books, for example, operated regularly; the largest of these paid Stern $600 per week. While slot machines had permanently disappeared from the Wincanton scene after the legislative investigations of the early 1950's, a number of men began to distribute pinball machines, which paid off players for games won. As was the case with numbers writers, these pinball distributors had been unorganized during the Craig administration. When Democratic Mayor Gene Donnelly succeeded Craig, he immediately announced that all pinball machines were illegal and would be confiscated by the police. A Stern agent then contacted the pinball distributors and notified them that if they employed Dave Feinman (Irv Stern's nephew) as a "public relations consultant," there would be no interference from the police. Several rebellious distributors formed an Alsace County Amusement Operators Association, only to see Feinman appear with two thugs from New York. After the association president was roughed up, all resistance collapsed, and Feinman collected $2,000 each week to promote the "public relations" of the distributors. (Stern, of course, was able to offer no protection against Federal action. After the Internal Revenue Service began seizing the pinball machines in 1956, the owners were forced to purchase the $250 Federal gambling stamps as well as paying Feinman. Over 200 Wincanton machines bore these stamps in the early 1960's, and thus were secure from Federal as well as local action.)

After the period of reform in the early 1950's, Irv Stern was able to establish a centralized empire in which he alone determined which rackets would operate and who would operate them (he never, it might be noted, permitted narcotics traffic in the city while he controlled it). What were the bases of his control within the criminal world? Basically, they were three: First, as a business matter, Stern controlled access to several very lucrative operations, and could quickly deprive an uncooperative gambler or numbers writer of his source of income. Second, since he controlled the police department he could arrest any gamblers or bookies who were not paying tribute. (Some of the local gambling and prostitution arrests which took place during the Stern era served another purpose—to placate newspaper demands for a crackdown. As one police chief from this era phrased it, "Hollywood should have given us an Oscar for some of our performances when we had to pull a phony raid to keep the papers happy.") Finally, if the mechanisms of fear of financial loss and fear of police

arrest failed to command obedience, Stern was always able to keep alive a fear of physical violence. As we have seen, numbers writers, pinball distributors, and competing gamblers were brought into line after outside enforcers put in an appearance. Stern's regular collection agent, a local tough who had been convicted of murder in the 1940's, was a constant reminder of the virtues of cooperation. Several witnesses who told grand juries or Federal agents of extortion attempts by Stern, received visits from Stern enforcers and tended to "forget" when called to testify against the boss.

Protection. An essential ingredient in Irv Stern's Wincanton operations was protection against law enforcement agencies. While he was never able to arrange freedom from Federal intervention (although, as in the case of purchasing excise stamps for the pinball machines, he was occasionally able to satisfy Federal requirements without disrupting his activities), Stern was able in the 1940's and again from the mid-1950's through the early 1960's to secure freedom from State and local action. The precise extent of Stern's network of protection payments is unknown, but the method of operations can be reconstructed.

Two basic principles were involved in the Wincanton protection system—pay top personnel as much as necessary to keep them happy (and quiet), and pay something to as many others as possible to implicate them in the system and to keep them from talking. The range of payoffs thus went from a weekly salary for some public officials to a Christmas turkey for the patrolman on the beat. Records from the numbers bank listed payments totaling $2,400 each week to some local elected officials, State legislators, the police chief, a captain in charge of detectives, and persons mysteriously labeled "county" and "State." While the list of persons to be paid remained fairly constant, the amounts paid varied according to the gambling activities in operation at the time; payoff figures dropped sharply when the FBI put the dice game out of business. When the dice game was running, one official was receiving $750 per week, the chief $100, and a few captains, lieutenants, and detectives lesser amounts.

While the number of officials receiving regular "salary" payoffs was quite restricted (only 15 names were on the payroll found at the numbers bank), many other officials were paid off in different ways. (Some men were also silenced without charge—low-ranking policemen, for example, kept quiet after they learned that men who reported gambling or prostitution were ignored or transferred to the midnight shift; they didn't have to be paid.) Stern was a major (if undisclosed) contributor during political campaigns—sometimes giving money to all candidates, not caring who won, sometimes supporting a "regular" to defeat a possible reformer, sometimes paying a candidate not to oppose a preferred man. Since there were few legitimate sources of large contributions for Democratic candidates, Stern's money was frequently regarded as essential for victory, for the costs of buying radio and television time and paying pollwatchers were high. When popular sentiment was running strongly in favor of reform, however, even Stern's contributions could not guarantee victory. Bob Walasek, later to be as corrupt as any Wincanton mayor, ran as a reform candidate in the Democratic primary and defeated Stern-financed incumbent Gene Donnelly. Never a man to bear grudges, Stern financed Walasek in the general election that year and put him on the "payroll" when he took office.

Even when local officials were not on the regular payroll, Stern was careful to remind them of his friendship (and their debts). A legislative investigating committee found that Stern had given mortgage loans to a police lieutenant and the police chief's son. County Court Judge Ralph Vaughan recalled that shortly after being elected (with Stern support), he received a call from Dave Feinman, Stern's nephew. "Congratulations, judge. When do you think you and your wife would like a vacation in Florida?"

"Florida? Why on earth would I want to go there?"

"But all the other judges and the guys in City Hall—Irv takes them all to Florida whenever they want to get away."

"Thanks anyway, but I'm not interested."

"Well, how about a mink coat instead. What size coat does your wife wear? * * *"

In another instance an assistant district attorney told of Feinman's arriving at his front door with a large basket from Stern's supermarket just before Christmas. "My minister suggested a needy family that could use the food," the assistant district attorney recalled, "but I returned the liquor to Feinman. How could I ask a minister if he knew someone that could use three bottles of scotch?"

Campaign contributions, regular payments to higher officials, holiday and birthday gifts—these were the bases of the system by which Irv Stern bought protection from the law. The campaign contributions usually ensured that complacent mayors, councilmen, district attorneys, and judges were elected; payoffs in some instances usually kept their loyalty. In a number of ways, Stern was also able to reward the corrupt officials at no financial cost to himself. Just as the officials, being in control of the instruments of law enforcement, were able to facilitate Stern's gambling enterprises, so Stern, in control of a network of men operating outside the law, was able to facilitate the officials' corrupt enterprises. As will be seen later, many local officials were not satisfied with their legal salaries from the city and their illegal salaries from Stern and decided to demand payments from prostitutes, kickbacks from salesmen, etc. Stern, while seldom receiving any money from these transactions, became a broker: bringing politicians into contact with salesmen, merchants, and lawyers willing to offer bribes to get city business; setting up middlemen who could handle the money without jeopardizing the officials' reputations; and providing enforcers who could bring delinquents into line.

From the corrupt activities of Wincanton officials, Irv Stern received little in contrast to his receipts from his gambling operations. Why then did he get involved in them? The major virtue, from Stern's point of view,

of the system of extortion that flourished in Wincanton was that it kept down the officials' demands for payoffs directly from Stern. If a councilman was able to pick up $1,000 on the purchase of city equipment, he would demand a lower payment for the protection of gambling. Furthermore, since Stern knew the facts of extortion in each instance, the officials would be further implicated in the system and less able to back out on the arrangements regarding gambling. Finally, as Stern discovered to his chagrin, it became necessary to supervise official extortion to protect the officials against their own stupidity. Mayor Gene Donnelly was cooperative and remained satisfied with his regular "salary." Bob Walasek, however, was a greedy man, and seized every opportunity to profit from a city contract. Soon Stern found himself supervising many of Walasek's deals to keep the mayor from blowing the whole arrangement wide open. When Walasek tried to double the "take" on a purchase of parking meters, Stern had to step in and set the contract price, provide an untraceable middleman, and see the deal through to completion. "I told Irv," Police Chief Phillips later testified, "that Walasek wanted $12 on each meter instead of the $6 we got on the last meter deal. He became furious. He said, 'Walasek is going to fool around and wind up in jail. You come and see me. I'll tell Walasek what he's going to buy.' "

Protection, it was stated earlier, was an essential ingredient in Irv Stern's gambling empire. In the end, Stern's downfall came not from a flaw in the organization of the gambling enterprises but from public exposure of the corruption of Mayor Walasek and other officials. In the early 1960's Stern was sent to jail for 4 years on tax evasion charges, but the gambling empire continued to operate smoothly in his absence. A year later, however, Chief Phillips was caught perjuring himself in grand jury testimony concerning kickbacks on city towing contracts. Phillips "blew the whistle" on Stern, Walasek, and members of the city council, and a reform administration was swept into office. Irv Stern's gambling empire had been worth several million dollars each year; kickbacks on the towing contracts brought Bob Walasek a paltry $50 to $75 each week.

OFFICIAL CORRUPTION

Textbooks on municipal corporation law speak of at least three varieties of official corruption. The major categories are nonfeasance (failing to perform a required duty at all), malfeasance (the commission of some act which is positively unlawful), and misfeasance (the improper performance of some act which a man may properly do). During the years in which Irv Stern was running his gambling operations, Wincanton officials were guilty of all of these. Some residents say that Bob Walasek came to regard the mayor's office as a brokerage, levying a tariff on every item that came across his desk. Sometimes a request for simple municipal services turned into a game of cat and mouse, with Walasek sitting on the request, waiting to see how much would be offered, and the petitioner waiting to see if he could obtain his rights without having to pay for them. Corruption was not as lucrative an enterprise as gambling, but it offered a tempting supplement to low official salaries.

NONFEASANCE

As was detailed earlier, Irv Stern saw to it that Wincanton officials would ignore at least one of their statutory duties, enforcement of the State's gambling laws. Bob Walasek and his cohorts also agreed to overlook other illegal activities. Stern, we noted earlier, preferred not to get directly involved in prostitution; Walasek and Police Chief Dave Phillips tolerated all prostitutes who kept up their protection payments. One madam, controlling more than 20 girls, gave Phillips et al. $500 each week; one woman employing only one girl paid $75 each week that she was in business. Operators of a carnival in rural Alsace County paid a public official $5,000 for the privilege of operating gambling tents for 5 nights each summer. A burlesque theater manager, under attack by high school teachers, was ordered to pay $25 each week for the privilege of keeping his strip show open.

Many other city and county officials must be termed guilty of nonfeasance, although there is no evidence that they received payoffs, and although they could present reasonable excuses for their inaction. Most policemen, as we have noted earlier, began to ignore prostitution and gambling completely after their reports of offenses were ignored or superior officers told them to mind their own business. State policemen, well informed about city vice and gambling conditions, did nothing unless called upon to act by local officials. Finally, the judges of the Alsace County Court failed to exercise their power to call for State Police investigations. In 1957, following Federal raids on horse bookies, the judges did request an investigation by the State Attorney General, but refused to approve his suggestion that a grand jury be convened to continue the investigation. For each of these instances of inaction, a tenable excuse might be offered—the beat patrolman should not be expected to endure harassment from his superior officers, State police gambling raids in a hostile city might jeopardize State-local cooperation on more serious crimes, and a grand jury probe might easily be turned into a "whitewash" in the hands of a corrupt district attorney. In any event, powers available to these law enforcement agencies for the prevention of gambling and corruption were not utilized.

MALFEASANCE

In fixing parking and speeding tickets, Wincanton politicians and policemen committed malfeasance, or committed an act they were forbidden to do, by illegally compromising valid civil and criminal actions. Similarly, while State law provides no particular standards by which the mayor is to make promotions within his police department, it was obviously improper for Mayor Walasek to demand a "political contribution" of $10,000 from Dave Phillips before he was appointed chief in 1960.

The term "political contribution" raises a serious legal and analytical problem in classifying the malfeasance of Wincanton officials, and indeed of politicians in many cities. Political campaigns cost money; citizens have a right to support the candidates of their choice; and officials have a right to appoint their backers to noncivil service positions. At some point, however, threats or oppression convert legitimate requests for political contributions into extortion. Shortly after taking office in the mid-1950's, Mayor Gene Donnelly notified city hall employees that they would be expected "voluntarily" to contribute 2 percent of their salary to the Democratic Party. (It might be noted that Donnelly never forwarded any of these "political contributions" to the party treasurer.) A number of salesmen doing business with the city were notified that companies which had supported the party would receive favored treatment; Donnelly notified one salesman that in light of a proposed $81,000 contract for the purchase of fire engines, a "political contribution" of $2,000 might not be inappropriate. While neither the city hall employees nor the salesmen had rights to their positions or their contracts, the "voluntary" quality of their contributions seems questionable.

One final, in the end almost ludicrous, example of malfeasance came with Mayor Donnelly's abortive "War on the Press." Following a series of gambling raids by the Internal Revenue Service, the newspapers began asking why the local police had not participated in the raids. The mayor lost his temper and threw a reporter in jail. Policemen were instructed to harass newspaper delivery trucks, and 73 tickets were written over a 48-hour period for supposed parking and traffic violations. Donnelly soon backed down after national news services picked up the story, since press coverage made him look ridiculous. Charges against the reporter were dropped, and the newspapers continued to expose gambling and corruption.

MISFEASANCE

Misfeasance in office, says the common law, is the improper performance of some act which a man may properly do. City officials must buy and sell equipment, contract for services, and allocate licenses, privileges, etc. These actions can be improperly performed if either the results are improper (e.g., if a building inspector were to approve a home with defective wiring or a zoning board to authorize a variance which had no justification in terms of land usage) or a result is achieved by improper procedures (e.g., if the city purchased an acceptable automobile in consideration of a bribe paid to the purchasing agent). In the latter case, we can usually assume an improper result as well—while the automobile will be satisfactory, the bribe giver will probably have inflated the sale price to cover the costs of the bribe.

In Wincanton, it was rather easy for city officials to demand kickbacks, for State law frequently does not demand competitive bidding or permits the city to ignore the lowest bid. The city council is not required to advertise or take bids on purchases under $1,000, contracts for maintenance of streets and other public works, personal or professional services, or patented or copyrighted products. Even when bids must be sought, the council is only required to award the contract to the lowest responsible bidder. Given these permissive provisions, it was relatively easy for council members to justify or disguise contracts in fact based upon bribes. The exemption for patented products facilitated bribe taking on the purchase of two emergency trucks for the police department (with a $500 campaign contribution on a $7,500 deal), three fire engines ($2,000 was allegedly paid on an $81,000 contract), and 1,500 parking meters (involving payments of $10,500 plus an $880 clock for Mayor Walasek's home). Similar fees were allegedly exacted in connection with the purchase of a city fire alarm system and police uniforms and firearms. A former mayor and other officials also profited on the sale of city property, allegedly dividing $500 on the sale of a crane and $20,000 for approving the sale, for $22,000, of a piece of land immediately resold for $75,000.

When contracts involved services to the city, the provisions in the State law regarding the lowest responsible bidder and excluding "professional services" from competitive bidding provided convenient loopholes. One internationally known engineering firm refused to agree to kickback in order to secure a contract to design a $4.5 million sewage disposal plant for the city; a local firm was then appointed, which paid $10,700 of its $225,000 fee to an associate of Irv Stern and Mayor Donnelly as a "finder's fee." Since the State law also excludes public works maintenance contracts from the competitive bidding requirements, many city paving and street repair contracts during the Donnelly-Walasek era were given to a contributor to the Democratic Party. Finally, the franchise for towing illegally parked cars and cars involved in accidents was awarded to two garages which were then required to kickback $1 for each car towed.

The handling of graft on the towing contracts illustrates the way in which minor violence and the "lowest responsible bidder" clause could be used to keep bribe payers in line. After Federal investigators began to look into Wincanton corruption, the owner of one of the garages with a towing franchise testified before the grand jury. Mayor Walasek immediately withdrew his franchise, citing "health violations" at the garage. The garageman was also "encouraged" not to testify by a series of "accidents"—wheels would fall off towtrucks on the highway, steering cables were cut, and so forth. Newspaper satirization of the "health violations" forced the restoration of the towing franchise, and the "accidents" ceased.

Lest the reader infer that the "lowest responsible bidder" clause was used as an escape valve only for corrupt purposes, one incident might be noted which took place under the present reform administration. In 1964, the Wincanton School Board sought bids for the renovation of an athletic field. The lowest bid came from a construction company owned by Dave Phillips, the corrupt police chief who had served formerly under Mayor Walasek. While the company was presumably competent to carry

out the assignment, the board rejected Phillips' bid "because of a question as to his moral responsibility." The board did not specify whether this referred to his prior corruption as chief or his present status as an informer in testifying against Walasek and Stern.

One final area of city power, which was abused by Walasek et al., covered discretionary acts, such as granting permits and allowing zoning variances. On taking office, Walasek took the unusual step of asking that the bureaus of building and plumbing inspection be put under the mayor's control. With this power to approve or deny building permits, Walasek "sat on" applications, waiting until the petitioner contributed $50 or $75, or threatened to sue to get his permit. Some building designs were not approved until a favored architect was retained as a "consultant." (It is not known whether this involved kickbacks to Walasek or simply patronage for a friend.) At least three instances are known in which developers were forced to pay for zoning variances before apartment buildings or supermarkets could be erected. Businessmen who wanted to encourage rapid turnover of the curb space in front of their stores were told to pay a police sergeant to erect "10-minute parking" signs. To repeat a caveat stated earlier, it is impossible to tell whether these kickbacks were demanded to expedite legitimate requests or to approve improper demands, such as a variance that would hurt a neighborhood or a certificate approving improper electrical work.

All of the activities detailed thus far involve fairly clear violations of the law. To complete the picture of the abuse of office by Wincanton officials, we might briefly mention "honest graft." This term was best defined by one of its earlier practitioners, State Senator George Washington Plunkitt who loyally served Tammany Hall at the turn of the century.

> There's all the difference in the world between [honest and dishonest graft]. Yes, many of our men have grown rich in politics. I have myself.
>
> I've made a big fortune out of the game, and I'm gettin' richer every day, but I've not gone in for dishonest graft—blackmailin' gamblers, saloonkeepers, disorderly people, etc.—and neither has any of the men who have made big fortunes in politics.
>
> There's an honest graft, and I'm an example of how it works. I might sum up the whole thing by sayin': "I seen my opportunities and I took 'em."
>
> Let me explain by examples. My party's in power in the city, and it's goin' to undertake a lot of public improvements. Well, I'm tipped off, say, that they're going to lay out a new park at a certain place.
>
> I see my opportunity and I take it. I go to that place, and I buy up all the land I can in the neighborhood. Then the board of this or that makes its plan public, and there is a rush to get my land, which nobody cared particular for before.
>
> Ain't it perfectly honest to charge a good price and make a profit on my investment and foresight? Of course, it is. Well, that's honest graft.[3]

While there was little in the way of land purchasing—either honest or dishonest—going on in Wincanton during this period, several officials who carried on their own businesses while in office were able to pick up some "honest graft." One city councilman with an accounting office served as bookkeeper for Irv Stern and the major bookies and prostitutes in the city.

Police Chief Phillips' construction firm received a contract to remodel the exterior of the largest brothel in town. Finally one councilman serving in the present reform administration received a contract to construct all gasoline stations built in the city by a major petroleum company; skeptics say that the contract was the quid pro quo for the councilman's vote to give the company the contract to sell gasoline to the city.

How Far Did It Go? This cataloging of acts of nonfeasance, malfeasance, and misfeasance by Wincanton officials raises a danger of confusing variety with universality, of assuming that every employee of the city was either engaged in corrupt activities or was being paid to ignore the corruption of others. On the contrary, both official investigations and private research lead to the conclusion that there is no reason whatsoever to question the honesty of the vast majority of the employees of the city of Wincanton. Certainly no more than 10 of the 155 members of the Wincanton police force were on Irv Stern's payroll (although as many as half of them may have accepted petty Christmas presents—turkeys or liquor.) In each department, there were a few employees who objected actively to the misdeeds of their superiors, and the only charge that can justly be leveled against the mass of employees is that they were unwilling to jeopardize their employment by publicly exposing what was going on. When Federal investigators showed that an honest (and possibly successful) attempt was being made to expose Stern-Walasek corruption, a number of city employees cooperated with the grand jury in aggregating evidence which could be used to convict the corrupt officials.

Before these Federal investigations began, however, it could reasonably appear to an individual employee that the entire machinery of law enforcement in the city was controlled by Stern, Walasek, et al., and that an individual protest would be silenced quickly. This can be illustrated by the momentary crusade conducted by First Assistant District Attorney Phil Roper in the summer of 1962. When the district attorney left for a short vacation, Roper decided to act against the gamblers and madams in the city. With the help of the State Police, Roper raided several large brothels. Apprehending on the street the city's largest distributor of punchboards and lotteries, Roper effected a citizen's arrest and drove him to police headquarters for proper detention and questioning. "I'm sorry, Mr. Roper," said the desk sergeant, "we're under orders not to arrest persons brought in by you." Roper was forced to call upon the State Police for aid in confining the gambler. When the district attorney returned from his vacation, he quickly fired Roper "for introducing politics into the district attorney's office."

[3] William L. Riordan, "Plunkitt of Tammany Hall" (New York: E. P. Dutton, 1963), p. 3.

If it is incorrect to say that Wincanton corruption extended very far vertically—into the rank and file of the various departments of the city—how far did it extend horizontally? How many branches and levels of government were affected? With the exception of the local Congressman and the city treasurer, it seems that a few personnel at each level (city, county, and State) and in most offices in city hall can be identified either with Stern or with some form of free-lance corruption. A number of local judges received campaign financing from Stern, although there is no evidence that they were on his payroll after they were elected. Several State legislators were on Stern's payroll, and one Republican councilman charged that a high-ranking State Democratic official promised Stern first choice of all Alsace County patronage. The county chairman, he claimed, was only to receive the jobs that Stern did not want. While they were later to play an active role in disrupting Wincanton gambling, the district attorney in Hal Craig's reform administration feared that the State Police were on Stern's payroll, and thus refused to use them in city gambling raids.

Within the city administration, the evidence is fairly clear that some mayors and councilmen received regular payments from Stern and divided kickbacks on city purchases and sales. Some key subcouncil personnel frequently shared in payoffs affecting their particular departments—the police chief shared in the gambling and prostitution payoffs and received $300 of the $10,500 kickback on parking meter purchases. A councilman controlling one department, for example, might get a higher percentage of kickbacks than the other councilmen in contracts involving that department.

LEGAL PROTECTION AGAINST CORRUPTION

Later in this report, Wincanton's gambling and corruption will be tied into a context of social and political attitudes. At this point, however, concluding the study of official corruption, it might be appropriate to consider legal reforms which might make future corruption more difficult. Many of the corrupt activities of Wincanton officials are already covered sufficiently by State law—it is clearly spelled out, for example, that city officials must enforce State gambling and prostitution laws, and no further legislation is needed to clarify this duty. The legal mandate of the State Police to enforce State laws in all parts of the State is equally clear, but it has been nullified by their informal practice of entering cities only when invited; this policy only facilitates local corruption.

The first major reform that might minimize corruption would involve a drastic increase in the salaries of public officials and law enforcement personnel. During the 1950's Wincanton police salaries were in the lowest quartile for middle-sized cities in the Nation, and were well below the median family income ($5,453) in the city. City councilmen then were receiving only slightly more than the median. Since that time, police salaries have been raised to $5,400 (only slightly below the median) and council salaries to $8,500. Under these circumstances, many honest officials and employees were forced to "moonlight" with second jobs; potentially dishonest men were likely to view Stern payoffs or extortionate kickbacks as a simpler means of improving their financial status. Raising police salaries to $7,000 or $8,000 would attract men of higher quality, permit them to forego second jobs, and make corrupt payoffs seem less tempting. The same considerations apply to a recommendation that the salaries of elected officials be increased to levels similar to those received in private industry. A recent budget for the city of Wincanton called for expenditures of $6 million; no private corporation of that size would be headed by a chief executive whose salary was $9,500 per year.

A second type of recommendation would reduce the opportunities available to officials to extort illegal payoffs or conceal corruption. First, the civil service system should be expanded. At the time this report was written, Wincanton policemen could not be discharged from the force unless formal charges were brought, but they could be demoted from command positions or transferred to "punishment" details at the discretion of the chief or mayor. The latter option is probably a proper disciplinary tool, but the former invites policemen to seek alliances with political leaders and to avoid unpopular actions. Promotions within the force (with the possible exception of the chief's position) should be made by competitive examination, and demotions should be made only for proven cause. (While research for this report was being conducted, a full 18 months before the next local election, police officers reported that politicking had already begun. Men on the force had already begun making friends with possible candidates for the 1967 elections, and police discipline was beginning to slip. Command officers reported that the sergeants were becoming unwilling to criticize or discipline patrolmen. "How can I tell someone off?" one captain asked. "I'll probably be walking a beat when the Democrats come back into power, and he may be my boss.") A comprehensive civil service system would also give command officers control over informal rewards and punishments, so that they could encourage "hustlers" and harass slackers, but formal review of promotions and demotions is essential to guard against the politicking, which has been characteristic of the Wincanton police force.

Second, opportunities for corruption could be reduced by closing the loopholes in State laws on bidding for municipal contracts. While a city should be free to disregard a low bid received from a company judged financially or technically unable to perform a contract, the phrase "lowest responsible bidder" simply opens the door to misfeasance—either to accepting under-the-table kickbacks or to rewarding political friends. In this regard, the decision to ignore the bid of former Police Chief Phillips is just as reprehensible as the decision to give paving contracts to a major party contributor. Furthermore, there is no reason why service contracts should be excluded from the competitive bidding; while the professions regard it as undignified to compete for clients, there is no reason why road repair or building maintenance contracts could not be judged on the basis of bids (with a

proviso regarding some level of competence). Finally, the exclusion of "patented or copyrighted products" is untenable—it is well known that distributors of say, automobiles, vary widely in their profit margins, or allowances for trade-ins, etc. City officials should be forced therefore to seek the best possible deal.

One mechanism, which is often suggested to guard against official misconduct, is an annual audit of city books by a higher governmental agency, such as those conducted of local agencies (e.g., urban renewal authorities) administering Federal programs. The evidence in Wincanton, however, seems to indicate that even while official corruption was taking place, the city's books were in perfect order. When a kickback was received on a city purchase, for example, the minutes of council meetings would indicate that *X* was the "lowest responsible bidder," if bids were required, and *X* would slip the payoff money to a "bagman," or contactman, on a dark street corner. The books looked proper and auditors would have had no authority to force acceptance of other bids. It would seem that revision of the bidding laws would be more significant than an outside audit.

Finally, the problem of campaign contributions must be considered. As was stressed earlier, contributions to political candidates are regarded in this country as both a manifestation of free speech and the best alternative to government sponsorship of campaigns. The use of political contributions as a disguise for extortion and bribery could be curtailed, however, by active enforcement of the "full reporting of receipts" provision of State campaign laws (in Wincanton, candidates filed reports of receipts, but, of course, neglected to mention the money received from Irv Stern). Second, city hall employees should be protected against the type of voluntary assessment imposed by Mayor Donnelly. Third, State and local laws might more clearly prohibit contributions, from persons doing business with the city, which can be identified as payoffs for past or future preferment on city contracts. (Tightening of bidding requirements, of course, would make such activities less profitable to the contractors.) [4]

GAMBLING AND CORRUPTION: THE GENERAL PUBLIC

THE LATENT FUNCTIONS OF GAMBLING AND CORRUPTION

> I feel as though I am sending Santa Claus to jail. Although this man dealt in gambling devices, it appears that he is a religious man having no bad habits and is an unmeasurably charitable man.
>
> —a Federal judge sentencing slot machine king Klaus Braun to jail in 1948.

> When I was a kid, the man in the corner grocery wrote numbers. His salary was about $20 a week and he made $25 more on book.
>
> —a reform candidate for the Wincanton City Council, early 1960's.

The instances of wrongdoing cataloged in earlier sections seem to paint an easily censurable picture. Irv Stern, Gene Donnelly, Bob Walasek—these names conjure up an image of such total iniquity that one wonders why they were ever allowed to operate as they did. While gambling and corruption are easy to judge in the abstract, however, they, like sin, are never encountered in the abstract—they are encountered in the form of a slot machine which is helping to pay off your club's mortgage, or a chance to fix your son's speeding ticket, or an opportunity to hasten the completion of your new building by "overlooking" a few violations of the building code. In these forms, the choices seem less clear. Furthermore, to obtain a final appraisal of what took place in Wincanton one must weigh the manifest functions served—providing income for the participants, recreation for the consumers of vice and gambling, etc.—against the latent functions, the unintended or unrecognized consequences of these events.[5] The automobile, as Thorstein Veblen noted, has both a manifest function, transportation, and a latent function, affirming the owner's social status. To balance the picture presented in earlier sections, and thus to give a partial explanation of why Wincanton has had its unusual history, this section explores the latent functions, the unintended and unexpected consequences, of gambling and corruption.

Latent Social Functions. The social life of Wincanton is organized around clubs, lodges, and other voluntary associations. Labor unions have union halls. Businessmen have luncheon groups, country clubs, and service organizations, such as the Rotary, Kiwanis, the Lions, etc. Each nationality group has its own meetinghouse—the Ancient Order of Hibernians, the Liederkranz, the Colored Political Club, the Cristoforo Colombo Society, etc. In each neighborhood, a PTA-type group is organized around the local playground. Each firehall is the nightly gathering place of a volunteer firemen's association. Each church has the usual assortment of men's, women's, and children's groups.

A large proportion of these groups profited in one way or another from some form of gambling. Churches sponsored lotteries, bingo, and "Las Vegas nights." Weekly bingo games sponsored by the playground associations paid for new equipment, Little League uniforms, etc. Business groups would use lotteries to advertise "Downtown Wincanton Days." Finally, depending upon the current policy of law enforcement agencies, most of the clubs had slot machines, payoff pinball machines, punchboards, lotteries, bingo, poker games, etc. For many of these groups, profits from gambling meant the difference between financial success and failure. Clubs with large and affluent membership lists could survive with only fees and profits from meals and drinks served. Clubs with few or impecunious members, however, had to rely on other sources of revenue, and gambling was both lucrative and attractive to nonmembers.

The clubs therefore welcomed slots, pinball machines, punchboards, and so forth, both to entertain members and to bring in outside funds. The clubs usually divided

[4] See the excellent discussion of political campaign contributions in Alexander Heard, "The Costs of Democracy" (Chapel Hill: University of North Carolina Press, 1960), and Herbert Alexander, "Regulation of Political Finance" (Berkeley: Institute of Governmental Studies, and Princeton: Citizens' Research Foundation, 1966).

[5] See the classic examination of manifest and latent functions in Robert K. Merton, "Social Theory and Social Structures," revised edition (New York: Free Press, 1957), pp. 19-87.

gambling profits equally with machine distributors such as Stern or Klaus Braun. Some clubs owed even more to gamblers; if Braun heard that a group of men wanted to start a new volunteer firemen's association, he would lend them mortgage money simply for the opportunity to put his slot machines in the firehall. It is not surprising, therefore, to find that the clubs actively defended Stern, Braun, and the political candidates who favored open gambling.

Gambling in Wincanton also provided direct and indirect benefits to churches and other charitable organizations. First, like the other private groups, a number of these churches and charities sponsored bingo, lotteries, etc., and shared in the profits. Second, leading gamblers and racketeers have been generous supporters of Wincanton charities. Klaus Braun gave away literally most of his gambling income, aiding churches, hospitals, and the underprivileged. In the late 1940's, Braun provided 7,000 Christmas turkeys to the poor, and frequently chartered buses to take slum children to ball games. Braun's Prospect Mountain Park offered free rides and games for local children (while their parents were in other tents patronizing the slot machines). Irv Stern gave a $10,000 stained glass window to his synagogue, and aided welfare groups and hospitals in Wincanton and other cities. (Since the residents of Wincanton refuse to be cared for in the room that Stern gave to Community Hospital, it is now used only for the storage of bandages.) When Stern came into Federal court in the early 1960's to be sentenced on tax evasion charges, he was given character references by Protestant, Catholic, and Jewish clergy, and by the staff of two hospitals and a home for the aged. Critics charge that Stern never gave away a dime that wasn't well publicized; nevertheless, his contributions benefited worthwhile community institutions.

(Lest this description of the direct and indirect benefits of gambling be misleading, it should also be stressed that many ministers protested violently against gambling and corruption, led reform movements and launched pulpit tirades against Stern, Walasek, et al.)

One final social function of Wincanton gambling might be termed the moderation of the demands of the criminal law. Bluntly stated, Irv Stern was providing the people with what at least a large portion of them wanted, whether or not State lawmakers felt they should want it. It is, of course, axiomatic that no one has the right to disobey the law, but in fairness to local officials it should be remembered that they were generally only tolerating what most residents of the city had grown up with—easily accessible numbers, horsebetting, and bingo. When reform mayor Ed Whitton ordered bingo parlors closed in 1964, he was ending the standard form of evening recreation of literally thousands of elderly men and women. One housewife interviewed recently expressed relief that her mother had died before Whitton's edict took effect; "It would have killed her to live without bingo," she said.

In another sense, Wincanton law enforcement was also moderated by the aid that the gambling syndicates gave, at no cost to the public, to persons arrested by the police for gambling activity. Stern provided bail and legal counsel during trials, and often supported families of men sent to jail. A large portion of the payments that Stern sent to the east coast syndicates (as discussed earlier) was earmarked for pensions to the widows of men who had earlier served in the Stern organization. In light of the present interest in the quality of legal services available to the poor, this aspect of Wincanton gambling must be regarded as a worthy social function.

In these ways, Wincanton gambling provided the financial basis for a network of private groups, filling social, service, and quasi-governmental functions. Leading the list of latent functions of gambling, therefore, we must put the support of neighborhood and other group social life and the provision of such important services as recreation and fire protection. Providing these services through private rather than public mechanisms not only reduced tax burdens but also integrated the services into the social structure of the neighborhood served. While it is hard to give profits from gambling sole credit for maintaining these clubs, it must be noted that a number of firemen's and political associations were forced to close their doors when law enforcement agencies seized slot and pinball machines.

Latent Economic Functions. Just as the proceeds from gambling made possible, or at least less expensive, an extensive series of social relationships and quasi-public services, so also did gambling and corruption affect the local economy, aiding some businesses while hindering others. Their manifest function, of course, was to increase the incomes of the providers of illicit services (members of the Stern syndicate, individual number writers and pinball machine distributors, madams, prostitutes, etc.), the recipients of payoffs (elected officials and policemen, for whom these payments were a welcome addition to low salaries), and the businessmen who secured unwarranted contracts, permits, variances, etc. On the other hand, these arrangements provided entertainment for the consumers of gambling and prostitution.

In describing the latent functions of Wincanton illegality, we can begin with two broad phenomena. First, gambling permitted a number of outmoded businesses to survive technological change. As a quotation at the beginning of this chapter indicated, a "mom and pop" grocery store or a candy or cigar store could make more from writing numbers or taking horse bets than they did from their nominal source of support. When reform mayors cracked down on betting, many of these marginal shops went out of business, not being able to compete with the larger, more efficient operations solely on the basis of sales. Second, the system provided an alternate ladder of social mobility for persons who lacked the educational or status prerequisites for success in the legitimate world. Irv Stern came to this country as a fruit peddler's son and is believed by the Internal Revenue Service to be worth several millions of dollars. Gene Donnelly was a bartender's son; Bob Walasek grew up in a slum, although he was able to attend college on an athletic scholarship. Many Wincantonites believe that

each of these men collected at least a quarter of a million dollars during his 4 years in city hall. As Daniel Bell has pointed out,[6] and as these men illustrate, organized crime in America has provided a quick route out of the slums, a means of realizing the Horatio Alger dream.

A number of legitimate enterprises in Wincanton profited directly or indirectly when gambling was wide open. Eight or ten major bingo halls provided a large nighttime business for the local bus company. In one year, for example, 272,000 persons paid to play bingo, and most of them were elderly men and women who were brought to the games on regular or chartered buses. Prizes for the bingo games were purchased locally; one department store executive admitted that bingo gift certificates brought "a sizable amount" of business into his store. Several drugstores sold large quantities of cosmetics to the prostitutes. As in Las Vegas, one Wincanton hotel offered special weekend rates for the gamblers at the dice game, who would gamble at night and sleep during the daytime. Finally, several landlords rented space to Stern for his bookie parlors and accounting offices. Worried that legislative investigations might terminate a profitable arrangement, one landlord asked the investigating committee, "Who else would pay $150 a month for that basement?" Being the center of gambling and prostitution for a wide area also meant increased business for the city's restaurants, bars, and theaters. One man declared that business at his Main Street restaurant was never as good as when gamblers and bingo players were flocking to the downtown area. (Many of these restaurants and bars, of course, provided gambling as well as food and drink for their customers.)

Corruption, like gambling, offered some businessmen opportunities to increase sales and profits. If minor building code violations could be overlooked, houses and office buildings could be erected more cheaply. Zoning variances, secured for a price, opened up new areas in which developers could build high-rise apartment buildings and shopping centers. In selling to the city, businessmen could increase profits either by selling inferior goods or by charging high prices on standard goods when bidding was rigged or avoided. Finally, corruptible officials could aid profits simply by speeding up decisions on city contracts, or by forcing rapid turnover of city-owned curb space through either "10-minute parking" signs or strict enforcement of parking laws. (Owners of large stores, however, sought to maximize profits by asking the police to ignore parking violations, feeling that customers who worried about their meters would be less likely to stay and buy.)

This listing of the latent benefits of gambling and corruption must be juxtaposed against the fact that many Wincanton businessmen were injured by the Stern-Walasek method of operations and fought vigorously against it. Leaders of the Wincanton business community—the bankers, industrialists, Chamber of Commerce, etc.—fought Walasek and Stern, refusing to kickback on anything, and regularly called upon State and Federal agencies to investigate local corruption.

It is somewhat misleading, however, to use the single term "business" in analysing responses to corruption. It will be more fruitful to classify businesses according to the nature of their contact with the city of Wincanton. Some industries had a national market, and only called upon the city for labor and basic services—water, sewage, police and fire protection, etc. Other companies such as sales agencies or construction firms did business directly with city hall and thus were intimately concerned with the terms upon which the city government did business. Because of the looseness of State bidding procedures, these businesses had to be careful, however, not to alienate officials. A third group, while not doing business with the city, had primarily a local clientele. Under these conditions, businesses in this group were frequently interested in corruption and gambling policies.

Official corruption affected each of these groups differently. Businesses whose markets lay primarily outside the city usually had to be concerned only with the possibility that Walasek might force them to pay for building permits. Companies dealing with City Hall, however, were exposed to every extortionate demand that the mayor might impose. As an example, agencies usually able to underbid their competitors were ignored if they refused to abide by the unofficial "conditions" added to contracts. Businessmen in the third category were in an intermediate position, both in terms of their freedom to act against the system and in terms of the impact that it had upon them. Like the others, they suffered when forced to pay for permits or variances. Legitimate businesses, such as liquor stores, taverns, and restaurants, whose functions paralleled those of the clubs, lost revenue when the clubs were licensed to have gambling and slot machines. Those businesses, such as banks, whose success depended upon community growth, suffered when the community's reputation for corruption and gambling drove away potential investors and developers. (Interestingly, businessmen disagree as to whether it is the reputation for corruption or for gambling that discourages new industry. Several Wincanton bankers stated that no investor would run the risk of having to bribe officials to have building plans approved, permits issued, and so forth. One architect, however, argued that businessmen assume municipal corruption, but will not move into a "sin town," for their employees will not want to raise children in such circumstances.)

The last detrimental aspect of gambling and corruption seems trivial in comparison with the factors already mentioned, but it was cited by most of the business leaders interviewed. Simply stated, it was embarassing to have one's hometown known throughout the country for its vice and corruption. "I'd go to a convention on the west coast," one textile manufacturer recalled, "and everyone I'd meet would say, 'You're from Wincanton? Boy, have I heard stories about that place!' I would try to talk about textiles or opportunities for industrial development, but they'd keep asking about the girls and the gambling." An Air Force veteran recalled being ridiculed about his hometown while in boot camp. Finally, some insiders feel that a Wincanton judge was persuaded

[6] Daniel Bell, "The End of Ideology" (New York: Free Press, 1960), ch. 7, "Crime as an American Way of Life."

to act against Irv Stern when he found that his daughter was being laughed at by her college friends for being related to a Wincanton official.

PUBLIC ATTITUDES TOWARD GAMBLING AND CORRUPTION

A clean city, a city free of gambling, vice, and corruption, requires at least two things—active law enforcement and elected officials who oppose organized crime. Over the last 20 years, Federal agents have been successful in prosecuting most of the leaders of Wincanton gambling operations. Slot machine king Klaus Braun was twice sent to jail for income tax evasion. Federal agents were also able to secure convictions against Irv Stern for income tax evasion (a 4-year sentence), gambling tax evasion (a 2-year sentence running concurrently with the income tax sentence), and extortion on a city contract to purchase parking meters (a 30-day concurrent sentence). Federal men also sent to jail lesser members of the Stern syndicate and closed down a still and an interstate dice game.

These Federal actions, however, had very little effect upon Wincanton gambling. Lieutenants carried on while Stern was in jail, and local police, at the direction of city officials, continued to ignore numbers writers, bookies, and prostitutes. As one Federal agent put it, "Even though we were able to apprehend and convict the chief racketeers, we were never able to solve the political problem—city officials were always against us." On the two occasions when Wincanton voters did solve the political problem by electing reform officials, however, organized crime was quickly put out of business. Mayor Hal Craig chose to tolerate isolated bookies, numbers writers, and prostitutes, but Stern and Braun were effectively silenced. Mayor Ed Whitton, in office since the early 1960's, has gone even further, and the only gamblers and prostitutes still operating in Wincanton are those whom the police have been unable to catch for reasons of limited manpower, lack of evidence, etc. The American Social Hygiene Association reported after a recent study that Wincanton has fewer prostitutes today than at any time since the 1930's. The police acknowledge that there are still a few gamblers and prostitutes in town, but they have been driven underground, and a potential patron must have a contact before he can do business.

If the level of law enforcement in a community is so directly tied to local voting patterns, we must look more closely at the attitudes and values of Wincanton residents. First, how much did residents know about what was going on? Were the events which have been discussed previously matters of common knowledge or were they perceived by only a few residents? Second, were they voting for open gambling and corruption; were they being duped by seemingly honest candidates who became corrupt after taking office; or were these issues irrelevant to the average voter, who was thinking about other issues entirely? Our conclusions about these questions will indicate whether long-range reform can be attained through legal changes (closing loopholes in the city's bidding practices, expanding civil service in the police department, ending the "home rule" policy of the State Police, etc.) or whether reform must await a change in popular mores.

PUBLIC AWARENESS OF GAMBLING AND CORRUPTION

In a survey of Wincanton residents conducted recently,[7] 90 percent of the respondents were able correctly to identify the present mayor, 63 percent recognized the name of their Congressman, and 36 percent knew the Alsace County district attorney. Seventy percent identified Irv Stern correctly, and 62 percent admitted that they did recognize the name of the largest madam in town. But how much did the people of Wincanton know about what had been going on—the extent and organization of Irv Stern's empire, the payoffs to city hall and the police, or the malfeasance and misfeasance of Bob Walasek and other city officials? Instead of thinking about simply "knowing" or "not knowing," we might subdivide public awareness into several categories—a general awareness that gambling and prostitution were present in the city, some perception that city officials were protecting these enterprises, and finally a specific knowledge that officials X and Y were being paid off. These categories vary, it will be noticed, in the specificity of knowledge and in the linkage between the result (e.g., presence of gambling or corruption) and an official's action.

While there is no way of knowing exactly how many Wincantonites had access to each type of knowledge about gambling and corruption during the period they were taking place, we can form some ideas on the basis of the newspaper coverage they received and the geographical distribution of each form of illegality. The dice game, for example, was in only one location (hidden and shifted periodically to escape Federal attention) and relied primarily on out-of-town gamblers. The newspapers said little about it, and it was probably safe to say that few residents knew of its existence until it was raided by the FBI in the early 1960's.

Prostitutes were generally found only in two four-block areas in the city—semi-slum areas that no outsider was likely to visit unless he was specifically looking for the girls. The newspapers, however, gave extensive coverage to every prostitution arrest and every report by the American Social Hygiene Association which detailed the extent of prostitution and venereal disease in the city. A series of newspaper articles, with photographs, forced the police to close (for a short period of time) several of the larger brothels. With regard to prostitution, therefore, it is likely that a majority of the adult population knew of the existence of commercialized vice; but, apart from innuendoes in the papers, there was little awareness of payoffs to the police. It was not until after the election of a reform administration, that Stern and Walasek were indicted for extorting payments from a madam.

In contrast to the dice games and prostitution, public awareness of the existence of pinball machines, horse-books, and numbers writing must have been far more widespread. These mass-consumption forms of gambling

[7] This survey was conducted by eight female interviewers from the Wisconsin Survey Research Laboratory, using a schedule of questions requiring 45 to 75 minutes to complete. Respondents were selected from among the adults residing in housing units selected at random from the Wincanton "City Directory." One hundred eighty-three completed interviews were obtained.

depended upon accessibility to large numbers of persons. Bets could be placed in most corner grocery stores, candy shops, and cigar counters; payoff pinball machines were placed in most clubs and firehalls, as well as in bars and restaurants. Apart from knowing that these things were openly available, and thus not subject to police interference, there was no way for the average citizen to know specifically that Irv Stern was paying to protect these gambling interests until Police Chief Phillips began to testify—again after the election of reformer Whitton.

Public awareness of wrongdoing was probably least widespread in regard to corruption—kickbacks on contracts, extortion, etc. Direct involvement was generally limited to officials and businessmen, and probably few of them knew anything other than that they personally had been asked to pay. Either from shame or from fear of being prosecuted on bribery charges or out of unwillingness to jeopardize a profitable contract, those who did pay did not want to talk. Those who refused to pay usually were unable to substantiate charges made against bribes so that exposure of the attempt led only to libel suits or official harassment. As we have seen, the newspapers and one garage with a towing contract did talk about what was going on. The garageman lost his franchise and suffered a series of "accidents"; the newspapers found a reporter in jail and their trucks harassed by the police. Peter French, the district attorney under Walasek and Donnelly, won a libel suit (since reversed on appeal and dismissed) against the papers after they stated that he was protecting gamblers. Except for an unsuccessful citizen suit in the mid-1950's seeking to void the purchase of fire trucks (for the purchase of which Donnelly received a $2,000 "political contribution") and a newspaper article in the early 1960's implying that Donnelly and his council had received $500 on the sale of a city crane, no evidence—no specific facts—of corruption was available to the public until Phillips was indicted several years later for perjury in connection with the towing contracts.

Returning then to the three categories of public knowledge, we can say that even at the lowest level—general perception of some form of wrongdoing—awareness was quite limited (except among the businessmen, most of whom, as we noted in the "Introduction," live and vote in the suburbs). Specific knowledge—this official received this much to approve that contract—was only available after legislative hearings in the early 1950's and the indictment of Phillips in the early 1960's; on both occasions the voters turned to reform candidates.

If, therefore, it is unlikely that many residents of Wincanton had the second or third type of knowledge about local gambling or corruption (while many more had the first type) during the time it was taking place, how much do they know now—after several years of reform and a series of trials—all well-covered in the newspapers revealing the nature of Stern-Donnelly-Walasek operations? To test the extent of specific knowledge about local officials and events, respondents in a recent survey were asked to identify past and present officials and racketeers and to compare the Walasek and Whitton administrations on a number of points.

Earlier, we noted that 90 percent of the 183 respondents recognized the name of the present mayor, 63 percent knew their Congressman (who had been in office more than 10 years), and 36 percent knew the district attorney. How many members of the Stern organization were known to the public? Seventy percent recognized Stern's name, 63 percent knew the head of the numbers bank, 40 percent identified the "bagman" or collector for Stern, and 31 percent knew the operator of the largest horsebook in town. With regard to many of these questions, it must be kept in mind that since many respondents may subconsciously have felt that to admit recognition of a name would have implied personal contact with or sympathy for a criminal or a criminal act, these results probably understate the extent of public knowledge. When 100 of the respondents were asked "What things did Mr. Walasek do that were illegal?", 59 mentioned extortion regarding vice and gambling, 2 mentioned extortion on city contracts, 7 stated that he stole from the city, 8 that he fixed parking and speeding tickets, 4 that he was "controlled by rackets," and 20 simply stated that Walasek was corrupt, not listing specific acts.

Even if Wincantonites do not remember too many specific misdeeds, they clearly perceive that the present Whitton administration has run a cleaner town than did Walasek or Donnelly. When asked to comment on the statement, "Some people say that the present city administration under Mayor Whitton is about the same as when Mayor Walasek was in office," 10 percent said it was the same, 74 percent said it was different, and 14 percent didn't know. When asked why, 75 respondents cited "better law enforcement" and the end of corruption; only 7 of 183 felt that the city had been better run by Walasek. Fifty-eight percent felt the police force was better now, 22 percent thought that it was about the same as when Walasek controlled the force, and only 7 percent thought it was worse now. Those who felt that the police department was better run now stressed "honesty" and "better law enforcement," or thought that it was valuable to have an outsider as commissioner. Those who thought it was worse now cited "inefficiency," "loafing," or "unfriendliness." It was impossible to tell whether the comments of "unfriendliness" refer simply to the present refusal to tolerate gambling or whether they signify a more remote police-public contact resulting from the "professionalism" of the commissioner. (In this regard, we might note that a number of policemen and lawyers felt that it had been easier to secure information regarding major crimes when prostitution and gambling were tolerated. As one former captain put it, "If I found out that some gangster was in town that I didn't know about, I raised hell with the prostitutes for not telling me.")

Comparing perceptions of the present and former district attorneys, we also find a clear preference for the present man, Thomas Hendricks, over Peter French, but there is a surprising increase in "Don't knows." Thirty-five percent felt the district attorney's office is run "differently" now, 13 percent said it is run in the same way, but 50 percent did not know. Paralleling this lack of attitudes toward the office, we can recall that only 36 percent

of the respondents were able to identify the present incumbent's name, while 55 percent knew his more flamboyant predecessor. Of those respondents who saw a difference between the two men, 51 percent cited "better law enforcement" and "no more rackets control over law enforcement."

In addition to recognizing these differences between past and present officials, the respondents in the recent survey felt that there were clear differences in the extent of corruption and gambling. Sixty-nine percent disagreed with the statement, "Underworld elements and racketeers had very little say in what the Wincanton city government did when Mr. Walasek was mayor;" only 13 percent disagreed with the same statement as applied to reform Mayor Whitton. When asked, "As compared with 5 years ago, do you think it's easier now, about the same, or harder to find a dice game in Wincanton?"; only one respondent felt it was easier, 8 percent felt it was about the same, 56 percent felt it was harder, and 34 percent didn't know. The respondents were almost as sure that Whitton had closed down horse betting; 51 percent felt it was harder to bet on horses now than it was 5 years ago, 11 percent felt it was about the same, and three respondents thought it was easier now than before. Again, 34 percent did not know.

PUBLIC ATTITUDES TOWARD CRIME AND LAW ENFORCEMENT

Earlier, we asked whether Wincanton's long history of gambling and corruption was based on a few bad officials and formal, structural defects such as the absence of civil service or low pay scales, or whether it was rooted in the values of the populace. The evidence on "public awareness" indicates that most Wincantonites probably knew of the existence of widespread gambling, but they probably had little idea of the payoffs involved. When we turn to public attitudes, we find a similar split—many citizens wanted to consume the services offered by Irv Stern, but they were against official corruption; few residents think that one produces the other. But in thinking about "public attitudes," several problems of definition arise. For one thing, "attitudes" depend on the way in which a question is phrased—a respondent would be likely to answer "no" if he were asked, "Are you in favor of gambling?", but he might also answer "yes" if he were asked whether it was all right to flip a coin to see who would buy the next round of drinks. As we will shortly see, it is very difficult to conclude that because a Wincantonite voted for candidate X, he was voting "for corruption"—in his mind, he might have been voting for a fellow Pole, or a workingman, or an athletic hero, etc., and the decision did not involve "corruption" or "reform."

Second, we have to ask whether "attitude," in the sense of a conscious preference for X over Y, is an appropriate concept. We must keep in mind that for Wincantonites, "reform" has been the exception rather than the rule. The vast majority of local citizens have lived with wide-open gambling all their lives, and the reform administrations of Craig and Whitton add up to only 7 of the last 40 years. As one lawyer said, "When I was a little kid, my dad would lift me up so I could put a dime in the slot machine at his club. We never saw anything wrong in it." In addition to knowing about gambling in Wincanton, the residents knew of other cities in the State in which gambling was equally wide open, and they believe that Wincanton is similar to most cities in the country. Fifty-four percent of the respondents in the survey agreed with the statement, "There is not much difference between politics in Wincanton and politics in other American cities." (Nineteen percent were undecided and only 25 percent disagreed.) Because of this specific history of gambling and this general perception that Wincanton is like other cities, it may be more accurate to speak of latent acceptance of gambling and petty corruption as "facts of life" rather than thinking of conscious choices, e.g., "I prefer gambling and corruption to a clean city and honest officials." Under most circumstances, the question has not come up.

In a series of questions included in the recent attitude survey, Wincantonites indicated a general approval or tolerance of gambling, but they frequently distinguished between organized and unorganized operations. Eighty percent felt that the State legislature should legalize bingo. Fifty-eight percent felt that a State-operated lottery would be a good idea. Fifty-four percent agreed with the general statement, "The State should legalize gambling." When asked *why* the State should legalize gambling, 42 percent of those favoring the idea felt that gambling was harmless or that people would gamble anyway; 44 percent thought that the State should control it and receive the profits; 8 percent felt that legalization would keep out racketeers. Forty-nine percent agreed that "gambling is all right so long as local people, not outsiders, run the game;" 35 percent disagreed; and 11 percent were uncertain. Forty-six percent felt that "the police should not break up a friendly poker game, even if there is betting." Here, 37 percent disagreed and 14 percent were uncertain.

If Wincanton residents are tolerant of gambling, they show little tolerance of official corruption: 72 percent of the respondents disagreed with a statement that, "A city official who receives $10 in cash from a company that does business with the city should not be prosecuted;" only 13 percent agreed. Sixty-one percent were unwilling to agree that, "It's all right for the mayor of a city to make a profit when the city buys some land so long as only a fair price is charged." Thirty-four percent agreed that, "It's all right for a city official to accept presents from companies so long as the taxpayers don't suffer," but 47 percent disagreed and 13 percent were undecided. Fifty-four percent did not believe that, "The mayor and police chief should be able to cancel parking and speeding tickets in some cases," but 36 percent thought it might be a good idea.

The intensity of feelings against corruption was brought out most strongly when the respondents were asked about the 30-day jail sentences imposed on Irv Stern and Bob Walasek for extorting $10,500 on city purchases of parking meters. Eighty-six percent felt that the sentences were too light; seven respondents felt that they were too severe,

generally feeling that publicity arising from the trial had hurt Walasek's family. When asked why they felt as they did, 32 percent felt that Walasek had "betrayed a public trust;" 18 percent gave an answer such as, "If it had been a little guy like me instead of a guy with pull like Walasek, I'd still be in jail."

In light of the mixed feelings about gambling and corruption, we might wonder whether Wincantonites are hostile toward the police department's present antigambling policy. This does not appear to be the case: 55 percent of the respondents disagreed with the statement, "The Wincanton police today are concentrating on gambling too much"; only 17 percent agreed, and 21 percent were undecided. Further support for the local police was indicated by the respondents when asked to comment on the statement, "If there is any gambling going on in Wincanton, it should be handled by the local police rather than the FBI"; 57 percent agreed and 19 percent disagreed. The preference for local action was slightly stronger—58 percent—when the question stated "* * * the local police rather than State Police."

We have frequently mentioned that Walasek and Stern were convicted on the basis of testimony given by former Police Chief Dave Phillips. Phillips was given immunity from Federal prosecution, and perjury charges against him were dropped. What was the public response to Phillips having testified? Was he regarded as a "fink" or a hero? Fifty-nine percent of the respondents felt that it was right for Phillips to testify. Only 15 percent felt that he should have received immunity, 40 percent felt the grant of immunity was wrong, and 40 percent did not know whether it was right or wrong. The most common reaction was that Phillips was as guilty as the others, or "he only testified to save his own skin."

Finally, to ascertain how much citizens know about law enforcement agencies, the survey respondents were asked, first, "As you remember it, who was it who decided that bingo should not be played in Wincanton?". Five percent attributed the ban to the legislature. Forty-three percent correctly stated that a joint decision of Mayor Whitton and District Attorney Hendricks (declaring that the State gambling law included bingo) had led to the current crackdown. Thirty-four percent didn't know. Ironically, 13 respondents believed that Walasek, Donnelly, Police Chief Phillips, or District Attorney French had ended bingo (all had been out of office for at least 6 months and opposed the ban)!

Second, respondents [8] were asked, "Which of the Federal investigative agencies would you say was primarily responsible for most of the prosecutions of Wincanton people in the past 10 years?". Thirty-one percent correctly cited the Internal Revenue Service, 20 percent mentioned the Federal Bureau of Investigation (whose only major involvement had been in raiding the dice game), and 46 percent did not know.

The Politics of Reform. In every local election in Wincanton, it seems that some candidates are running on "reform" platforms, charging their opponents with corruption or at least tolerating gamblers and prostitutes. Usually, we see Republicans attacking Democratic corruption. But Democratic primary candidates also attack the records of Democratic incumbents, and in 1955, Democrats promised the voters that they would rid the town of the prostitutes and bookies that "pearl gray" Hal Craig had tolerated. Frequently, officials have become corrupt after they were elected, but Wincanton voters have never returned a known criminal to office. Following legislative investigations in the early 1950's, Mayor Watts lost the general election, receiving only 39 percent of the vote. After the Federal indictment of Police Chief Phillips in the early 1960's, Bob Walasek was defeated in the Democratic primary, running a poor third, with only 19 percent of the vote. Even with Walasek out of the running, the voters selected Republican Whitton over his Democratic opponent, a councilman in the Walasek administration. While the Republicans were able to elect councilmen in two elections, they were unable to make inroads in the off-year council elections despite wholesale Federal gambling raids in the months just prior to the elections in these years.

Looking at these voting figures, two questions arise—why corruption and why reform? As we have seen, Wincantonites have never voted for corruption, although they may have voted for men tolerant of the gambling citizens demanded. While the newspapers and the reformers have warned of the necessary connection between gambling and corruption, their impact has been deadened by repetition—Wincanton voters have acquired a "ho-hum" attitude, saying to themselves, "That's just the Gazette sounding off again." or "The Republicans are 'crying wolf' just like they did 4 years ago." As Lord Bryce said of Americans 80 years ago:

> The people see little and they believe less. True, the party newspapers accuse their opponents of such offenses, but the newspapers are always reviling somebody; and it is because the words are so strong that the tale has little meaning * * *.
>
> The habit of hearing charges promiscuously bandied to and fro, but seldom probed to the bottom, makes men heedless.[9]

If the Democrats have dominated Wincanton elections so consistently, why did they lose in two important elections? Those years were different because official corruption was being documented by Federal investigators; in other years investigations were only showing widespread gambling, and only newspaper inferences suggested that officials were being paid off. It is equally, perhaps more, significant to note that Federal investigations attracted national attention—instead of seeing allusions of corruption in the Wincanton Gazette, city voters were beginning to read about themselves and their city in *The New York Times* and the papers of the larger cities within the State. Just as national media coverage of the "War on the Press" may have forced Mayor Donnelly to back down, so the national interest during the two elections may have shamed local voters into deserting the Democratic Party. The years when the Republicans

[8] This question was inserted in the schedule after the survey was underway; only 87 respondents were asked this question.

[9] James Bryce, "The American Commonwealth," vol. II (London: MacMillan, 1889), p. 204.

won were different because the voters were forced to recognize the conflict between their norms (honesty in government, no corruption, etc.) and the actions of local Democratic officials. Their "active sense of outrage" [10] produced a crisis leading to a readjustment of their normal patterns of behavior. Furthermore, even though the voters had been willing to tolerate petty corruption on the part of past officials, the national investigations indicated that officials were now going too far. As Irv Stern had predicted, Bob Walasek, unlike his predecessor, got "greedy," and pushed the voters too far, tolerating too much vice and gambling and demanding kickbacks on too many contracts and licenses. For the voters, the "price" of Democratic control had gotten too high.[11]

> A city where the government has for its subjects acquaintances, whose interests and passions it knows and can at pleasure thwart or forward, can hardly expect a neutral government.
>
> —Sir Ernest Barker,
> "Greek Political Theory" [12]

THE FUTURE OF REFORM IN WINCANTON

When Wincantonites are asked what kind of law enforcement they want, they are likely to say that it is all right to tolerate petty gambling and prostitution, but that "you've got to keep out racketeers and corrupt politicians." Whenever they come to feel that the city is being controlled by these racketeers, they "throw the rascals out." This policy of "throwing the rascals out," however, illustrates the dilemma facing reformers in Wincanton. Irv Stern, recently released from Federal prison, has probably, in fact, retired from the rackets; he is ill and plans to move to Arizona. Bob Walasek, having been twice convicted on extortion charges, is finished politically. Therefore? Therefore, the people of Wincanton firmly believe that "the problem" has been solved—"the rascals" have been thrown out. When asked, recently, what issues would be important in the next local elections, only 9 of 183 respondents felt that clean government or keeping out vice and gambling might be an issue. (Fifty-five percent had no opinion, 15 percent felt that the ban on bingo might be an issue, and 12 percent cited urban renewal, a subject frequently mentioned in the papers preceding the survey.) Since, under Ed Whitton, the city is being honestly run and is free from gambling and prostitution, there is no problem to worry about.

On balance, it seems far more likely to conclude that gambling and corruption will soon return to Wincanton (although possibly in less blatant forms) for two reasons—first, a significant number of people want to be able to gamble or make improper deals with the city government. (This assumes, of course, that racketeers will be available to provide gambling if a complacent city administration permits it.) Second, and numerically far more important, most voters think that the problem has been permanently solved, and thus they will not be choosing candidates based on these issues, in future elections.

Throughout this report, a number of specific recommendations have been made to minimize opportunities for wide-open gambling and corruption—active State Police intervention in city affairs, modification of the city's contract bidding policies, extending civil service protection to police officers, etc. On balance, we could probably also state that the commission form of government has been a hindrance to progressive government; a "strong mayor" form of government would probably handle the city's affairs more efficiently. Fundamentally, however, all of these suggestions are irrelevant. When the voters have called for clean government, they have gotten it, in spite of loose bidding laws, limited civil service, etc. The critical factor has been voter preference. Until the voters of Wincanton come to believe that illegal gambling produces the corruption they have known, the type of government we have documented will continue. Four-year periods of reform do little to change the habits instilled over 40 years of gambling and corruption.

RESEARCH ON THE POLITICS OF CORRUPTION [13]

Reviewing the literature on the politics of corruption, one is tempted to conclude that while everyone is writing about it, no one is saying very much about it. Most of the material in the field can be classified as simple reports of wrongdoing or official investigations. Both tend to come in waves coinciding with popular interest in reform,[14] and are written with a strongly moralistic bias. The classic exposés of municipal corruption are, of course, the works of the muckrakers—Steffans, Sinclair, Tarbell, etc.—written at the turn of the century.[15] More recently, issues of the "National Civic Review" (known as the "National Municipal Review" until 1958), have presented reports of specific cases of corruption, graft, or bribery; titles such as "Indianapolis Mayor Faces Jail Sentence," "Election Frauds in Philadelphia," and "Eliminating California Bosses" indicate the specific and reforming quality of most "Review" articles. Their authors generally view the world in black and white terms—a conflict between the good guys (the average, basically honest but put-upon citizenry) and the bad guys ("politicans" and "bosses"). The typical "Review" solution to the problem of corruption calls for both structural changes—nonpartisan elections, city manager government, etc.—and citizen action—the uprising of an alert, informed, and indignant public against evil machines. Local politics is represented as a morality play; an example is the story of municipal reform in Des Moines in the 1920's:

> A remarkable story * * * one in which taxpayers were arrayed against politicians, prosecuting attorneys against slick lawyers, and municipal graft against good government. It is the story of how an

[10] Arnold A. Rogow and Harold D. Lasswell, "Power, Corruption, and Rectitude" (Englewood Cliffs: Prentice-Hall, 1963), p. 72.
[11] Cf. Eric L. McKitrick, "The Study of Corruption," 72 Political Science Quarterly 507 (December 1957).
[12] Sir Ernest Barker, "Greek Political Theory" (London: Methuen, 1918), p. 13.
[13] Joel Margolis, a graduate student in the Department of Political Science, University of Wisconsin, performed the research upon which this review of the literature is based.
[14] Ironically, there has been a strong interest in corruption in the years since World War II, even though ethics in government have probably been at a higher level than at most other periods in our history. For a brief overview of American corruption which puts recent misdeeds in their proper historical perspective, see Sidney Warren, "Corruption in Politics," 22 Current History 65–69, 211–215, 285–289, and 348–354 (1952).
[15] The ideas and work of the major muckrakers are summarized in David Mark Chalmers, "The Social and Political Ideas of the Muckrakers" (New York: Citadel Press, 1964).

> American city cleaned house, lodged a number of public servants * * * in the State's penal institutions * * * placed an increased value on its tax dollar, and put its public affairs on a plane of decency and efficiency all in the last two years * * *
>
> The people * * * who have been looted see the dawn of a new day in popular self-government.[16]

The official investigations of political corruption display a similar degree of specificity and simplicity. Both Federal (e.g., the Wickersham Commission and the Kefauver and McClellan committee hearings) and State (e.g., the Massachusetts Crime Commission and the Illinois Crime Investigating Commission reports) agencies hold hearings, report that crime and corruption were found in city X or department Y, and then call for prosecutions and new legislation to correct these situations. Little time or space is devoted to analysis of the social or political causes of the events portrayed.

In contrast with these numerous but superficial journalistic and official investigations and reports, social scientists have had an infrequent but somewhat more analytical interest in corruption. Corruption has seldom been the direct focus of their work, but has often been discussed in connection with other phenomena. Generally using the "functional" approach [17] applied earlier in this report, students of political parties, for example, have argued that corruption can serve as an important supplement to legal patronage [18] as a means of financing and holding together a political machine.[19] More broadly, it has been argued that corrupt practices may be necessary to overcome the decentralization of government brought about by the separation of executive, legislative, and judicial processes, the creation of independent boards and commissions, etc.[20] Finally, corrupt distribution of governmental jobs and services has been viewed as a mechanism for instilling a feeling of national identity in new immigrant populations, as well as providing for their social welfare.[21]

From another point of view, political corruption has been considered functional to the business community in offering protection against aggressive competition, speed in finalizing contracts with government, and freedom from cumbersome codes and regulations.[22] In underdeveloped nations, Nathaniel Leff feels that corruption can be a vital catalyst in inclining political leaders toward economic development, mobilizing the state bureaucracy to aid entrepreneurs, and paying off the existing "power elite" to tolerate economic and social change.[23] The benefits that corruption offers to legitimate businessmen accrue also to illegitimate enterprises; as we have seen in Wincanton, corruptly procured protection allowed Irv Stern to stabilize the gambling industry and assign contracts with the city, while landowners and businessmen were able to buy immunity from building and zoning regulations.

A third group of studies has served to break down any false notions that corruption and criminality are sharply distinct from the values and way of life of "law-abiding" members of society. A number of studies have shown that to a certain extent criminal careers mirror the approved values of seeking social advancement, prestige, and having one's own business; furthermore, gamblers and racketeers are frequently respected and emulated members of immigrant and lower class social groups.[24] Finally, as law enforcement officers know all too well, some members of all social classes condone or approve gambling and corruption, although many citizens may also, either ambivalently or hypocritically, demand strict law enforcement.[25] Because of these conflicts between legal norms and actual popular attitudes, several political scientists have concluded that corruption can perform the valuable function of permitting the continued existence of the society. Instead of a direct confrontation between the norm and the fact, corrupt enforcement of the laws can permit quiet fulfillment of both sets of values, e.g., through a territorial arrangement in which "good neighborhoods" are kept free of gambling and prostitution while other areas of the city or metropolitan area are "wide open." [26] Until legal norms coincide with popular values, these corruptly induced adjustments allow the society to run more smoothly.[27]

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[16] Merze Marvin, "Des Moines Cleans House," 14 National Municipal Review 539 (September, 1925).

[17] See Robert K. Merton, "Social Theory and Social Structure," revised edition (New York: Free Press, 1957), pp. 19–87; Eric L. McKitrick, "The Study of Corruption," 72 Political Science Quarterly 502–514 (December, 1957); Don Martindale, editor, "Functionalism in the Social Sciences" (Philadelphia: American Academy of Political and Social Sciences, 1965).

[18] On the role of patronage in the party system, see V. O. Key, Jr., "Politics, Parties and Pressure Groups," 4th ed. (New York: Thomas Y. Crowell, 1958), ch. 13; and James Q. Wilson, "The Economy of Patronage," 69 Journal of Political Economy 369–380 (August, 1961).

[19] For a general description of city machines, see Edward C. Banfield and James Q. Wilson, "City Politics" (Cambridge: Harvard University Press, 1963), ch. 9. Literature on some of our more famous city bosses is listed in Charles R. Adrian, "Governing Urban America" (New York: McGraw-Hill, 1961) pp. 498–499.

[20] Henry Jones Ford, "Municipal Corruption," 19 Political Science Quarterly 673–686 (1904).

[21] V. O. Key, Jr., "The Techniques of Political Graft in the United States," unpublished Ph. D. dissertation, Department of Political Science, University of Chicago, 1934.

[22] Ibid.; McKitrick, op. cit. supra, n. 5.

[23] Nathaniel H. Leff, "Economic Development through Bureaucratic Corruption," 8 American Behavioral Scientist 8–14 (November, 1964).

[24] Daniel Bell, "Crime as an American Way of Life," in "The End of Ideology" (New York: Free Press, 1960); William Foote Whyte, "Street Corner Society" (Chicago: University of Chicago Press, 1943), pp. 111–193; David Matza, "Delinquency and Drift" (New York: John Wiley, 1964); Donald R. Cressey, "The Functions and Structure of Criminal Syndicates," a report to the President's Commission on Law Enforcement and Administration of Justice, 1966.

[25] Charles E. Merriam, "Chicago: A More Intimate View of Urban Politics" (New York: MacMillan, 1929), pp. 54–60; Virgil W. Peterson, "Obstacles to Enforcement of Gambling Laws," 269 Annals 9–20 (May, 1950).

[26] Merriam, op. cit. supra, n. 13.

[27] Harold D. Lasswell, "Bribery," 2 Encyclopedia of the Social Sciences 690–692 (New York: MacMillan, 1930); M. McMullan, "A Theory of Corruption," 9 Sociological Review 181–201 (July 1961); Key, op. cit. supra, n. 9.

ASPECTS OF THE EVIDENCE GATHERING PROCESS IN ORGANIZED CRIME CASES: A PRELIMINARY ANALYSIS

by G. Robert Blakey

Contents

The most flagrant manifestation of crime in America is organized crime. It erodes our very system of justice —in all spheres of government. It is bad enough for individuals to turn to crime because they are misguided or desperate. It is intolerable that corporations of corruption should systematically flaunt our laws.

LYNDON B. JOHNSON,
"Special Message on Crime,"
March 9, 1966.

112 Cong. Rec. 5146

SUMMARY

From a legal standpoint, organized crime continues to grow, despite efforts to deal with it, because of defects in the evidence gathering process. Existing substantive criminal theory is adequate to deal with organized criminal activity. Law, however, is not self-executing. To bring criminal penalties into play it is necessary to develop legally admissible evidence. Above all else, the testimony of witnesses is indispensable in the prosecution of organized crime. The existing legal tools available to develop such testimony need to be strengthened, and alternatives need to be sanctioned. The investigatory power of grand juries must be reinforced. Immunity grant and similar legislation must be broadened. The law of perjury must be vitalized. Most importantly, legislation must be enacted authorizing the electronic surveillance techniques necessary to develop witnesses, to corroborate their testimony, and to serve as an evidentiary substitutes for them. Criminal sanctions will play little or no role in any attempt to arrest or reverse the growth of organized crime until such steps are taken.

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INTRODUCTION

Mr. Justice Frankfurter once observed of journeys in the law that often "where one comes out on a case depends on where one goes in." [1] So it is in any examination of the legal tools presently available or proposed to deal with organized crime. The attitudes and assumptions people bring to the controversy color, shape and determine the resolutions they propose.[2] At one extreme, some seem to believe that the social order depends almost exclusively on punishment by law, and requires the capture, conviction and severe treatment of as many

[1] *United States* v. *Rabinowitz*, 339 U.S. 56, 69 (1950).

[2] See generally Schwartz, *On Current Proposals to Legalize Wiretapping*, 103 U. PA. L. REV. 157-59 (1954).

culprits as possible. To these people, proposals to increase the power of those who administer the penal system, therefore, naturally strike a responsive cord. Privacy may be important, but justice is always paramount. At the other extreme, some seem to think that all criminal law is simply crudely disguised vengeance, that incarceration is a pointless cruelty deterring or reforming no one, embittering its victims more than it protects society and inflicting less pain on the guilty than on innocent dependants. To these people, proposals to increase the power of those who administer the criminal law are always unnecessary and constitute unwarranted intrusions into the life of an individual. Privacy is paramount. Justice counts for little if anything. Between these two untenable extremes, there lies a middle course, which commends itself to moderates. A system of penal law must maintain both individual privacy and justice. Neither value can be dogmatically accorded paramount priority. Each issue in the system calls for a careful and informed judgment weighing both values. No judgment is final. The balance may at any time shift. Every balance struck must always remain open to reconsideration. Law, like life, is a trade-off, a compromise of absolutes, always to be pragmatically assessed. The problem is, as Pound put it, "one of compromise; of balancing conflicting interests and of securing as much as may be with the least sacrifice of other interests." [3] It is in this context, therefore, that the existing law and various proposals to change that law must be considered.

CONSPIRACY THEORY

The utility of conspiracy theory in the prosecution of organized crime is manifest. No other single substantive legal tool has been as effective in bringing organized crime to book. Nevertheless, a dispassionate examination and analysis of its origin, development and use today leaves a feeling of uneasiness. An almost direct relation seems to exist between its present efficiency and its potential threat to individual liberty.

The exact origin of conspiracy theory in the common law apparently is not known. While it first received legislative recognition as early as 1305,[4] it did not reach full maturity until the 17th century when the criminal law experienced perhaps its greatest growth largely at the hands of the infamous Star Chamber. In 1611, the Star Chamber in the *Poulterers Case* [5] held for the first time that an unexecuted agreement was itself punishable. Emphasis was thus shifted from the substantive crime to the agreement which preceded it. Thereafter, the history of conspiracy theory aptly illustrated, as Mr. Justice Jackson has pointed out, "the tendency of a principle to expand itself to the limit of its logic." [6]

Writing in 1842, Chief Justice Shaw in the leading case of *Commonwealth* v. *Hunt* [7] summed up the historical development of conspiracy law and gave to the concept its classic definition: "a combination of two or more persons, by some concerted action, to accomplish some criminal or unlawful purpose, or to accomplish some purpose, not in itself criminal or unlawful, by criminal or unlawful means."

The development of conspiracy theory in the law constituted an acute recognition by society of the special danger presented by group crime.[8] Division of labor, specialization, anonymity, complexity of organization, continuity of operation, insulation from the normal investigative techniques of law enforcement, enhanced ability to corrupt the processes of law enforcement, and the accumulation of capital and skills are all made possible. There is no question that multiple-party, conspiratorial organized crime presents to society a challenge materially different from incident crime. Conspiracy theory is the attempt of the law to take the measure of that difference.

The United States,[9] New York,[10] Illinois [11] and California [12] have statutory provisions prohibiting conspiracy. The California statute is based on the Field Code, the pioneer attempt at codification of the criminal law in the United States. The Illinois and New York provisions are the product of the recent revisions of their penal codes. Each modifies the common law and requires the commission of an overt act in addition to the agreement itself.[13] The requirement has small substantive significance, however, since the overt act need not be criminal.[14] Indeed, it may be as innocuous or as incriminating as a single phone call.[15]

Punishment under the Federal,[16] New York [17] and Illinois [18] statutes is made proportionate to the substantive crime. This has presented little difficulty on the Federal level since most offenses committed by those engaged in organized crime are felonies.[19] Illinois, however, has experienced difficulty here. A major organized crime activity, gambling, under Illinois law in the past has been generally considered only a misdemeanor.[20] This problem was eliminated by the enactment of a syndicated gambling act.[21] Under the California statute, on the other hand, it is possible to secure a stiffer sentence by using the conspiracy statute.[22] This device has been carefully and effectively used by California prosecutors to strike at organized crime, particularly professional gambling.

Conspiracy theory itself differs little from jurisdiction to jurisdiction. A conspiracy is thought to constitute a continuing crime.[23] Criminal liability thus remains viable during the entire life of any organized criminal activity. While each co-conspirator must be aware of the existence of co-conspirators,[24] he need not know their identity [25] or the exact outlines of the criminal organization.[26] Indeed, it is not necessary that any expressed communication take

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[3] POUND, CRIMINAL JUSTICE IN THE AMERICAN CITY 18 (1922).
[4] Ordinance of Conspirators, 1305, 33 Edw. 1.
[5] 9 Co. Rep. 55b, 77 Eng. Rep. 813 (Star Chamber 1611).
[6] *Krulewitch* v. *United States*, 336 U.S. 440, 445 (1949) (concurring opinion quoting CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 51 (1929)).
[7] 45 Mass. (4 Met.) 111, 123 (1842).
[8] *Callaman* v. *United States*, 364 U.S. 587, 593-94 (1961) (Frankfurter, J.); *Krulewitch* v. *United States*, 336 U.S. 440, 448-49 (1949) (Jackson, J., concurring).
[9] 18 U.S.C. § 371 (1964). To keep the paper within manageable proportions and because the major endeavors of organized crime operate within these jurisdictions, only Federal, New York, Illinois, and California law will be reviewed.
[10] N.Y. REV. PEN. LAW §§ 105.00-.30 (effective Sept. 1, 1967).
[11] ILL. ANN. STAT. ch. 38, § 8-2 (Smith-Hurd Supp. 1967).
[12] CAL. PEN. CODE § 182.
[13] 18 U.S.C. § 371 (1964); N.Y. REV. PEN. LAW § 105.20 (effective Sept. 1, 1967); ILL. ANN. STAT. ch. 38, § 8-2 (Smith-Hurd Supp. 1967); CAL. PEN. CODE § 184.
[14] See, *e.g.*, *Yates* v. *United States*, 354 U.S. 298, 333-34 (1957). Its chief significance is procedural. N.Y. REV. PEN. LAW § 105.25 (effective Sept. 1, 1967).
[15] See, *e.g.*, *Smith* v. *United States*, 92 F.2d 460 (9th Cir. 1937).
[16] 18 U.S.C. § 371 (1964).
[17] N.Y. REV. PEN. LAW §§ 105.00-.30 (effective Sept. 1, 1967).
[18] ILL. ANN. STAT. ch. 38, § 8-2(c) (Smith-Hurd Supp. 1967).
[19] See, *e.g.*, 18 U.S.C. § 1952 (1964), as amended, 18 U.S.C. § 1952(b) (Supp. I, 1965) (interstate travel in aid of racketeering: five years).
[20] See, *e.g.*, ILL. ANN. STAT. ch. 38, § 28-1 (Smith-Hurd 1964).
[21] ILL. ANN. STAT. ch. 38, § 28-1.1 (Smith-Hurd Supp. 1967).
[22] CAL. PEN. CODE § 182 provides for imprisonment in the state prison for a term up to three years in a conspiracy case, even though the substantive crime may carry a lighter sentence. See, *e.g.*, CAL. PEN. CODE § 337a (bookmaking: up to one year in the state prison).
[23] *Hyde* v. *United States*, 225 U.S. 347, 369 (1912).
[24] *United States* v. *Falcone*, 311 U.S. 205 (1940).
[25] *Blumenthal* v. *United States*, 332 U.S. 539, 557-58 (1947). Where the co-conspirator is indifferent as to the number of his fellow coconspirators, he takes "his chances." *United States* v. *Andolschek*, 142 F.2d 503, 507 (2d Cir. 1944) (L. Hand, J.).
[26] *People* v. *Cornell*, 188 Cal. App. 2d 668, 10 Cal. Reptr. 717 (1961).

place between the conspirators.[27] Criminal liability attaches to those on the periphery and reaches into the center of the conspiracy touching the chief figures no matter how hard they might seek to insulate themselves from overt criminal activity. All members of a criminal organization are thus equally liable for the crime of conspiracy. In addition, concerted criminal activity carries with it vicarious substantive criminal liability.[28] Every party to a conspiracy is liable for any offense committed by a co-conspirator reasonably contemplated by the conspiracy and committed in furtherance of it. Management-level members of a criminal combine may thus be held responsible not only for the crime of conspiracy but also for substantive offenses committed by others in furtherance of it.

All of this may be concretely illustrated by the investigation, prosecution and conviction for compulsory prostitution [29] of Charles "Lucky" Luciano, the head of a criminal syndicate in New York City in the late 1930's. Over a period of years, Luciano gained monopoly control over prostitution in New York. Luciano himself did not take an active part in the daily operation of the business. His organization included such diverse functionaries as "strong arm enforcers," "protection collectors," "booking agents," "keepers of the houses" and the prostitutes themselves. Indeed, Luciano's combine was so large and well set up that it is clear that he did not know all of the people in his organization. In addition, the organization's activities were not limited solely to vice aspects of the business. If arrested, the girls were supplied bail, counsel, and other help in escaping punishment. Ultimately, Luciano's substantive conviction for compulsory prostitution rested on evidence which established his role in the overall conspiracy.

The list of major [30] and minor [31] organized crime figures convicted by utilizing conspiracy theory is long. Indeed, there is no question that existing conspiracy theory is equal to the challenge of organized crime. The failure of the criminal law to meet the challenge of organized crime must be sought elsewhere.

We began this section with the observation that modern conspiracy law poses a danger to individual liberty. The danger does not lie in the theory itself. It lies instead in what is often necessary to do to bring a successful conspiracy prosecution today. Typically, the organized crime conspiracy case must be built largely on circumstantial evidence. Direct evidence or confessions are seldom available. Consequently, trial courts have had to give the prosecution wide latitude in the introduction of evidence if convictions are ever to be obtained.[32] Testimony has been admitted relating to the events occurring prior to the earliest date in the indictment; it has even been admitted when it relates to events occurring prior to the date of the enactment of the statute prohibiting the substantive offense.[33] The only test has been one of remoteness and relevancy.[34] Reviewing courts, moreover, have accorded great discretion to trial courts in admitting such evidence,[35] and once the unlawful agreement has been established, only slight evidence has been held necessary to connect a co-conspirator with the conspiracy.[36] Usually, of course, hearsay testimony cannot be used to show guilt, and an individual can be held criminally responsible only for his own acts. Establish a conspiracy, however, and connect a party with it by such slight independent evidence, and "any act or declaration by one co-conspirator committed in furtherance of the conspiracy and during its pendency is admissible against each co-conspirator." [37]

Again, an individual usually stands trial alone. Fifteen to twenty defendants, however, are not uncommon in the typical conspiracy trial.[38] A great quantity of evidence of wrong-doing is introduced. Little of it in reference to time, place and person deals directly with any single individual. Most of it must be introduced initially under instructions limiting its admissibility until the conspiracy itself has been prima facie established.[39] The danger that an individual will get caught up in an indiscriminate general finding of guilt is real. It is here that the danger to individual liberty lies.

Recognizing this danger, the law has developed a number of devices to minimize or eliminate it. Initially, of course, the decision to bring a multiple-defendant conspiracy prosecution lies with the prosecutor. Today, however, on the Federal level [40] and in New York,[41] Illinois [42] and California,[43] it is possible to move the trial court for a severance and a separate trial. Denying the motion lies in the discretion of the court. Nevertheless, the motion is seldom granted. Indeed, after New York abolished its old rule according a defendant an absolute right to severance in 1926, it was fourteen years before the Court of Appeals reversed a trial court's denial.[44]

Granting a severance seldom works substantial justice. Too often the limited resources of the government dictate the unwisdom of trying each defendant separately. This is particularly true in the case of parties on the periphery of the organization, who should nonetheless be held responsible for their conduct. In addition, the added burden on prosecution witnesses is formidable. It is extremely difficult to secure cooperation in organized crime cases. The prospect of multiple trials virtually guarantees that it will not be secured. A severance also gives to all, save those first tried, virtually complete pretrial criminal discovery, a serious problem in the area of organized crime. Further, multiple trials increase the prospect of inconsistent verdicts, a specter which no system of justice whose impact is significantly didactic can easily ignore.

In addition to severance, other devices are available.[45] Defense counsel, for example, can identify themselves and their client when they participate actively in the trial. A seating chart of the defendants can be given to the jury.[46] It is possible to allow the jury to take notes.[47]

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[27] *People* v. *Fedele*, 366 Ill. 618, 10 N.E.2d 346 (1937).
[28] *Pinkerton* v *United States*, 326 U.S. 640 (1946); *People* v. *Sisson*, 31 Cal. App. 2d 92, 87 P.2d 420 (1939); *People* v. *Suddeth*, 374 Ill. 132, 28 N.E.2d 268 (1940); *People* v. *Luciano*, 277 N.Y. 348, 14 N.E.2d 433 (1938).
[29] *People v. Luciano*, *supra* note 28.
[30] See, *e.g.*, *United States* v. *Aviles*, 274 F.2d 179 (2d Cir. 1960) (conviction of Vito Genovese, the successor head of Luciano's syndicate).
[31] See, *e.g.*, *United States* v. *Agueci*, 310 F.2d 817 (2d Cir. 1962) (conviction of Joseph Valachi, member in the Genovese syndicate)
[32] *Nye & Nissen* v. *United States*, 168 F.2d 864, 857 (9th Cir. 1948), *aff'd*, 336 U.S. 613 (1949).
[33] See, *e.g.*, *United States* v. *Barrow*, 229 F. Supp. 722 (E.D. Pa. 1964), *modified on other grounds*, 363 F.2d 62 (3d Cir. 1966).
[34] See, *e.g.*, *United States* v. *Dennis*, 183 F.2d 201, 231 (2d Cir. 1950) (L. Hand, J.), *aff'd on other grounds*, 341 U.S. 494 (1951).
[35] *People* v. *Drury*, 335 Ill. 529, 167 N.E. 823 (1929), *affirming* 250 Ill. App. 547 (1928); *People* v. *Connolly*, 253 N.Y. 330, 171 N.E. 393 (1930), *affirming* 227 App. Div. 167, 237 N.Y. Supp. 303 (1929).
[36] *Tonplain* v. *United States*, 42 F.2d 202 (5th Cir.), *cert. denied*, 282 U.S. 886 (1959).
[37] *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 984–85 (1959).
[38] See, *e.g.*, *United States* v. *Aveles*, 274 F.2d 179 (2d Cir. 1960).
[39] *Glasser* v. *United States*, 315 U.S. 60, 74 (1942).
[40] FED. R. CRIM. P. 14.
[41] N.Y. CODE CRIM. PROC. § 391.
[42] ILL. ANN. STAT. ch. 38, § 114-8 (Smith-Hurd 1964).
[43] CAL. CODE CRIM. PROC. § 1098.
[44] *People* v. *Feolo*, 282 N.Y. 276, 26 N.E.2d 256 (1940).
[45] See generally Wessel, *The Conspiracy Charge as a Weapon Against Organized Crime*, 38 NOTRE DAME LAW. 689 (1963); *Developments in the Law—Criminal Conspiracy*, 72 HARV. L. REV. 920, 980–82 (1959).
[46] *United States* v. *Carlisi*, 32 F. Supp. 479 (E.D.N.Y. 1940).
[47] See, *e.g.*, N.Y. CODE CRIM. PROC. § 426; *United States* v. *Campbell*, 138 F. Supp. 344, 349 (N.D. Iowa 1956) (collection of statutes).

Pre-trial stipulations on non-essential matters can be worked out. It is thus not possible to say that the range of techniques is unduly limited.

While it is possible, although difficult, to conduct the multiple defendant conspiracy trial fairly, there is, however, one large area where major improvement could be made: the evidence gathering process itself. Most of the crucial problems now associated with the conspiracy trial—ambiguous circumstantial evidence, possibly suspect accomplice testimony,[48] prejudicial variance where multiple conspiracies are proven,[49] termination of the conspiracy and the issues of the statute of limitations [50] or the co-conspirator declaration rule—are basically evidentiary questions. Defendant and prosecution alike suffer when there are deficiencies in the evidence available. If we can significantly raise the quantity and quality of the evidence available to the prosecution in the types of situations best handled through the device of the conspiracy charge, we can reasonably expect materially to reduce the significance and re-occurrence of these questions. More convictions could not only be secured, but fairly secured. Evaluation of subsequent proposals in this paper in the area of the evidence gathering process, particularly immunity grants and electronic surveillance techniques, should take this into account: the tools have positive civil liberties implications.

THE EVIDENCE GATHERING PROCESS

If the existing criminal conspiracy theory is adequate to deal with organized crime, why, it might be asked, has organized crime continued to grow? On reflection, the answer seems apparent: the law is not self-executing. To bring criminal sanctions into play it is necessary to develop legally admissible evidence. In organized crime cases, however, witnesses simply do not volunteer to testify or to turn over relevant books and records. Indeed, as former Attorney General Nicholas deB. Katzenbach has testified, even after the case has been developed, it has been necessary to forgo prosecution "hundreds of . . . [times] because key witnesses would not testify for fear of [being murdered]." [51] Compulsory process is necessary. Traditionally, the grand jury has been the chief vehicle out of which that process has issued. Any evaluation of the evidence gathering process thus must begin with an examination of the grand jury.

THE GRAND JURY

The grand jury originated in Anglo-American law with the summoning of a group of townspeople before a public official to answer questions under oath, a system of inquiry used for such administrative purposes as the compilation of the Domesday Book of William the Conqueror.[52] In 1164, the Crown first established the criminal grand jury, a body of twelve knights, whose function was to accuse those who according to public knowledge had committed crimes.[53] Witnesses as such were not heard before this body. Two years later at the Assize of Clarendon, Henry II established the grand jury largely in the form in which it is known today.

During the 13th and the early part of the 14th century the grand jurors themselves served as petit jurors in the same matters in which they presented indictments. Not until the eventual separation of the grand jury and petit jury did the function of accusation become clearly defined and did crown witnesses come to be examined in secret before the grand jury.

The original function of the grand jury was to give to the central government the benefit of local knowledge in the apprehension of those who violated the King's peace. Its value as a buffer between citizen and state, the function which first comes into mind today,[54] did not fully mature until well into the 17th century. In 1681 in *Colledge's* case [55] and the *Earl of Shaftesburry's* [56] case, the grand juries which first heard the evidence of the Royal prosecutor refused to indict. These cases are usually marked as thus establishing the institution of the grand jury as a bulwark against despotism.[57] Two years later the propriety of the grand jury report [58] was also indirectly litigated. A Chester grand jury without returning a formal indictment charged certain Whigs with seditious conduct. An action for libel was brought and the court unanimously found for the defendants, apparently thus sustaining the actions of the jurors.[59]

The modern grand jury is a "prototype" of its ancient British counterpart.[60] Aptly termed "a grand inquest" by the Supreme Court in *Blair* v. *United States*,[61] its inquisitorial powers are virtually without rival today. Despite early attempts in this country to limit the scope of its investigatory powers to that which was brought to its attention by prosecutor or court,[62] its common law powers have survived largely without artificial limitations.[63] No such limitation is found, for example, in Federal,[64] New York [65] or California [66] law, where the grand jury is em-

[48] The whole question of corroborating accomplice testimony is beyond the scope of this paper. It is required by CAL. PEN. CODE § 1111 and N.Y. CODE CRIM. PROC. § 399. The rule stands with the two witness rule, discussed below, as an unjustifiable impediment to legitimate convictions in organized crime cases. It adds legal insulation to the factual insulation sought by higher-ups in criminal organizations. The N.Y. COMM. ON THE ADMINISTRATION OF JUSTICE, THIRD SUPPLEMENTAL REP. 16 (1937), aptly characterized the rule as "a refuge of organized crime [which] protects the principals in racketeering cases." Their recommendation that the rule be abolished, however, was not adopted. The rule is not followed in Federal or Illinois courts. See, *e.g.*, *Ellis* v. *United States*, 321 F.2d 931 (9th Cir. 1963); *People* v. *Alexander*, 198 Ill. 2d 472, 172 N.E.2d 785 (1961). See generally 7 WIGMORE, EVIDENCE §§ 2056 *et seq.* (3d ed. 1940). On balance it seems that the rule should be abolished. Among the cases lost because of it, an indictment for murder returned in 1946 against Vito Genovese, a head of a New York syndicate, had to be dismissed after the murder of one of the two key witnesses because the other's testimony was uncorroborated. N.Y. Times, Oct. 4, 1966, p. 94, col. 3.

[49] *Kotteakos* v. *United States*, 328 U.S. 750 (1946) (prejudice found); *Berger* v. *United States*, 295 U.S. 78 (1935) (prejudice not found).

[50] *Grunewald* v. *United States*, 353 U.S. 391, 396–97 (1957); *Cook* v. *People*, 231 Ill. 9, 82 N.E. 863 (1907); *People* v. *Hines*, 284 N.Y. 93, 29 N.E.2d 483 (1940).

[51] Testimony of Nicholas deB. Katzenbach, *Invasions of Privacy, Hearings Before the Subcommittee on Administrative Practice and Procedure of the Sen. Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 3, at 1158 (1965). The related problem of material witnesses is beyond the scope of this paper. See generally Comment, 18 Mo. L. REV. 38 (1953).

[52] See generally Note, *The Grand Jury as an Investigatory Body*, 74 HARV. L. REV. 590 (1961), and authorities cited therein.

[53] ORFIELD, CRIMINAL PROCEDURE FROM ARREST TO APPEAL 137–39 (1947).

[54] See, *e.g.*, *Hoffman* v. *United States*, 341 U.S. 479, 485 (1951); *Hale* v. *Henkel*, 201 U.S. 43, 59 (1906).

[55] [1681] 8 How. St. Tr. 550.

[56] *Id.* at 759.

[57] See generally Kuh, *The Grand Jury "Presentment": Foul Blow or Fair Play?* 55 COLUM. L. REV. 1104 (1955). Ultimately, indictments were obtained from more complaint juries, and both defendants were convicted.

[58] The grand jury report and the presentment are sometimes confused. The report is a declaration by the jury relating to a situation not amounting to an indictment. The presentment is the notice taken by a grand jury of an offense from their own knowledge or observation without any bill of indictment laid before them at the suit of the King. 4 BLACKSTONE, COMMENTARIES 301 (Andrews ed. 1899). From the English presentment the Crown prosecutor would then draw up the formal Latin indictment. See generally Kuh, *supra* note 57, at 1104 n. 7, and authorities cited therein.

[59] Proceedings between Charles Earl of Macclesfield and John Starkey, Esq., [1684] 10 How. St. Tr. 1330.

[60] *Cf. Blair* v. *United States*, 250 U.S. 273, 282 (1919).

[61] *Id.* at 282.

[62] See generally Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L., C. & P. S. 26, 40–42 (1955). *Compare* grand jury charge of Justice Field, 30 Fed. Cas. 993 (C.C.D. Cal. 1872), with *Hale* v. *Henkel*, 201 U.S. 43, 59 (1906).

[63] See, *e.g.*, *Ward* v. *State*, 2 Mo. 120 (1829), where after a St. Louis grand jury questioned a wide variety of witnesses in a gambling probe, the court was asked to quash the resulting indictments on the grounds they were the product of a "fishing expedition." The court refused, commenting that to hold otherwise "would strip [the grand jury] of [its] greatest utility and convert [it] into a mere engine to be acted upon by circuit attorneys or those who might choose to use them."

[64] *Hale* v. *Henkel*, 201 U.S. 43 (1905).

[65] *New York* ex rel. *Livingston* v. *Wyatt*, 186 N.Y. 383, 79 N.E. 330 (1906).

[66] *Samish* v. *Superior Court*, 28 Cal. App. 2d 685, 83 P.2d 305 (1938).

powered to inquire into and return indictments for all crimes committed within its jurisdiction.[67] Indeed, the grand jury has usually been held open to citizen complaints.[68] Secrecy, however, governs its hearings.[69] Only in California has this rule been relaxed. There, "public sessions" are permitted in cases affecting the "general publice welfare involving alleged corruption, misfeasance, or malfeasance in office. . ." [70] Grand jury reports, often a catalyst for reform, may also be filed in New York,[71] California,[72] and Illinois.[73] Only under Federal law has this historic right been restricted.[74]

Under Federal [75] and New York [76] law the modern grand jury is composed of not less than sixteen nor more than twenty-three persons. Illinois [77] law specifies that the jury shall consist of twenty-three persons of whom sixteen shall constitute a quorum. In California, except in Los Angeles,[78] nineteen persons make up the grand jury. Twelve affirmative votes are required in each jurisdiction to return an indictment.[79]

Ultimately, the power of the grand jury rests on the subpoena. Only through it can witnesses be compelled to appear and the production of books and records be required. In New York, the prosecutor subpoenas witnesses in the name of the grand jury.[80] California permits him to subpoena witnesses for the jury in his own name.[81] Under Federal law, subpoenas issue only out of court.[82] Uniform state legislation in force in New York,[83] California [84] and Illinois [85] gives state grand juries subpoena power over individuals and books and records [86] in a forty-four state area. No citizen any place where the legislation has been enacted can avoid his duty to appear to testify.[87]

Apart from the use of the subpoena, the grand jury usually must depend on existing law enforcement agencies to do investigatory work. Only California provides for the hiring of experts to examine records of public officials [88] and authorizes the Attorney General to hire special counsel and investigators upon request of the grand jury.[89]

Everywhere the prosecutor is recognized as the prime legal advisor and interrogator for the grand jury.[90] It is he who usually decides which cases will be investigated or which matters will be presented to the grand jury.[91] The grand jury, of course, retains power to move on its own, but it is seldom exercised today. In California, the State Attorney General is also permitted to have a grand jury impaneled at any time [92] and to take full charge of the presentation.[93]

Today the grand jury is generally thought of as "an arm of the court." [94] This means that the jury is subject to the supervisory power of the court. The court impanels it,[95] charges it,[96] chooses its foreman,[97] protects against abuses of its authority,[98] and ultimately discharges it.[99] Usually, the life of the grand jury parallels the term of court. New York [100] draws a new panel each term of the Supreme Court; the grand jury terminates at its end. Illinois follows a similar rule; the grand jury's life may, however, extend up to eighteen months, and in Cook County up to six grand juries may sit at one time.[101] California [102] and Federal law [103] allow the court to impanel grand juries whenever it is appropriate. Under Federal law, the grand jury's term extends until discharge, but not longer than eighteen months.[104] The number of juries is left up to the discretion of the court.[105] A Federal court may also discharge a grand jury at any time "for any reason or for no reason" [106] even though the jury has not finished the business before it. In contrast, California law limits the number of grand juries, but authorizes their discharge only "on completion of the business before the jury." [107]

The conclusion seems inescapable: "As an instrument of discovery against organized crime, the grand jury has no counterpart." [108] Despite its broad powers of inquiry, however, the grand jury needs to be strengthened. A grand jury should be called into session in each jurisdiction once every eighteen months. This would guarantee periodic review of the law enforcement situation by an independent body. The jury should be selected without discrimination from all of the residents within its jurisdiction. The foreman should be selected democratically by the jury itself—not appointed by the court. This would guarantee that the grand jury would not be subject to improper influences by the court. The right of the jury to pursue any violation of the criminal law within its jurisdiction should be guaranteed; the jury should not be limited by the charge of the court. The right of any private party to approach the jury through the foreman should be secured. Citizens would then have a recourse to rectify wrongs outside of regular law enforcement process. The life of the jury should be set at eighteen months with the right to extend its term up to thirty-six months at six month intervals on a showing to the court that its business is not finished. Should the court refuse to extend the term, or otherwise attempt to prematurely discharge the jury, an immediate right of appeal with provision for automatic suspension of the discharge order should be provided. The jury should have the right to petition the court to impanel other

[67] See, *e.g.*, CAL. PEN. CODE § 917; N.Y. CODE CRIM. PROC. § 245.
[68] *Cf.* 1794 ATT'Y GEN. ANN. REPS. 22; *People* v. *Lawrence*, 21 Cal. 368 (1863). *But see* ILL. ANN. STAT. ch. 38, § 112-6, comment, at 276 (Smith-Hurd Supp. 1967); *People* v. *Parker*, 374 Ill. 524, 30 N.E. 2d 11 (1940) (person held in contempt for private communication to grand jury).
[69] See, *e.g.*, ILL. ANN. STAT. ch. 38 § 112-6 (Smith-Hurd Supp. 1967).
[70] CAL. PEN. CODE § 939.1.
[71] N.Y. CODE CRIM. PROC. § 253-a.
[72] *Cf. Irvin* v. *Murphy*, 129 Cal. App. 713, 19 P.2d 292 (1933), which, in addition, accords the report a privilege against libel.
[73] *People* v. *Polk*, 21 Ill. 2d 594, 174 N.E.2d 594 (1961); ILL. ANN. STAT. ch. 38, § 112, comment, at 265 (Smith-Hurd 1964).
[74] See, *e.g.*, *Application of United Elec. Radio & Mach. Workers of America*, 111 F. Supp. 858 (S.D.N.Y. 1953).
[75] FED. R. CRIM. P. 6(a).
[76] N.Y. CODE CRIM. PROC. § 224.
[77] ILL. ANN. STAT. ch. 38, § 112-2(a) (Smith-Hurd 1964).
[78] CAL. PEN. CODE § 888.2.
[79] ILL. ANN. STAT. ch. 38, § 112-4 (Smith-Hurd 1964). FED. R. CRIM. P. 6(b); N.Y CODE CRIM. PROC. § 224; CAL PEN. CODE § 888.2 (Los Angeles requires 14). An indictment presently is not thought constitutionally mandatory. *Hurtado* v. *California*, 110 U.S. 516 (1884).
[80] N.Y. CODE CRIM. PROC. §§ 609, 255(2).
[81] CAL. PEN. CODE § 939.2.
[82] *Hale* v. *Henkel*, 201 U.S. 43 (1906).
[83] N.Y. CODE CRIM. PROC. § 618(a).
[84] CAL. PEN. CODE § 1334.
[85] ILL. ANN. STAT. ch. 38, §§ 156-1 to -6 (Smith-Hurd 1964), as amended, ILL. ANN. STAT. ch. 38, § 156-1 (Smith-Hurd Supp. 1967).
[86] *In re Saperstein*, 30 N.J. Super. 373, 104 A.2d 842, *cert. denied*, 348 U.S. 874 (1954). *Contra*, *In re Grothe*, 59 Ill. App. 2d 1, 208 N.E.2d 581 (1965).
[87] *New York* v. *O'Neill*, 359 U.S. 9, 11-12 (1959).
[88] CAL. PEN. CODE § 926.
[89] CAL. PEN. CODE § 936.
[90] CAL. PEN. CODE §§ 934-35; N.Y. CODE CRIM. PROC. § 256.
[91] See, *e.g.*, *United* v. *Steel*, 238 F. Supp. 580 (S.D.N.Y. 1965).
[92] CAL. PEN. CODE § 913.
[93] CAL. PEN. CODE § 936.
[94] *Spector* v. *Allen*, 281 N.Y. 251, 22 N.E.2d 360 (1939).
[95] *In re Grand Jury Subpoena*, 225 F. Supp. 923 (N.D. Ill. 1964).
[96] See *e.g.*, ILL. ANN. STAT. ch. 38, §112-2(b) (Smith-Hurd 1964).
[97] FED. R. CRIM. P. 6(c); N.Y. CODE CRIM. PROC. § 224; CAL. PEN. CODE § 912; ILL. ANN. STAT. ch. 38, § 112-2(b) (Smith-Hurd 1964).
[98] *In re Grand Jury Subpoena*, 225 F. Supp. 923 (N.D. Ill. 1964).
[99] ILL. ANN. STAT. ch. 38, § 112-3(a) (Smith-Hurd 1964).
[100] N.Y. CODE CRIM. PROC. § 225.
[101] ILL. CODE CRIM. PROC. § 112-3.
[102] CAL. CONST. art. 1, § 8.
[103] FED. R. CRIM. P. 6(g).
[104] FED. R. CRIM. P. 6(a).
[105] Advisory Comm. on Rule 6(a), p. 139.
[106] *In re Investigation of World Arrangements*, 107 F. Supp. 628, 629 (D.D.C. 1952).
[107] CAL. PEN. CODE § 915.
[108] Younger, *The Grand Jury Under Attack*, 46 J. CRIM. L., C. & P.S. 214, 224 (1955).

juries where its work load is excessive and the failure to do so should also be appealable. Finally, the jury should have the statutory right within its own system to appeal to the state or Federal Attorney General to replace the local prosecutor and investigative agents with special counsel and investigators where the jury is dissatisfied with the work performed for it. On the Federal level, the right to file reports should be restored. With these powers added or guaranteed, the grand jury would be a formidable social force working against organized crime. Communities everywhere would have available to them an institution for reform and for protection against both corruption and organized crime.[109]

THE DUTY TO TESTIFY AND THE PRIVILEGE AGAINST SELF-INCRIMINATION

A grand jury subpoena can compel the attendance of a witness and the production of books and records. Ultimately, however, the grand jury has no power as such to compel the witness to testify or to turn over the books and records. Securing the witness' testimony and having the books and records turned over involve the interaction of the witness' duty to testify and his privilege against self-incrimination.

Not until the 16th century did the modern witness become a common figure in civil or criminal trials.[110] Up until that time jurors were supposed to find the facts based on their own self-acquired knowledge. Indeed, the pure witness—the individual who merely happens to have relevant information and who is unrelated to either party—at this time ran the substantial risk of a suit for maintenance if he volunteered to testify.[111] This situation became, of course, wholly intolerable as litigation became more complex and juries became less and less able to resolve factual disputes on their own. Finally, in *Stat.* of *Elizabeth* in 1563,[112] provision was made for compulsory process for witnesses in civil cases. With the enactment of this statute, the risk of a suit for maintenance diminished, for "what a man does by compulsion of law cannot be called maintenance." [113]

The *Stat.* of *Elizabeth* only made it possible to testify freely; it imposed no duty to testify. Nevertheless, the step from right to duty was short, and it was soon taken. By 1612, Sir Francis Bacon in the *Countess of Shrewsbury's Trial* [114] was able to assert confidently:

> You must know that all subjects, without distinction of degrees, owe to the King tribute and service, not only of their deed and land, but of their knowledge and discovery. If there be anything that imports the King's service they ought themselves undemanded to impart it; much more, if they be called and examined, whether it be of their own fact or of another's, they ought to make direct answer.

For more than three centuries it thus has been a maxim of indubitable certainty that the "public has a right to everyman's evidence." [115] "When the cause of justice requires the investigation of the truth," as Wigmore [116] put it, "no man has knowledge that is rightly private." Nonetheless, the duty to testify, which history and society of necessity have imposed on each of us, is not absolute; it is qualified by the privilege against self-incrimination.

The history of the privilege against self-incrimination [117] is the complicated story of the hated practice of the oath *ex officio mero,* an abuse first of heresy trials in the ecclesiastical courts and then of the infamous Star Chamber, which took its rules of procedure from ecclesiastical law, and of the emotional reaction which accompanied its abolition and ultimately stopped incriminating interrogation in the common law courts. Until the early 17th century, when the long battle between King and Parliament began, no serious and successful objection had been made to the oath *ex officio.* Under proper circumstances, the canon law upheld it. Through the influence of Lord Coke, however, a change occurred. By 1615, the power of the ecclesiastical court to use the oath *ex officio* in any penal inquiry had been ended by decisions of the common law courts.[118] The Star Chamber and its similar practice were the next to go. As a direct result of public indignation at the *Lilburn Trial,*[119] where the defendant was ordered pilloried and whipped for a failure to respond to the oath, Parliament abolished both the oath and the Chamber itself.[120]

Before the Star Chamber, Lilburn himself had not claimed a privilege against self-incrimination, but merely that the proper presentment had not been made, a presentment necessary before the oath could be lawfully administered. After his cause had triumphed, however, the distinction was soon lost or ignored. The oath itself had come to be associated with the Stuart tyranny. Details were forgotten.[121] Repeatedly claimed, then assumed for argument, finally by the end of the reign of Charles II, there was no longer any doubt of its general application.[122] No one at any time in any English court could be compelled to accuse himself. It was out of this history and the experience of the colonists with the Royal Governors that the privilege ultimately found its way into our Bill of Rights in the Fifth Amendment.[123]

The modern privilege against self-incrimination applies to both Federal and state proceedings.[124] Any question the answer to which would furnish a link in a chain of evidence [125] which would incriminate the witness need not be answered "unless he chooses to speak in the unfettered exercise of his own will." [126] The privilege applies not only at trial but also in any circumstance of official interrogation.[127] Only testimonial utterances fall within its scope.[128] The privilege is personal; it may not be claimed to protect another.[129] In addition, it protects only natural persons; corporations [130] or unions [131] may not claim its protection. The privilege may be waived by the recitation of incriminating facts; [132] the law requires its waiver when an accused testifies in his own behalf at a criminal trial.[133] Generally, it must be asserted to be claimed. Otherwise it is waived. For the privilege

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[109] *Cf.* THE KEFAUVER REPORT ON ORGANIZED CRIME 200 (Didier ed. 1951).
[110] See generally 7 WIGMORE, EVIDENCE § 2190 (3d ed. 1940); Morgan, *The Privilege Against Self-Incrimination,* 34 MINN. L. REV. 1-45 (1949).
[111] See, *e.g.*, [1450] Y.B. 28 Hen. 6, 6, 1.
[112] St., 1563, 5 Eliz. 1, c. 9, § 12.
[113] Littleton arguing in [1450] Y.B. 28 Hen. 6, 6, 1.
[114] [1612] 2 How. St. Tr. 769, 778.
[115] *Cf. Piedmonte* v. *United States,* 367 U.S. 556, 558 n.2 (1961).
[116] 8 WIGMORE, EVIDENCE § 2190, at 66 (3d ed. 1940).
[117] See generally *id.* § 2250.
[118] See *id.* § 2250, at 289 nn.56 & 57, and cases cited therein.
[119] [1637] 3 How. St. Tr. 1315.
[120] St., 16 Car. 1, cc. 10, 11.
[121] Bentham, *Rationale of Judicial Evidence* (1827), 7 THE WORKS OF JEREMY BENTHAM 456, 462 (Bowring ed. 1843), quoted in 8 WIGMORE, EVIDENCE § 2250, at 292 (McNaughton rev. ed. 1961).
[122] See cases cited 7 WIGMORE, EVIDENCE § 2250, at 298-99 n.105 (3d ed. 1940).
[123] See generally Pittman, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America,* 22 VA. L. REV. 763 (1935).
[124] *Malloy* v. *Hogan,* 378 U.S. 1 (1964).
[125] *Hoffman* v. *United States,* 341 U.S. 479, 486 (1951).
[126] *Malloy* v. *Hogan,* 378 U.S. 1, 8 (1964).
[127] *Cf. Miranda* v. *Arizona,* 384 U.S. 436 (1966).
[128] *Schmerber* v. *California,* 384 U.S. 757 (1966).
[129] *Rogers* v. *United States,* 340 U.S. 367, 371 (1951).
[130] *Wilson* v. *United States,* 221 U.S. 361 (1911).
[131] *United States* v. *White,* 322 U.S. 694 (1944).
[132] *Rogers* v. *United States,* 340 U.S. 367, 373 (1951).
[133] *Spies* v. *Illinois,* 123 U.S. 131, 180 (1887).

is "merely an option of refusal not a prohibition of inquiry." [134]

Like the duty to testify, the privilege against self-incrimination, however, is not an absolute. Should a witness refuse to testify before a grand jury asserting his privilege, the inquiry need not be ended. Under proper conditions, it is possible to displace the privilege with a grant of immunity from criminal prosecution, thus removing the witness' privilege not to answer. It becomes necessary, therefore, to turn to a consideration of the immunity grant and the process whereby it may be enforced.

THE IMMUNITY GRANT AND CONTEMPT OF COURT

In England, it was only a comparatively short time after the privilege against self-incrimination had matured before various techniques to mitigate its impact on the administration of justice developed. The first reliable example occurred in the *Trial of Lord Chancellor Macclesfield* in 1725. [135] The Chancellor had been guilty of traffic in public offices. An act was passed to immunize the present Masters in Chancery so that their testimony could be compelled. Once the present "criminality" legally attaching to their actions was effectively "taken away" by the statute, their privilege against self-incrimination "ceased" to exist.[136] What Parliament found it could thus do with its amnesty powers, the King's prosecutors soon learned they could accomplish by the tendering of Royal pardons. The tradition in English law of permitting the privilege to be thus annulled stands even today unquestioned.[137]

The American colonists not only brought with them the privilege against self-incrimination, but they also adopted these various techniques. As early as 1807 in the treason trial of Aaron Burr, President Jefferson attempted to give an executive pardon to one of the witnesses against Burr.[138] The witness refused the pardon, but testified anyway. The right of a witness to refuse a pardon, and thus defeat the technique, was not clearly established until 1915, when the Supreme Court upheld the right of a grand jury witness to turn down an executive pardon from President Wilson.[139] In the intervening years the cloud which existed over the pardon technique because of the Burr trial directed the chief attention of the law toward the legislatively authorized immunity grant.

Congress first adopted a compulsory immunity statute in 1857.[140] Legally, no attack was successfully mounted upon it. Nevertheless, its operation was hardly successful, since it automatically protected against prosecution any matter about which any witness testified before Congress. One individual, who had stolen two million dollars in bonds from the Interior Department, had himself called before Congress, where he testified to a matter relating to the bonds and was immunized.[141] This was an obviously intolerable situation and the statute was soon repealed. In its place the Immunity Statute of 1862 [142] was enacted. The new statute did not grant immunity from prosecution; it merely purported to protect the witness from having his testimony subsequently used against him. Six years later the statute was broadened to cover judicial proceedings.[143] After being upheld by lower Federal courts,[144] relying on an early New York decision,[145] the statutory scheme finally reached the Supreme Court in *Counselmen* v. *Hitchcock* in 1892.[146] The Court refused to uphold the immunity statute, noting that the statute to be upheld would have to afford a protection coextensive with the privilege.[147] The Court found the protection inadequate because it did not eliminate criminality but merely protected the witness from the use of the compelled testimony. The Court observed: "It could not, and would not, prevent the use of his testimony to search out other testimony to be used in evidence against him. . ." [148]

Congress responded to the *Counselmen* decision with the Immunity Act of 1893.[149] This time the statute granted immunity from prosecution, not merely from use of the testimony. Once again the validity of the immunity device was presented to the Supreme Court. In *Brown* v. *Walker*,[150] the Court by a closely divided vote sustained its basic constitutionality. The Court held that once the criminality attaching by law to the actions of the witness was removed by another law the privilege ceased to operate. The dissenters suggested that the privilege was intended to accord to the witness an absolute right of silence designed to protect not only from criminality but also disgrace or infamy, something no legislative immunity could eliminate. The majority, relying on English history, rejected this proposition. Since *Brown* v. *Walker*, the basic principle of the immunity grant has not been successfully challenged, and congressional enactments extending the principle, for example, to internal security [151] and narcotics [152] investigations has been sustained.

Today, Illinois [153] has a general immunity statute. New York,[154] California [155] and Federal statutes [156] grant immunity in a limited number of classes of cases.[157] Usually, the witness must claim his privilege, be directed to testify, and then testify before he receives immunity.[158] Normally, the immunity will extend to all matters substantially related to any matter revealed in a responsive answer.[159] Nevertheless, some Federal statutes grant immunity automatically on testimony without a claim of privilege.[160] The danger here of accidentally granting an individual an "immunity bath" is substantial.[161] It seems clear that these statutes should be amended to require a claim of

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[134] 7 WIGMORE, EVIDENCE § 2268, at 388 (3d ed. 1940).
[135] [1725] 16 How. St. Tr. 767, 921, 1147.
[136] *Cf. Hale* v. *Henkel*, 201 U.S. 43, 67 (1906).
[137] 8 WIGMORE, EVIDENCE § 2281, at 469 (3d ed. 1940).
[138] See generally Wendel, *Compulsory Immunity Legislation and the Fifth Amendment Privilege: New Development and New Confusion*, 10 ST. LOUIS U.L.J. 327, 330-31 (1966).
[139] *Burdick* v. *United States*, 236 U.S. 79 (1915). *Cf. United States* v. *Wilson*, 32 U.S. (7 Pet.) 150, 160-61 (1833).
[140] Act of Jan. 24, 1857, ch. 19, 11 Stat. 155.
[141] See generally Wendel, *supra* note 138, at 333-35.
[142] Act of Jan. 24, 1862, ch. 11, 12 Stat. 333. The statute is now found in 18 U.S.C. § 3486 (1964), as amended, 18 U.S.C. § 3486(c) (Supp. I, 1965).
[143] Act of Feb. 25, 1868, ch. 13, 15 Stat. 37.
[144] *United States* v. *Williams*, 28 Fed. Cas. 670 (C.C.S.D. Ohio 1872); *United States* v. *Brown*, 24 Fed. Cas. 1273 (D.C.C. Ore. 1871); *United States* v. *Farrington*, 5 Fed. Cas. 343 (SC.N.D.N.Y. 1881); *In re Phillips*, 19 Fed. Cas. 506 (D.C.D. Va. 1869).
[145] *People* v. *Kelly*, 24 N.Y. 74 (1861).
[146] 142 U.S. 547 (1892).
[147] *Id.* at 565-84.
[148] *Id.* at 564.
[149] Act of Feb. 11, 1893, ch. 83, 27 Stat. 443.
[150] 161 U.S. 591 (1896).
[151] *Ullman* v. *United States*, 350 U.S. 422 (1956), *upholding* 18 U.S.C. § 3486 (1964), as amended, 18 U.S.C. § 3486(c) (Supp. I, 1965).
[152] *Reina* v. *United States*, 364 U.S. 507 (1960), *upholding* 18 U.S.C. § 1406 (1964).
[153] ILL. ANN. STAT. ch. 38, § 106-1 (Smith-Hurd 1964).
[154] A grand jury, upon request by the prosecutor, may order the witness to answer a question or produce evidence, N.Y. REV. PEN. LAW § 2447 (effective Sept. 1, 1967), and grant immunity in investigations under a number of penal laws. See, *e.g.*, abortion (§ 81-a), anarchy (§ 166), bribery of labor representatives (§§ 380-81), bucket shop offense (§ 395), conspiracy (§ 584), corruption of agents (§ 439), election offenses (§ 770), gambling (§ 996), kidnapping (§ 1256), narcotic drug offenses (§ 1752-a), resisting execution of process (§ 1787), riots and unlawful assemblies (§ 2097).
[155] CAL. PEN. CODE § 1324.
[156] See, *e.g.*, 18 U.S.C. § 1406 (1964) (narcotics).
[157] 8 WIGMORE, EVIDENCE § 2281, at 502 n.11 (3d ed. 1940), collects most of the federal and state statutes.
[158] See, *e.g.*, *New York* v. *DeFeo*, 308 N.Y. 595, 127 N.E.2d 592 (1955).
[159] *Heike* v. *United States*, 227 U.S. 131, 144 (1913) (Holmes, J.).
[160] *United States* v. *Monia*, 317 U.S. 424 (1943).
[161] See, *e.g.*, *United States* v. *Wilbur*, 225 F. Supp. 40 (D.N.J. 1965).

privilege so that the proper authorities may be alerted to the immunity issue and the possibility of incrimination by the witness if he testifies. Other Federal statutes require specific approval of the Attorney General and a court order before the immunity attaches.[162] Both provisions serve vital purposes. No one ought to be granted immunity without the concurrence of the chief law enforcement officer of the jurisdiction. Generally, only he is in a position to know whether the price of the testimony is worth paying. Only he will be in a position to know of other investigations and only he will have the perspective to choose which investigation is most important to the overall administration of justice.

Requiring approval of the court serves to make visible the decision of the Attorney General. The danger of hidden immunization of friends is thus lessened. No Attorney General would dare run the political risk of openly flaunting his responsibility. Where it might be attempted, it could be expected that the court would have inherent power to refuse to be a party to it.[163] It seems readily evident that these three safeguards—claim, authorization, approval—ought to be part of every immunity statute.

Since New York [164] has an immunity provision applying in investigations of violations of its conspiracy statute and the California [165] act includes all felony matters before a grand jury, no practical differences exist between their present provisions and a general immunity statute. Under Federal law, however, the case by case limitation has constituted a major impediment to the effective investigation of organized crime. The need for broader immunity provisions seems apparent. Indeed, it is already part of the President's program.[166] Approaching the problem piecemeal, however, is tantamount to closing the barn after the horse has been stolen as a matter of conscious policy. A general immunity statute should be enacted. The existing patchwork situation should be consolidated and safeguards put in across the board.[167]

Up until the recent decisions of the Supreme Court in *Malloy* v. *Hogan* [168] and *Murphy* v. *Waterfront Commission,*[169] the Illinois [170] and California [171] statutes were virtually dead letters, since they were conditioned on a showing that the witness ran no possibility of incrimination under the laws of a sister state or the Federal government. Prior to *Malloy* v. *Hogan,* the privilege was thought to protect only against incrimination under the laws of the questioning sovereign.[172] Now the Federal privilege protects against both state and Federal incrimination. The *Malloy* decision could have spelled the end of valid state immunity statutes.[173] Under the Necessary and Proper and the Supremacy Clauses of the constitution, the power of Congress to immunize against state incrimination has been upheld.[174] No such power is possible for state authorities. Nevertheless, the Supreme Court indicated in *Murphy* v. *Waterfront Commission* [175] that state immunity statutes were still valid. The Court found that the constitutional privilege was adequately displaced if the witness was protected against direct or derivative use of his compelled testimony. Contrary to the *Counselman* decision, the Court seemed to feel that this was possible through the use of the fruit of the poisonous tree process of derivative suppression, an analogy borrowed from Fourth Amendment illegally obtained evidence cases.[176] The combined effect of these two decisions should be to breathe life back into the Illinois and California statutes.

The decision in *Murphy* has other important implications. If the underlying premise of *Counselman*—that there is no way to protect the witness from the derivative use of his compelled testimony—has indeed been rejected, it seems clear that granting immunity from prosecution rather than use of testimony is no longer constitutionally compelled on any level, state or Federal. Giving immunity where it is not necessary is giving an unnecessary gratuity to crime, a step no sane society ought ever to take.[177] In addition, it now seems clear that it is not necessary to give a valid grant of Federal immunity to immunize against state prosecution. It might well have been thought at least potentially necessary prior to *Malloy* v. *Hogan,* when it seemed only a matter of time until the privilege would be extended to cover state and Federal law. Now that we know, under *Murphy,* that it is not, comity between state and Federal authorities would seem to indicate that those statutes granting it be amended.

To facilitate the acquisition of needed evidence, New York, in addition to providing immunity statutes, has imposed a duty of candor upon its public servants. By constitutional provision,[178] officials who refuse to sign a waiver of immunity or to answer relevant questions concerning the conduct of their offices are disqualified from holding office for a period of five years. Experience has shown that this provision has been extremely valuable in dealing with official corruption, an almost inevitable incident of organized crime. The constitutionality of the provision has not been fully litigated, although the broad question has reached the Supreme Court on a number of occasions.[179] It seems clear that discharge predicated solely on a claim of the privilege against self-incrimination violates due process.[180] On the other hand, the right to discharge, after a proper hearing, an official who refuses to testify has been sustained.[181] Until, if ever, this type of provision is unequivocally struck down, its value in fighting official corruption seems so obvious that it ought to be widely adopted. Concern with civil liberties, proper when the relation of citizen-state is at issue, seems inappropriate when the relation is state-employee, particularly when it is recognized that nothing threatens true civil liberty more than corrupt government.

Ultimately, of course, none of these techniques is a panacea. When a witness' privilege against self-incrimination cannot be claimed, it does not necessarily follow that he will cooperate fully in the investigation. The stage, however, is set for moving the investigation forward through the use of the contempt power.

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[162] See, *e.g.*, 18 U.S.C. § 1953 (1964).
[163] *But see* Rogge, *New Federal Immunity Act and the Judicial Function*, 45 CAL. L. REV. 109 (1957).
[164] N.Y. PEN. CODE §§ 2447, 548.
[165] CAL. PEN. CODE § 1324.
[166] Bills are currently pending in Congress to broaden the federal immunity power. See, *e.g.*, S. 2190, which was reported out and passed by the Senate on Aug. 26, 1966. 112 CONG. REC. 19875 (daily ed. Aug. 26, 1966).
[167] MODEL STATE WITNESS IMMUNITY ACT, commentary (1952) should be consulted by anyone concerned with reform in this area.
[168] 378 U.S. 1 (1964).
[169] *Id.* at 52.
[170] ILL. ANN. STAT. ch. 38 § 106-1 (Smith-Hurd 1964); *cf. People* v. *Burkert*, 7 Ill. 2d 506, 131 N.E.2d 495 (1955).
[171] CAL. PEN. CODE § 1324.
[172] *Knapp* v. *Schweitzer*, 357 U.S. 371 (1958); *United States* v. *Murdock*, 284 U.S. 141 (1931); *Feldman* v. *United States*, 322 U.S. 487 (1944).
[173] See generally Wendel, *supra* note 138, at 327, 367 *et seq.*
[174] See, *e.g.*, *Adams* v. *Maryland*, 347 U.S. 179 (1954).
[175] 378 U.S. 52 (1964).
[176] See, *e.g.*, *Wong Sun* v. *United States*, 371 U.S. 471 (1963).
[177] *Cf. Heike* v. *United States*, 227 U.S. 131, 144 (1913) (Holmes, J.).
[178] N.Y. CONST. art. 1, § 6.
[179] See, *e.g.*, *Stevens* v. *Marks*, 383 U.S. 234 (1965); *Beilan* v. *Board of Educ.*, 357 U.S. 399 (1958); *Learner* v. *Casey*, 357 U.S. 468 (1958); *Slochower* v. *Board of Educ.*, 350 U.S. 551 (1956). The question was indirectly once again before the Court in the context of the admissibility of confessions obtained under threat of invoking such a statute in *Garrity* v. *New Jersey*, 385 U.S. 493 (1966). The Court held the confessions inadmissible, but a number of the justices noted that a dismissal might be constitutionally valid.
[180] *Slochower* v. *Board of Educ.*, 350 U.S. 551 (1966).
[181] *Beilan* v. *Board of Educ.*, 357 U.S. 399 (1958).

The contempt power has roots which run deep in Anglo-American legal history.[182] The early English courts acted for the King. Contempt of court was thus contempt of King.[183] By the 14th century, the principles upon which punishment was inflicted to secure obedience to the commands of King and court were firmly established.[184] Indeed, as the principles developed, justice was both swift and severe. In 1631, for example, a convicted felon threw a brickbat at a Chief Justice; his right hand was cut off, and he was hanged immediately in the presence of the court.[185] No one took lightly then the respect due to a court.

Under modern law, there is no question that courts have power to enforce compliance with their lawful orders.[186] Federal,[187] Illinois,[188], New York,[189] and California[190] law expressly confirm this ancient power. When subpoenaed before a grand jury, the witness must attend.[191] The grand jury, however, has no power as such to hold a witness in contempt if he refuses to testify without just cause. To constitute contempt the refusal must come after the court has ordered the witness to answer specific questions.[192] Two courses are open when a witness thus refuses to testify after a proper court order: civil or criminal contempt.

Under civil contempt, the refusal is brought to the attention of the court,[193] and the witness may be confined until he testifies;[194] he is said to carry "the keys of the [prison] in [his] own pocket."[195] Usually, where the contempt is clear, no bail is allowed when an appeal is taken.[196] The confinement cannot extend beyond the life of the grand jury, although the sentence can be continued or reimposed if the witness adheres to his refusal to testify before a successor grand jury.[197]

Under criminal contempt, after a hearing,[198] the witness may be imprisoned, not to compel compliance with, but to vindicate the court's order.[199] Federal law[200] requires a jury trial if the sentence to be imposed will exceed six months. No other limit is set. New York law provides for the crime of criminal[201] contempt and for criminal contempt.[202] The crime of criminal contempt must be prosecuted as other crimes; the punishment is limited to one year in prison.[203] Criminal contempt may be punished up to a fine of $250 and thirty days in jail.[204] The two provisions are not mutually exclusive.[205] Under Illinois law, there is no limit to the term which may be imposed for criminal contempt, although review is possible for abuse of discretion.[206] California sets a maximum fine of $500 and a maximum sentence of five days for criminal contempt.[207]

As the contempt power has developed over the years, it seems fully adequate to meet the task it must perform in the evidence gathering process. It needs no reform which would strengthen it.

THE LAW OF PERJURY

A subpoena can compel the attendance of a witness before a grand jury or at trial. An immunity grant can displace his privilege against self-incrimination. And the threat of imprisonment for civil contempt can coerce him into testifying. But only the possibility of a perjury prosecution, or some related sanction,[208] can provide any guarantee that his testimony will be truthful. Today the possibility of a perjury prosecution is not likely, and if it materializes, the likelihood of a conviction is not high. Using the available Federal figures,[209] we see that only 52.7 percent of the defendants in perjury cases were found guilty from 1956 through 1965. In all other criminal cases, however, 78.7 percent of the defendants were found guilty. The difference is striking. Indeed, out of 307,227 defendants only 713 were even charged with perjury during this ten-year period. The threat of a perjury conviction today thus offers little hope as a guarantee of truthfulness in the evidence gathering process in organized crime investigations.

We are told that perjury has always been widespread[210] and that "our ancestors perjured themselves with impunity."[211] The evidence indicates that little has changed.[212] Indeed, it seems apparent that virtually every organized crime investigation and prosecution is characterized by false testimony. Whatever the situation elsewhere in the administration of justice, here false testimony begins in the field with interviews, extends into the grand jury, and ultimately infects the trial itself. Convictions for perjury based on this false testimony, nevertheless, are the exception instead of the rule.[213] It is, moreover, a failure directly attributable to the law itself. Consequently, it can be relatively easily remedied.

For centuries perjury was not the false testimony of a witness, but the false verdict of a jury. It was the incidental result of the process of attaint, whose main object was to set aside such verdicts.[214] The process was so objectionable that it was little used.[215] During the 14th century, however, witnesses began to be used in trials, and the function of the jury shifted from returning

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[182] See generally GOLDFARB, THE CONTEMPT POWER (1963).
[183] Beale, *Contempt of Court, Criminal and Civil*, 21 HARV. L. REV. 161 (1908).
[184] See generally *Toafe* v. *Downes*, 24 L.Q. 194 (1908).
[185] Anon. [1631] Dy. 1886.
[186] *United States* v. *Barnett*, 376 U.S. 681, 753 (1964); *United States* v. *United Mine Workers*, 330 U.S. 258, 330-32 (1947).
[187] 18 U.S.C. § 401 (1964).
[188] ILL. ANN. STAT. ch. 38, § 106-3 (Smith-Hurd 1964); *cf.* comments ch. 106, at 72.
[189] N.Y. JUDICIARY LAW § 750(a); N.Y. REV. PEN. LAW § 600 (effective Sept. 1, 1967).
[190] CAL. PEN. CODE § 166; *cf. Ex parte Brons*, 15 Cal. App. 2d 1, 58 P.2d 38 (1936); CAL. CODE CIV. PROC. §§ 1991, 177-78, 1209.
[191] See, *e.g.*, *United States* v. *Neff*, 212 F.2d 297 (3d Cir. 1954).
[192] *Wong Gin Ying* v. *United States*, 231 F.2d 776 (D.C. Cir. 1956); *Arthur* v. *Superior Ct.*, 42 Cal. Reptr. 441, 398 P.2d 777 (1965); *In re Greenleaf*, 176 Misc. 566, 28 N.Y.S.2d 28, 30 (1941).
[193] The usual procedures are set out in *In re Hitson*, 177 F. Supp. 844 (N.D. Cal. 1959), *rev'd on other grounds*, 283 F.2d 355 (9th Cir. 1960).
[194] *McCrone* v. *United States*, 307 U.S. 61 (1939); *Giancana* v. *United States*, 352 F.2d 921 (7th Cir.), *cert. denied*, 382 U.S. 959 (1965); CAL. CODE CIV. PROC. § 1219; ILL. ANN. STAT. ch. 38, art. 106, comments, at 72 (Smith-Hurd 1964); N.Y. JUDICIARY LAW § 774.
[195] *In re Nevitt*, 117 Fed. 449, 461 (8th Cir. 1902).
[196] See, *e.g.*, *United States* v. *Coplon*, 339 F.2d 192 (6th Cir. 1964).
[197] *Shillitani* v. *United States*, 384 U.S. 364 (1966).
[198] *Harris* v. *United States*, 382 U.S. 162 (1966); *People* v. *Albany County*, 147 N.Y. 290, 41 N.E. 700 (1895); see *People* v. *Burkert*, 7 Ill. 2d 506, 131 N.E.2d 495 (1935); CAL. CODE CIV. PROC. § 1211, N.Y. JUDICIARY LAW § 755.
[199] *Gompers* v. *Bucks Stove and Range*, 221 U.S. 418, 441 (1911).
[200] *Cf. Cheff* v. *Schnackenberg*, 384 U.S. 373 (1966).
[201] N.Y. REV. PEN. LAW § 600 (effective Sept. 1, 1967).
[202] N.Y. JUDICIARY LAW § 750(a). *Cf. Koota* v. *Colombo*, 269 N.Y.2d 147, 216 N.E.2d 568 (1966).
[203] *People* v. *Gross*, 5 App. Div. 3d 878, 172 N.Y.S.2d 432, *aff'd*, 5 N.Y.2d 131, 181 N.Y.S.2d 499 (1958).
[204] N.Y. JUDICIARY LAW § 751.
[205] *People* v. *Meakim*, 133 N.Y. 214, 30 N.E. 828 (1892).
[206] *People* v. *Stalter*, 31 Ill. 2d 154, 201 N.E.2d 97, 99, *cert. denied*, 380 U.S. 912 (1964).
[207] CAL. PEN. CODE § 19.
[208] Under federal law, false testimony must also obstruct justice to constitute contempt. *Compare In re Michael*, 326 *U.S.* 324 (1945), *with Clark* v. *United States*, 289 U.S. 1 (1933). This is not generally true. See, *e.g.*, *Kings County Grand Jury* v. *Grillo*, 12 N.Y.2d 206, 88 N.E.2d 138, 237 N.Y.S.2d 709 (1963).
[209] 1956-65 ATT'Y GEN. ANN. REPS. Comparable state and foreign statistical data were collected for an earlier period in N.Y. LAW REVISION COMM'N REP. 285-317 (1935). The Report cautiously concludes that the existing data are at best "not inconsistent with the hypothesis expressed by prosecutors and others that perjury convictions are few and difficult to obtain." *Id.* at 288.
[210] 2 HALLAM, EUROPE DURING THE MIDDLE AGES 372 (8th ed. 1841).
[211] 2 POLLOCK & MAITLAND, HISTORY OF ENGLISH LAW 543 (2d ed. 1952).
[212] See, *e.g.*, POUND & FRANKFURTER, CRIMINAL JUSTICE IN CLEVELAND 388 (1922).
[213] Two notable exceptions are *United States* v. *Letchos*, 316 F.2d 481 (7th Cir. 1963), *cert. denied*, 375 U.S. 824 (1964), and *United States* v. *Nicolette*, 310 F.2d 359 (7th Cir. 1962), *cert. denied*, 372 U.S. 442 (1963), which grew out of the unsuccessful prosecution of Anthony Accardo, a syndicate boss in Chicago, for a false statement on an income tax return. See *United States* v. *Accardo*, 298 F.2d 133 (7th Cir. 1962).
[214] 3 STEPHEN, HISTORY OF THE CRIMINAL LAW OF ENGLAND 211 (1883).
[215] *Id.* at 242.

verdicts based on their own information to finding facts based on testimony presented to them.[216] This change gave rise to the need for a sanction when false evidence was presented to the jury. A large gap was left in the law.[217]

The first statutory reference to the crime of perjury appeared in 1540.[218] The Star Chamber read this act as authorizing punishment for perjury.[219] Although the crime was theoretically cognizable in the ordinary criminal courts, it was dealt with almost exclusively in the Star Chamber, where the proceedings were presided over by the Lord Chancellor and conducted according to the ecclesiastical law [220] under which a quantitative notion obtained of the credit to be accorded to the testimony of a witness under oath. From this notion, the so-called two witness rule developed, that is, two witnesses to the same fact are necessary to establish it.[221] Lord Chief Justice Hardwicke in *Rex* v. *Nunez* summed up the rule: "One man's oath is as good as another's." [222] When the Star Chamber was abolished in 1640,[223] the principles it had established in perjury prosecutions were carried over into the common law.[224]

The crime of perjury was committed at common law if, after a lawful oath had been administered in judicial proceedings, the person swore willfully, absolutely, and falsely on a material matter.[225] With but few modifications the Federal,[226] New York,[227] California [228] and Illinois [229] statutes reflect the common law. The Federal statute first appeared in roughly its present form in the Revised Statutes of 1874. The California act was based on the Field Code, which was enacted by California in 1871. The New York and Illinois statutes are a part of their recent Penal Code revisions. The chief substantive changes introduced have been the separation of the crime into degrees with the limitation that the element of materiality be reserved for the higher degree,[230] and the inclusion of false swearing in other than judicial proceedings within the definition of perjury.[231] In addition, attempts have been made to deal legislatively with the problem, discussed below, of contradictory statements under oath. Other than these relatively minor developments, the law of perjury may still be said to be largely the "handiwork" of Lord Coke.[232]

Of the five elements of perjury [233]—lawful oath,[234] proper proceedings,[235] false swearing, willfulness, and materiality—only the retention of materiality,[236] defined as the "tendency" [237] or "capability" [238] of the false testimony "to influence" [239] the tribunal before which it is given, has been the occasion of calls for reform. The New York Court of Appeals in *People* v. *Teal* [240] confused materiality with admissibility and reversed the conviction of a woman who had attempted to suborn false testimony which could not have been the subject matter of a perjury prosecution if given, since, in the opinion of the court, the testimony would have been inadmissible. Although the decision was subsequently deprived of much of its force,[241] it led the New York State Law Revision Commission in 1935 to recommend the enactment of the present New York Statutory scheme,[242] which provides for a conviction for false swearing without a showing of materiality.[243] The decision and its progeny were also apparently responsible for the adverse comment—"useless technicality . . . anomaly" [244]—by the Commissioners on Uniform State Laws, who recommended that the materiality requirement be eliminated in the Model Act.[245] Decisions elsewhere on materiality have not presented the same difficulties.[246]

The question of the status of materiality as a question of law or fact has also given some trouble. Under Federal,[247] California,[248] and, evidently, Illinois [249] cases, it is a question of law. New York, however, apparently makes it a question of fact under proper instruction for the jury.[250]

While the requirement has resulted in much litigation [251] and has resulted in the freeing of individuals clearly guilty of false swearing,[252] it probably ought to be retained in the law.[253] False answers to trival and insignificant questions seldom cause substantial harm to the administration of justice. Perjury prosecutions should be limited as a matter of law to the serious and important. The requirement of materiality is a device which works to make this the case.

Of far greater consequence to the administration of justice, however, has been the retention of the special common law rules of evidence applicable in perjury prosecution. Federal, California, New York and Illinois courts have all followed the so-called two witness rule [254] and its corollary, the direct evidence rule. Actually, the two witness rule is misnamed. Under modern law, it no longer requires the testimony of two witnesses; it merely provides "that the uncorroborated oath of one witness is not enough to establish the falsity of the [testimony of

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[216] KENNY, OUTLINES OF CRIMINAL LAWS § 459 (16th ed. Turner 1952).
[217] N.Y. LAW REVISION COMM'N REP. 235 (1935).
[218] 3 Hen. 8, c. 1 (1540).
[219] 3 STEPHEN, *op. cit. supra* note 214, at 244, questions the validity of this construction.
[220] See generally 7 WIGMORE, EVIDENCE § 2040 (3d ed. 1940).
[221] *Id.* § 2042.
[222] Cas T. Hard 265, 95 Eng. Rep. 171 (K.B. 1736).
[223] 16 Car. 1, c. 10.
[224] 7 WIGMORE, EVIDENCE § 2049 (3d ed. 1940).
[225] 4 BLACKSTONE, COMMENTARIES 137. Blackstone, in turn, relied on Lord Coke, 3 Inst. 164.
[226] 18 U.S.C. § 1621 (1964); see *United States* v. *Norris*, 300 U.S. 564, 574 (1938).
[227] N.Y. REV. PEN. LAW § 210.00-50 (effective Sept. 1, 1967).
[228] CAL. PEN. CODE §§ 118-29.
[229] ILL. ANN. STAT. ch. 38, § 32-2 (Smith-Hurd 1964).
[230] See, *e.g.*, N.Y. REV. PEN. LAW § 210.5 (effective Sept. 1, 1967) (materiality not required for third degree perjury).
[231] See, *e.g.*, ILL. ANN. STAT. ch. 38, § 32-2 (Smith-Hurd 1964) (any proceeding or in any matter where oath required).
[232] The New York Law Revision Commission observed that if Lord Coke were brought to life tomorrow, "he would discover in [the law of perjury] little to diminish the pleasure of recognition, nothing to excite his surprise." N.Y. LAW REVISION COMM'N REP. 233-34 (1935).
[233] *United States* v. *Huass*, 355 U.S. 570 (1958); *United States* v. *Debrow*, 346 U.S. 374 (1953).
[234] Any oath having a legislative basis is sufficient. *United States* v. *Caha*, 152 U.S. 211 (1894).
[235] A court without jurisdiction is not a proper proceeding, *West* v. *United States*, 258 Fed. 413 (6th Cir. 1919), but an indictment not charging a crime can still give a court jurisdiction sufficient to support a perjury conviction. *William* v. *United States*, 341 U.S. 58 (1951).
[236] The element has ancient roots, *Rex* v. *Griepe*, 12 Mod. 139, 88 Eng. Rep. 1220 (K.B. 1642), although its historical validity has been questioned. See generally N.Y. LAW REVISION COMM'N REP. 12-23 (1935).
[237] *Carroll* v. *United States*, 16 F.2d 951 (2d Cir. 1927).
[238] *Blackmon* v. *United States*, 108 F.2d 572 (5th Cir. 1940); *People* v. *Pastau*, 39 Cal. App. 2d 407, 103 P.2d 224 (1940).
[239] See, *e.g.*, CAL. PEN. CODE § 123 (not a defense that, in fact, the testimony did not affect the proceedings).
[240] 196 N.Y. 372, 89 N.E. 1086 (1909).
[241] N.Y. LAW REVISION COMM'N REP. 273-84 (1935).
[242] N.Y. REV. PEN. LAW § 210.00-50 (effective Sept. 1, 1967).
[243] The Commission was led to this recommendation by the course of opinions in the Appellate Division, where virtually every conviction appealed between 1909 and 1935 was reversed where materiality was seriously put in issue. N.Y. LAW REVISION COMM'N REP. 269 (1935).
[244] MODEL ACT ON PERJURY, preparatory note, at 7 (1952).
[245] MODEL ACT ON PERJURY § 4 (1952).
[246] See, *e.g.*, KENNY, *op. cit. supra* note 216, § 465, which summarizes the English cases, where the potential mischief in the doctrine has been construed away; and Lillich, *The Element of Materiality in the Federal Crime of Perjury*, 35 IND. L.J. 1 (1959), who concludes that it "might as well be omitted from [the] statute" since it has been read so broadly.
[247] *Sinclair* v. *United States*, 279 U.S. 263 (1929).
[248] *People* v. *Chadwick*, 4 Cal. App. 63, 87 Pac. 384 (1906).
[249] *Wilkinson* v. *People*, 226 Ill. 135, 80 N.E. 699 (1907).
[250] *People* v. *Clemente*, 285 App. Div. 258, 136 N.Y.S.2d 202 (1954), *aff'd per curiam*, 309 N.Y. 890, 131 N.Y.2d 294 (1955). The law elsewhere is reviewed in the excellent dissenting opinion of Breitel, J., beginning 136 N.Y.S.2d 209 (1954).
[251] McClintock, *What Happens to Perjurers*, 24 MINN. L. REV. 727 (1940).
[252] See, *e.g.*, *United States* v. *Cross*, 170 F. Supp. 303 (D.D.C. 1959) (union president testified falsely before congressional committee acting for non-legislative purpose).
[253] On the whole subject of perjury, see generally the excellent analysis in MODEL PENAL CODE 96-165, §§ 208.20-24 and app. (Tent. Draft No. 6, 1957).
[254] The cases are collected in 7 WIGMORE, EVIDENCE § 2042 (3d ed. 1940).

the] accused . . . ." [255] The corroborating evidence, moreover, need not independently establish the falsity of the testimony; [256] it is enough if it furnishes a basis to overcome the oath of the accused and his presumption of innocence.[257] The rule has no application to elements of perjury other than falsity.[258]

As a corollary of the two witness rule, it is generally held that the evidence introduced to show the falsity of the accused's testimony must be direct.[259] Circumstantial evidence alone will not suffice for conviction no matter how persuasive. Like the two witness rule, the direct evidence rule apparently applies only to the element of falsity.[260]

The emasculating effect these evidence rules have had on the threat of perjury as a guarantee of truthfulness in the evidence gathering process in organized crime investigations need not be belabored. Two illustrations should suffice. In *United States* v. *Otto* [261] the defendant was convicted of perjury committed during a grand jury investigation of two gambling syndicates. The object of the investigation was to establish a link between the two syndicates. The defendant, a member of one syndicate, was asked certain questions about the head of the other. He denied ever having "talked to" the other man. Although there was ample circumstantial evidence to indicate that conversations must have taken place, the Court of Appeals reversed the conviction on the basis of the direct evidence rule. An even more egregious result was reached in *People* v. *O'Donnell*.[262] The defendant was convicted of perjury committed in a hearing on a motion for a new trial in a narcotics case. The false testimony alleged illegal conduct by the police supposedly witnessed by the defendant when he was an inmate in jail. The prosecution proved by jail records that the defendant was not in jail when he said he saw the alleged actions. The court observed that the evidence "unquestionably" would have supported the conviction if other than perjury was involved, but that under the direct evidence rule it could not stand.

Indeed, the absurdity of these two rules has led to the development of exceptions. One leading case is *People* v. *Doohy*.[263] The defendant gave testimony before a grand jury and at several trials that he had bribed certain public officials. One of the officials secured a reversal. When the defendant was again called to the stand, he testified that he did not remember bribing the official. Despite the two witness and the circumstantial evidence rules, the Court of Appeals affirmed the defendant's conviction for perjury and held that where direct evidence or the testimony of two witnesses is necessarily not available, the rules have no application. Other courts have followed [264] or employed [265] the reasoning of the *Doohy* decision. For that matter, in New York the holding has been so expanded that it is today questionable that the direct evidence rule remains the law.[266] Federal courts, too, have been narrowing the scope of the rule. Sometimes it has been overcome by terming the available evidence "direct." [267] Other times, the rule has been given a special twist to uphold the conviction. *United States* v. *Collins* [268] is illustrative. The defendant, the secretary-treasurer of a union, testified falsely about when minutes of a certain meeting were prepared and signed by him. The grand jury was seeking to determine when payments were made by the union to a wire tapper. The prosecution showed that the minutes had been typed on a typewriter with a style of type not in existence at the time the defendant said he signed them. The Court of Appeals held that the rule should be understood to require only evidence assuring a "solidly found verdict." [269]

Closely related to the direct evidence rule are the cases holding that contradictory statements under oath may not be the subject matter of a perjury prosecution without the additional proof of the falsity of one of the statements.[270] Dissatisfaction with this result led to the adoption of statutes in California,[271] New York [272] and Illinois.[273] Only at the Federal level does the rule today remain viable.[274] The California statute deals only with false pre-trial testimony, which is used to institute a suit, and then only makes the subsequent contradictory testimony prima facie evidence of the falsity of the pre-trial testimony.[275] The Illinois statute goes further and relieves the prosecution of the burden of pleading or proving which statement was false.[276] The New York statute follows a similar course.[277]

It seems clear that the two witness and the direct evidence rules ought to be abolished. Suggestions that the existing rules are necessary "to protect honest witnesses from hasty and spiteful retaliation in the form of unfounded perjury prosecutions" [278] are unconvincing. Note first that the adopted remedy is broader than the alleged abuse. The existing rules apply across the board. They are not limited to situations where it might be reasonably supposed retaliation was involved. Further, it is obvious that the remedy is hardly adequate even as adopted. It can easily be circumvented merely by acquiring a spiteful accomplice. Thus, it is a bad rule even if you grant the possibility of the evil. The law, moreover, ought to encourage not testimony, but truthful testimony. The existing rules run counter to this goal; perjury, not truth, is protected. More importantly, the rules constitute an unwarranted slander on the power of discernment of prosecutors, grand juries, trial judges and the petit jury. The rules seem to assume that somehow the spiteful prosecution can be brought and a conviction obtained without the support of anyone other than the complainant.

The existing rules are, in short, an unwarranted obstacle to securing legitimate perjury convictions. There is ample protection against spiteful retaliation in the traditional safeguards applicable to every criminal case.

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[255] *Hammer* v. *United States*, 271 U.S. 620, 626 (1926).
[256] *United States* v. *Neff*, 212 F.2d 297 (3d cir. 1954).
[257] *Arena* v. *United States*, 226 F.2d 227, 228 (9th Cir. 1955).
[258] *United States* v. *Hammer*, 271 U.S. 620 (1926) (act of swearing and words sworn); *United States* v. *Magin*, 280 F.2d 74 (7th Cir.) *cert. denied*, 364 U.S. 914 (1960) (willfulness). *Contra*, *United States* v. *Remington*, 191 F.2d 246 (2d Cir. 1951), *cert. denied*, 343 U.S. 907 (1952).
[259] *Radomsky* v. *United States*, 180 F.2d 781 (9th Cir. 1950); *People* v. *Burcham*, 62 Cal. App. 649, 217 Pac. 558 (1923).
[260] *United States* v. *Magin*, 280 F.2d 74 (7th Cir. 1960), *cert. denied*, 364 U.S. 914 (1961) (willfulness).
[261] 54 F.2d 277 (2d Cir. 1931).
[262] 132 Cal. App. 2d 840, 283 P.2d 714 (1955).
[263] 172 N.Y. 165, 64 N.E. 807 (1902).
[264] *United States* v. *Nicolette*, 310 F.2d 359 (7th Cir. 1962), *cert. denied*, 372 U.S. 942 (1963); *Behrle* v. *United States*, 100 F.2d 714 (D.C. Cir. 1938); *People* v. *DeMartini*, 50 Cal. App. 109, 194 Pac. 506 (1920) (dictum).
[265] *Johnson* v. *People*, 94 Ill. 505 (1880).
[266] *People* v. *Wright*, 28 Misc. 2d 719, 214 N.Y.S.2d 461 (1961) (handwriting expert circumstantial but sufficient); see *People* v. *Calandrillo*, 29 Misc. 2d 485, 215 N.Y.S.2d 355 (1961).
[267] *United States* v. *Zborowski*, 271 F.2d 661, 664 (2d Cir. 1959).
[268] 272 F.2d 650 (2d Cir. 1959), *cert. denied*, 362 U.S. 911 (1960).
[269] 272 F.2d at 652. *United States* v. *Goldberg*, 290 F.2d 729 (2d Cir. 1961), *cert. denied*, 368 U.S. 899 (1962), noted in dictum that *Collins* rejects, not follows, the direct evidence rule.
[270] See, *e.g.*, *People* v. *Glenn*, 294 Ill. 333, 128 N.E. 532 (1920).
[271] CAL. PEN. CODE § 118(a).
[272] N.Y. REV. PEN. LAW § 210.20 (effective Sept. 1, 1967).
[273] ILL. ANN. STAT. ch. 38, § 32-2(b) (Smith-Hurd 1964).
[274] See, *e.g.*, *United States* v. *Nessanbaum*, 205 F.2d 93 (3d Cir. 1953); *McWhorter* v. *United States*, 193 F.2d 982 (5th Cir. 1952); *United States* v. *Buckner*, 118 F.2d 468 (2d Cir. 1941).
[275] CAL. PEN. CODE § 118(a).
[276] ILL. ANN. STAT. ch. 38, § 32-2(b) (Smith-Hurd 1964).
[277] N.Y. REV. PEN. LAW § 210.20 (effective Sept. 1, 1967). The statute in its older form was effective. See, *e.g.*, *People* v. *Ashby*, 203 N.Y.S.2d 854, 8 N.Y.2d 672 (1960).
[278] *Weiler* v. *United States*, 323 U.S. 606, 609 (1945). It is assumed that no one would attempt to justify the rules on the "indefensible" oath against oath historical rationale. See 7 WIGMORE, EVIDENCE § 2041 (3d ed. 1940).

There is no good reason why perjury should not be treated like any other crime. Sound prosecutive discretion and proof beyond a reasonable doubt to a judge and jury constitute ample protection against the unwarranted charge and conviction of perjury.

On the Federal level, a statute dealing with contradictory oaths should also be adopted. There is much merit in the observation that consistency alone should not be a legislative goal.[279] There is, however, a legitimate goal in allowing the prosecution to plead and prove its case in the alternative, showing the falsity by inherent logical inconsistency. Those who committed willful perjury ought not to be able to escape by placing the prosecution in a logic dilemma. It should be sufficient for conviction if the evidence shows either statement is false without specifying the false statement. There is no good reason why such proof should not be sufficient.

THE USE OF ELECTRONIC SURVEILLANCE

Each of the steps in the evidence gathering process discussed above works to produce the testimony necessary to make substantive prohibitions designed to deal with organized crime more than precatory trusts. Of far greater significance than any of these aspects of the process, however, is the use of electronic surveillance techniques to develop strategic intelligence concerning organized crime, to set up specific investigations, to develop witnesses, to corroborate their testimony, or to put together electronic substitutes for them.

The Law. On the constitutional level, the Fourth Amendment prohibits the interception of any communication without the consent of one of the parties accomplished by a physical invasion into a constitutionally protected area.[280] If one of the parties consents, no constitutional issues are presented, no matter where the interception takes place.[281] If the interception is accomplished without a physical invasion of a constitutionally protected area, the question of consent is irrelevant.[282] The Fifth Amendment as such places no ban on the use of electronic surveillance devices.[283]

The Sixth Amendment absolutely prohibits the surreptitious interrogation of an indicted defendant.[284] The Fourteenth Amendment applies to state action the same limitations imposed upon Federal action found in the Fourth [285] and Sixth Amendments.[286]

On the statutory level, Section 605 of the Federal Communications Act of 1934 [287] prohibits the interception and public disclosure of the contents of any wire communication or its interception and use for personal benefit.[288] Section 605 applies to private persons,[289] Federal agents,[290] and state agents.[291] In addition, it it covers both interstate [292] and intrastate [293] phone calls. Listening on an extension with the consent of one of the parties does not constitute an interception.[294] Evidence directly [294a] or indirectly [295] obtained in violation of the statute must be suppressed in Federal [296] but not state courts.[297] Only those whose privacy was invaded may object to a violation of the statute.[298] Unaffected private citizens have no standing to complain.[299] In addition, the actions of Federal officers are governed by Section 2236 of Title 18, United States Code, which prohibits, under criminal penalty, a search of any private dwelling or the malicious search of any other building or property without a warrant, not incident to an arrest, or without consent.[300] The actions of state officers are governed by the Civil Rights Act, which provides for civil [301] and criminal penalties.[302]

On the state level, New York,[303] California [304] and Illinois [305] have enacted legislation regulating or prohibiting electronic surveillance. New York authorizes ex parte bugging and wiretapping on court order on a showing of reasonable cause to believe evidence of crime may be obtained.[306] The authorization lasts sixty days, but it may be indefinitely renewed.[307] Emergency bugging is permitted when there is no time to obtain a court order.[308] Unauthorized wiretapping and bugging are made criminal.[309] Possession of wiretapping and bugging equipment is outlawed.[310] On the other hand, California prohibits wiretapping,[311] the electronic overhearing of conversations between those in physical custody and their attorneys, religious advisors or licensed physicians,[312] and the installation of a bug by private parties without the permission of the owner of the place where it is installed,[313] or the overhearing of any confidential communication without the consent of any party by any person, including Federal or state law enforcement

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[279] MODEL PENAL CODE, 133 (Tent. Draft No. 6, 1957).

[280] *Silverman* v. *United States*, 365 U.S. 505 (1916) (spike-mike). *Compare Irvine* v. *California*, 347 U.S. 128 (1954), *with Mapp* v. *Ohio*, 367 U.S. 643 (1961). The literature on electronic surveillance is overwhelming. Citations to the best pieces are collected in PAULSEN & KADISH, CRIMINAL LAW AND ITS PROCESSES 900 (1962). Mention must also be made of the recent studies of Prof. Alan F. Westin for the Association of the Bar of the City of New York, *Issues and Proposals for the 1970's*, pt. I, 66 COLUM. L. REV. 1003, pt. 2, 67 COLUM. L. REV. 1205 (1966). The major arguments are considered in ACLU, *The Wiretapping Problem Today* (pamphlet 1965).

[281] *Osborn* v. *United States*, 385 U.S. 323 (1966) (recorder); *Lopez* v. *United States*, 373 U.S. 427 (1963) (recorder); *On Lee* v. *United States*, 343 U.S. 747 (1952) (transmitter and recorder).

[282] *Goldman* v. *United States*, 316 U.S. 129 (1942) (dictaphone); *Olmstead* v. *United States*, 277 U.S. 438 (1928) (wiretap).

[283] *Hoffa* v. *United States*, 385 U.S. 293 (1966) (admission overheard by informer; like result); *Olmstead* v. *United States*, *supra* note 282; *cf. Stroud* v. *United States*, 251 U.S. 15 (1919) (letters intercepted lawfully may be used against sender).

[284] *Massiah* v. *United States*, 377 U.S. 201 (1964).

[285] *Clinton* v. *Virginia*, 377 U.S. 158 (1964).

[286] *McLeod* v. *Ohio*, 381 U.S. 356 (1965).

[287] 48 Stat. 1103 (1934), 47 U.S.C. § 605 (1958).

[288] This is the interpretation of the Department of Justice. Testimony of Nicholas deB. Katzenbach, *Hearings Before the Subcommittee on Criminal Laws and Procedures of the Sen. Comm. of the Judiciary*, 89th Cong., 2d Sess. 34 (1966). The history of the Department's position is traced in Brownell, *The Public Security and Wiretapping*, 39 CORNELL L.Q. 195, 197-200 (1954), and criticized in Donnelly, *Electronic Eavesdropping*, 38 NOTRE DAME LAW. 667, 671-72 (1963).

[289] *United States* v. *Gris*, 247 F.2d 860 (2d Cir. 1957).

[290] *Nardone* v. *United States*, 302 U.S. 379 (1937).

[291] *Benanti* v. *United States*, 355 U.S. 96 (1957).

[292] *Nardone* v. *United States*, 302 U.S. 379 (1937).

[293] *Weiss* v. *United States*, 308 U.S. 321 (1939).

[294] *Rathbun* v. *United States*, 355 U.S. 107 (1957).

[294a] *Nardone* v. *United States*, 302 U.S. 379 (1939).

[295] *Nardone* v. *United States*, 308 U.S. 338 (1939).

[296] *Nardone* v. *United States*, 302 U.S. 379 (1937).

[297] *Pugach* v. *Dollinger*, 365 U.S. 458 (1961) (injunctive relief denied); *Schwartz* v. *Texas*, 344 U.S. 199 (1952) (evidence not suppressible); *Williams* v. *Ball*, 194 F. Supp. 393 (W.D.N.Y.), *aff'd*, 294 F.2d 94 (2d Cir.), *cert. denied*, 368 U.S. 990 (1961) (injunctive relief denied); *United States* ex rel. *Griffin* v. *Hendrick*, 360 F.2d 614 (3d Cir. 1966) (evidence not suppressible); *People* v. *Dinan*, 1 N.Y.2d 350, 183 N.E.2d 689, 229 N.Y.S.2d 406 (1962), *remittitur amended*, 11 N.Y.2d 1057, 184 N.E.2d 184, 230 N.Y.S.2d 212 (1962), *cert. denied*, 371 U.S. 877 (1962) (court order wiretap admissible). But where the evidence is obtained, in addition, in violation of state law, it will be suppressed. *People* v. *McCall*, 17 N.Y.2d 152, 269 N.Y.S.2d 396, 216 N.E.2d 570 (1966). *McCall* has had a substantial impact on the authorizing procedures for the use of electronic tools in New York.

[298] *Goldstein* v. *United States*, 316 U.S. 114 (1942).

[299] *Hoffman* v. *O'Brien*, 88 F. Supp. 490 (S.D.N.Y. 1949), *aff'd*, 339 U.S. 955 (1950).

[300] There are [illegible] under § 2236. Its application to electronic searches and seizures, therefore, remains an open question. A crucial issue would be whether or not a growth in the constitutional understanding of "search" would carry with it a growth in the scope of the prohibition of the statute. *Cf. United States* v. *Southeastern Underwriters Assn.*, 322 U.S. 533 (1943).

[301] REV. STAT. §§ 1979-80 (1875), 42 U.S.C. §§ 1983, 1985 (1964). *Cf. Monroe* v. *Pape*, 365 U.S. 167 (1961).

[302] 18 U.S.C. §§ 241-42 (1964). *Cf. United States* v. *Price*, 383 U.S. 787 (1966); *United States* v. *Guest*, 383 U.S. 745 (1966).

[303] N.Y. CODE CRIM. PROC. § 813-a, b.

[304] CAL. PEN. CODE §§ 591, 690, 653i-j.

[305] ILL. ANN. STAT. ch. 38, § 14-1 (Smith-Hurd 1964).

[306] N.Y. CODE CRIM. PROC. § 813-a.

[307] *Ibid.*

[308] N.Y. CODE CRIM. PROC. § 813-b.

[309] N.Y. REV. PEN. LAW §§ 738-45 (effective Sept. 1, 1967).

[310] N.Y. REV. PEN. LAW § 742 (effective Sept. 1, 1967).

[311] CAL. PEN. CODE § 640.

[312] CAL. PEN. CODE § 653i.

[313] CAL. PEN. CODE § 625h.

agents.[314] Illinois has an even more comprehensive statute, which prohibits the electronic overhearing of any conversation by any person without the consent of all parties.[315] Both civil and criminal penalties are provided.[316]

The Practice. It is difficult to determine how much legal and illegal private and law enforcement electronic surveillance occurs. Federal law enforcement agencies have and are employing these techniques under varying limitations.[317] These techniques are also being employed by law enforcement agencies on the state level.[318] How much private use or illegal law enforcement use on the state or Federal level occurs cannot be definitely ascertained. There seems to be, however, a consensus that the use of these techniques is relatively widespread.

The widespread existence of electronic surveillance has been made possible by the tremendous scientific developments which have taken place in the last half century. Microminiaturization in electronics and the invention of the magnetic tape stand out as the two most important events. Much publicity has been given to the awesome potential of electronic devices: thumbnail-size microphones, cigarette package-size transmitters, induction coil devices for wiretapping. Methods of transforming the ordinary telephone into a microphone, which can be activated hundreds of miles away, have been demonstrated. Research has also developed a laser beam which under laboratory conditions can pick up conversations in a room from the outside window pane. Under ideal conditions, the parabolic microphone can be used to overhear conversations at distances from which they would otherwise be inaudible.

Less widespread publicity has been given to the inherent investigative limitations on the practical use of these devices. It is often difficult if not impossible to install them safely where a surreptitious entry is required. Pairs must be located to wiretap. Often one or more additional entries are required to adjust the equipment. Power sources must be found. Monitoring them and analyzing their product consume an inordinate amount of time. Static and room noise interfere with reception often making use impractical. Wireless devices can be detected by sweeping. Wired equipment can be visually discovered. Often it is impossible to employ the devices because the neighborhood is hostile or there is insufficient time to set up the equipment. Indeed, despite the practical limitations, the potential is such that the wiretap or the wired bug remain the most productive electronic surveillance techniques where the consent of one of the parties to the conversation cannot be obtained. From a legitimate law enforcement standpoint, both require, if properly and safely installed and monitored, such an expenditure of effort, time, and manpower that normal investigative techniques are generally preferred.

The Need. Ultimately, proposals to ban the use of electronic surveillance techniques turn on the same considerations which must be faced in considering proposals to authorize their limited use. The arguments for and against wiretapping and bugging are essentially the same. No real distinction can be made between the techniques.[319] Everything turns on the question of social need. Usefulness alone, of course, is not enough. The broader question of privacy must be included in the equation. In addition, the availability of alternative means of securing the evidence must be considered. In the final analysis, however, the conclusion must be the product of a careful and informed balancing. What must be done at the end of that process, moreover, seems unavoidable. The alternatives themselves are clear. If the case for the use of electronic surveillance techniques cannot be made, then they ought to be totally banned, and the ban strictly enforced. If it can be made, then authorizing legislation ought to be enacted. In either case, it seems clear that the existing legislation and its enforcement policies are inadequate. On this point alone, virtually everyone is in agreement.

To examine the need for electronic surveillance techniques, it is first necessary to explore the two distinct but related purposes for which they may be used: strategic and tactical intelligence. Normally, law enforcement agencies react to the commission of specific crimes. A complaint is made or some evidence of criminal activity manifests itself in the course of routine patrol work. The agency then moves from known crime toward unknown criminal, a "Sherlock Holmes" approach. This is the approach most appropriate to incident crime, and it is the approach most familar to people who have little training in police work. Consequently, it reflects the popular conception of police work.

Organized or professional crime, however, presents a different picture. Here there are identifiable individuals systematically setting out to and accomplishing criminal purposes. They expect to be in business over a long period of time.[320] Here preventive police work offers a hope of success. Long term investigations may be set up without having first to isolate a particular criminal act. Dig long enough and evidence of their unlawful activity will turn up. Against this sort of criminal activity, strategic intelligence, that is, a look at the overall picture, is not only useful, but indispensable.

The police, if they have a decent informant program, or if they just keep their ears open, will always know, in a general way, who is who, and what with whom the "whos" are up to. It is necessary, however, to verify this information. One must identify persons, criminal activities, criminal and non-criminal associates, and geographical areas of operation in greater detail than usual informant information gives you. Acting on general information without close regard to its accuracy is bad police practice because it subjects innocent people to unnecessary investigation and wastes precious manpower. The first purpose of electronic surveillance techniques, therefore, is to get hard information in those areas where existing intelligence data says one ought to look. The examination has as its purpose the establishment of probable guilt or probable innocence. Where the information comes back positive, further action can then

[314] CAL. PEN. CODE § 653j. *But see Johnson* v. *Maryland*, 254 U.S. 51 (1920).
[315] ILL. ANN. STAT. ch. 38, § 14-2 (Smith-Hurd 1964). *Cf. People* v. *Kurth*, 34 Ill. App. 2d 487, 216 N.E.2d 154 (1966).
[316] ILL. ANN. STAT. ch. 38, § 14-6 (Smith-Hurd 1964).
[317] See, *e.g.*, Supplemental Memorandum for the United States, *Black* v. *United States*, No. 1029 Oct. term 1965, Sup. Ct., pp. 2-4.
[318] Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary, *Wiretapping and Eavesdropping, Summary Report of Hearings 1958-61*, 87th Cong., 2d Sess. 17-18, 40-44 (Comm. Print 1962).
[319] *But see* Donnelly, *Electronic Eavesdropping*, 38 NOTRE DAME LAW. 667, 682-84 (1963); Kamisar, *The Big Ear, The Private Eye and the Lawman*, 36 WIS. BAR BULL. 33, 45-47 (1963). The same basic invasion of privacy is involved in both since each overhear speech without consent. On the other hand, bugging also involves an invasion of place not present in wiretapping. To this degree, there is a difference, but it is one of degree not kind.
[320] The extent to which these "businessmen" use the telephone is brought out in the Final Report of the McClellan Committee examination of the Apalachin meeting. S. REP. No. 1139, 86th Cong., 2d Sess., pt. 2, at 488 (1960).

be intelligently planned based on the overall crime picture developed. Investigative priorities can then be set up both as to likelihood of success and the importance of an individual and his activity to the general administration of justice. Once the broad picture is painted, it is possible to move in and set up specific investigations, the ultimate tactical purpose of strategic intelligence. This sort of work can be done only haphazardly, if at all, using face-to-face secondhand information.

Use of electronic surveillance techniques for tactical intelligence purposes seeks information for basically different purposes. The aim now is an arrest, trial, conviction and incarceration. It aims to bring the criminal process to bear on a particular situation. This narrow aim, of course, is pursued for broader goals. Hopefully, the invocation of the criminal process can bring about a better social situation, and certain kinds of antisocial behavior can be curbed. The main purpose, however, is limited. Hence the term "tactical." During the course of a specific investigation, electronic surveillance techniques are used to establish probable cause for arrest or search, to develop witnesses, or to obtain admissions of guilt. They may also be used at trial to corroborate or impeach testimony or refresh a witness' recollection.

Theoretically, of course, all of these purposes can be achieved with the use of evidence not electronically seized. Why then is it so often contended that these techniques are not just needed but are indispensible? To answer this question it is necessary to consider several concrete investigations where these techniques were used. From this sort of examination, the indispensable character of wiretapping and bugging for any serious program of bringing criminal sanctions to bear on organized crime emerges.

The most sophisticated use of these techniques—where the goal has been a criminal trial—has been made by the Office of the District Attorney of New York County. It has been testified that without electronic surveillance techniques, specifically wiretapping, this Office could not have achieved the convictions of James "Jimmy" Hines, John Paul "Frankie" Carbo, Charles "Lucky" Luciano and Anthony "Little Augie Pisano" Carfano.[321] It is appropriate then to examine how those techniques were used in this representative sample of major investigations and prosecutions and to give some general attention to New York's overall experience with electronic surveillance, considering the needs of both law enforcement and privacy.

JIMMY HINES: POLITICAL CORRUPTION

In the early thirties Dutch Schultz, through the use of strong-arm methods, obtained control of all policy games in New York County, and operated them as a single enterprise. To protect himself and his profits from the police, he enlisted the aid of Jimmy Hines, then Democratic leader of the county.

Hines supplied protection for $1,000 a month, but all contacts between Schultz, the bankers, and Hines were made through key intermediaries, like "Dixie" Davis. Davis and Hines met frequently, but at private parties, and Hines only met Schultz once, in 1932. The only way to get evidence on Hines or Schultz would be to get a man like Davis to turn states evidence or secure a confession or admission of guilt from Hines or Schultz.

From June 10 to October 29, 1936, the District Attorney listened to a telephone in Hines' office, recording a number of calls which referred to Hines' share of the policy operation. As Schultz had been killed, Hines now ran the banks indirectly, and as each banker called up for protection or favors, the banker's conversation was recorded. These conversations were later used to enlist the banker's cooperation in the case against Hines.[322] They also served as vital admissions.

After Hines was indicted, Davis disappeared. A tap was placed on his wife's home telephone. From this tap, it was possible to trace Davis and obtain additional, necessary information on the policy racket. Ultimately, Davis cooperated with the prosecution, but only because of wiretap obtained evidence. Experience has shown over the years that only by facing certain individuals with their own voices can they be induced to co-operate.

Without the use of wiretaps, it would thus have been impossible to determine the extent of the conspiracy or to secure the cooperation of the key witnesses. A number of policy bankers agreed to testify only after the District Attorney played their recorded conversation in their presence. The bankers realized that if they denied their involvement in the policy operation before the grand jury, they would face perjury charges. There would have been no corroboration of Davis's testimony without the wire-taps; this was the only direct evidence linking Hines to Dutch Schultz, a link necessary to establish the overall conspiracy.

Hines was sentenced to 4 to 8 years in the penitentiary. The other conspirators pled guilty to lesser crimes. Without the use of wiretaps, the case could not have been made.

PAUL JOHN "FRANKIE" CARBO: LEGITIMATE BUSINESS[323]

In 1947, a New York grand jury investigating corruption in professional boxing returned a presentment which resulted in the enactment of Section 9133 of the Unconsolidated Law of New York. This Section makes it a crime to act as an undercover manager or matchmaker.

In 1957 and 1958, the District Attorney of the County of New York conducted an investigation into corruption and underworld control of boxing. During the investigation nine wiretaps were ordered by the courts.

A tap on the phone of Hymie Wollman, a manager in Frank Carbo's control, disclosed evidence that

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[321] Subcomm. on Constitutional Rights of the Sen. Comm. on the Judiciary, *Wiretapping and Eavesdropping, Summary Report of Hearings 1958-61*, 87th Cong., 2d Sess. 41 (Comm. Print 1962).

[322] The importance of using wiretapping and bugging to develop witnesses cannot be overemphasized. When you question an individual, what you base the questions on is crucial. The then Chief Counsel of the McClellan Committee, Robert F. Kennedy, makes the point: "The kind of proof makes a difference. He can say very forcefully someone's a liar—that's easy. But here we had his own voice on the tapes. He couldn't deny it." Quoted in MAGUIRE, EVIDENCE OF GUILT 247 n.16 (1959). Faced with the hard choice of talk, perjury, or contempt, knowing you have his own voice to keep him straight, the witness most often decides to cooperate.

[323] Carbo has been identified as a member of the Gaetano Lucchese syndicate in New York City. *Organized Crime and Illicit Traffic in Narcotics, Hearings Before the Permanent Subcommittee on Investigations of the Senate Committee on Government Operations*, 88th Cong., 2d Sess., pt. 1, at 274 (1963).

Carbo in fact was the real manager of the fighter Jimmy Peters, and that Wollman was merely a nominee. An examination of records or physical surveillance or traditional interview techniques would not have shown the real situation.

A tap on the office phone of the International Boxing Club yielded evidence that the officers of the I.B.C. were under Carbo's control. Carbo, for example, was overheard ordering Billy Brown, the matchmaker for the I.B.C., to leave the office and meet him across the street. Brown was observed immediately thereafter obeying the order. Another intercepted message revealed that Carbo ordered Brown to come to Boston and Brown obeyed. Normal investigative techniques will not produce this type of evidence, key evidence under Section 9133 or similar statutes dealing with undercover situations. It would be impossible to arrange to observe this kind of conduct unless you knew it was going to happen, or if you did see it, you would be unaware of its significance without advance information. Only the direct participants had the information, and they were not co-operating; an overhear was the only realistic alternative.

The tap on the line of B. Wollman Bros. established that Hymie Wollman and Willie Ketchum were making payments to Carbo for his "services." This call was one of the overt acts charged in the conspiracy indictment brought against Carbo. These transactions were known firsthand only by the participants. They were not willing witnesses. Again an overhear was the only realistic alternative.

Without wiretaps, the exact extent and nature of the conspiracy could not have been discovered by law enforcement officials, since most of the key transactions were conducted by telephone. There was nothing to investigate using normal techniques.

Intercepted conversations not only established the criminal nature of the boxing business as run by Carbo, but were also used to convince witnesses to testify for the People. For instance, Fred Fierro, a trainer was reluctant until he heard the tape of a conversation between Carbo (with Wollman) and Peters (a boxer). Realizing that the District Attorney knew and could prove the relationship between Wollman and Carbo, Fierro began to cooperate. Questioning without the tapes yielded nothing but denials that could not be contradicted. This was a classic case where only the voice confrontation would work.

Carbo pled guilty to three counts of the indictment after listening to the chief assistant district attorney's opening to the jury, which detailed out the People's proof. Carbo was sentenced to two years in prison. The prosecution could not have been successfully brought without the use of wiretaps.

CHARLES "LUCKY" LUCIANO: ORGANIZED VICE [324]

One of the bases of Luciano's nationwide criminal empire was organized prostitution. The New York part of the prostitution included over 200 girls in at least ten different houses. Luciano was completely separated from the operation, and he never involved himself in its day to day workings. A raid on any house would, of itself, never have tied in Luciano.

To keep this vast business functioning with maximum efficiency, it was necessary for the "managers" to use the telephone to direct the prostitutes to those houses where, on any given night, the business was heavier than usual. Apparently realizing that the telephones might be tapped, the "managers" changed numbers every month and changed locations almost as frequently.

Three telephones were tapped from January 11, 1936, to February 1, 1936. The telephones were located in a house of prostitution, which was the headquarters of the operation. All of the phones were used by the manager and related to the activities of the prostitution ring. Conversations that were recorded gave the district attorney enough evidence to arrest over one hundred prostitutes and to build foolproof cases against managers. At the onset, the prostitutes were completely unwilling to cooperate, but when confronted with the evidence, some of them agreed to testify against their superiors, who in turn were persuaded, partly on the basis of the tapes, to testify against Luciano. Again the key to breaking the case was the recorded voices.

Luciano was convicted and sentenced to 30 to 50 years in prison. Without the use of wiretaps, it would have been impossible to put together the evidence that was used to enlist the cooperation of the key witnesses necessary to tie in Luciano himself. A case could have been made against the operation by the use of traditional police techniques, but Luciano was so insulated from the overt criminal activities that there was no way to tie him to it without breaking those who had contact with him. It took incontrovertible evidence to break them. The wiretaps supplied it. Normal techniques would not have been successful.

ANTHONY "LITTLE AUGIE PISANO" CARFANO: UNIONS [325]

In 1953, a New York grand jury inquiry was begun into racketeering in union welfare funds. The investigation disclosed a conspiracy between syndicate members that controlled certain labor unions and insurance agents, who shared with the union officials monies owing to the agents as a result of insurance contracts placed by the unions.

Some of the unions involved included the Distillery, Rectifying, and Wine Workers International, the Laundry Workers Union, and the Electrical Union.

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[324] Luciano was the founder of the nationwide cartel which is today so influential in organized crime. Permanent Subcomm. on Investigations of the Senate Comm. on Gov't Operations, *Organized Crime and Illicit Traffic in Narcotics*, S. Rep. No. 72, 89th Cong., 1st Sess. 5 (1965). A résumé of his activities appears at pp. 795, 987, 1006 and 1035 in the Hearings of the above Committee, *supra* note 323, pts. 1-5.

[325] Carfano has been identified as a lieutenant in the Vito Genovese syndicate of New York City. *Organized Crime and Illicit Traffic in Narcotics*, *supra* note 324, at 248.

Louis Saperstein was an insurance agent with offices in New York, New Jersey, and Illinois. He was also the Officer and Director of a number of different agencies. In one year Saperstein's income rose from about twenty thousand dollars a year to over five hundred thousand dollars. This remarkable increase consisted mostly of commissions earned from insurance contracts placed by certain unions.

Based on information obtained during the course of the investigation, the telephones of two union officers, Sol Cliento and George Scalise, were tapped pursuant to a court order. As a result of the conversations overheard, Saperstein was called before the grand jury, given immunity, and asked whether Cliento and Scalise received kickbacks from him on the commissions he earned from the union insurance contracts. Although he was given immunity, and his recorded conversations with Scalise and Cliento were played to him, Saperstein refused to cooperate because of a fear of reprisals from the syndicate elements which controlled the unions. (Subsequently, after he indicated a willingness to cooperate, Saperstein was indeed shot four times in the head at close range, but survived.)

Saperstein was indicted for criminal contempt based on his testimony before the grand jury. With the wiretapped conversations as evidence, he was convicted of five counts of criminal contempt and sentenced to five years in prison. After serving five weeks of the sentence, he agreed to cooperate with the district attorney.

Saperstein returned to the grand jury, and based on the same wiretapped conversations that had been used in evidence at his trial, he testified concerning the kickbacks that went from the insurance agents to the union officials.

Based on this evidence, the grand jury indicted Cliento, Scalise, and Anthony Carfano. All eventually pled guilty.

Without Saperstein's testimony, there would not have been a case against the union officials. It was only after his recorded conversations were used to convict him of contempt that Saperstein agreed to cooperate. In short, a conviction of Saperstein without the wiretaps would have been impossible, and without the wiretaps and Saperstein's eventual cooperation, a successful prosecution of the union officials could not have been brought.

Over the years New York has faced one of the nation's most aggravated organized crime problems. The cases above are illustrative of that problem. And only in New York have law enforcement officials been able to mount a relatively continuous and relatively successful attack on an organized crime problem. The cases above are illustrative of that success. The limited success has been attributable primarily to a combination of dedicated and competent personnel and adequate legal tools. More than any other, electronic surveillance techniques, as we have just seen, have been *the* tools. The failure to do more in New York has been primarily attributable to the failure to commit to the task additional resources of time and men. The debilitating influence, and incompetence, underscored by the New York State Crime Commission, must also be noted.[326] The law enforcement aspect of the New York experience, in short, demonstrates that no one factor determines success in any attempt to bring criminal sanctions to bear on organized crime: adequate human resources and adequate legal tools are both necessary, and the key legal tool is electronic surveillance.

The New York experience is also relevant to the question of privacy. Court supervision under New York's permissive statutes at one time was often perfunctory. Today the picture has substantially changed under the impact of pre-trial adversary hearings on motions to suppress electronically seized evidence. A number of years ago there was evidence of low level police abuse. Legislative and administrative action, however, has been largely successful in curtailing its incidence. Use by New York prosecutors has been free from demonstrated abuse, and in recent years, they have shown a willingness to investigate and prosecute both private and law enforcement violation of the state electronic surveillance provisions. The techniques, moreover, have been sparingly used. Since 1959, for example, the Office of the District Attorney of New York County, where the most vigorous use of them is made, has averaged only about seventy-five wiretap orders per year—used only for leads and not court disclosure—and about nineteen bug orders per year.

There is no substantial evidence, moreover, that the commercial, political, intellectual or personal life of the New York community has measurably suffered because of the court order system. The fear that authorized electronic surveillance would seriously impair free communication therefore has proven largely unreal. Indeed, even members of the underworld, who have legitimate reason to fear that their meetings might be bugged or their phones tapped, have continued to meet and to make relatively free use of the phone.

On the whole, thus, New York has shown that privacy and justice can both be well served in this area.

THE OBJECTIONS: CONSTITUTIONAL AND POLICY

A number of serious objections have been raised to the use of electronic surveillance techniques, which are not answered merely by establishing that wiretapping and bugging are indispensible aids in the investigation and prosecution of organized crime. Some are of constitutional dimension. Others are not. Nevertheless, it ought to be frankly recognized at the outset that no constitutional provision on its face specifically deals with electronic surveillance. Those possible constitutional restrictions which may be involved in this area have been developed through judicial interpretation. Until some scheme authorizing electronic surveillance is enacted, it will not be possible for any court to pass on its ultimate validity. It is clear, moreover, as Mr. Justice Brennan

[326] N.Y. Crime Comm'n, First Rep., Legislative Doc. No. 23, 20-24 (1953). New York experience prior to 1958 is reviewed in Dash, Schwartz & Knowlton, The Eavesdropper 35-119 (1959). The Eavesdropper is assessed in a symposium, *The Wiretapping-Eavesdropping Problem: Reflection on the Eavesdroppers*, 44 Minn. L. Rev. 813-940 (1960). The English experience is contained in Comm. of Privy Councillors Appointed to Inquire Into the Interception of Communications Rep. (1957).

recently observed, that the question of the constitutionality of any such scheme is still "open." [327] Our hands are not yet tied. Experimentation is still possible. There is room here for what Mr. Justice Brennan has termed "an imaginative solution whereby the rights of individual liberty and the needs of law enforcement are fairly accommodated." [328]

THE FIRST AMENDMENT

It has been suggested that the fear of electronic surveillance inhibits the exercise of rights guaranteed by the First Amendment. Traditionally, our concern with wiretapping and bugging has centered around issues of search and seizure. More, some suggest, is involved.[329] To say what one wishes, to hear what one pleases, and to write what one likes requires a freedom from fear of surreptitious surveillance. Without privacy of communication, people may become increasingly reluctant to exercise their rights of speech, press and worship. With the use of electronic devices, every intimate and secret expression of the individual is subject to state and private scrutiny. A man's thoughts, associates, conduct in home, or office, (indeed bedroom!) may be recorded.

It makes no difference that this inhibition would be indirect. Of course, any scheme of unrestricted electronic surveillance would necessarily have an inhibiting, if not stupefying, effect. But even the fear of accidentally or indirectly being overheard, a necessary risk in even a limited scheme of authorization, would deter many, it is suggested,[330] from speaking. Free conversation is often characterized by exaggeration, obscenity, agreeable falsehoods and the expression of anti-social desires not seriously meant. Innocent people, too, have a stake in uninhibited speech. Authorization of electronic surveillance would strike a blow at these liberties.

To these arguments against authorizing electronic surveillance, there is no ultimately satisfying or easy answer. The question, however, is not therefore simply resolved against authorization. Other values are involved. Indeed, it is recognized by those who object on these grounds that a balancing process must ultimately resolve the question.[331]

Restrictions may be placed on the authorization which will help guarantee that the impact on innocent speech will be cut to a minimum. For, note, there is no right to have privacy in the conduct of criminal enterprises. Indeed, the constitution authorizes such an invasion of privacy where probable cause is established. The real issues concern distinguishing with reasonable accuracy beforehand the criminal, from the innocent, conversation and guaranteeing to the maximum degree possible, that during the course of overhearing the guilty, as little as possible of the innocent will be intercepted. Only when such a scheme has been set up may we evaluate whether or not the loss of privacy necessarily involved will be counter-balanced by the gain to the administration of justice. Privacy is only one value in a democratic society; justice is another of equal importance. The question cannot be answered in the abstract because the issue is one of degree. There is room for debate.

THE FOURTH AMENDMENT

The Fourth Amendment condemns unreasonable searches and seizures and provides that warrants shall not issue save on probable cause to seize specifics from specified places. Those who cite the constitutional objections to any scheme of authorized electronic surveillance under the Fourth Amendment have pointed out that almost inherently wiretapping and bugging are indiscriminate, the object of the seizure is evidence per se, and the usefulness depends on lack of notice to the suspect.[332] Electronic surveillance cannot, therefore, ever be reasonable, and no scheme for wiretapping and bugging via warrants can pass a constitutional muster.

Indiscriminate search and seizure has been condemned from the beginning of the American experiment. Indeed, it was an objection to the general warrant and its widespread use which gave rise in no small part to the Colonies' dissatisfaction with the administration of justice by the mother country. Authorizing the use of electronic surveillance warrants would be tantamount to authorizing a general warrant. To be constitutional a search warrant must describe with specificity the things to be seized [333] or the place to be searched.[334] It must leave no discretion to the officer to determine what may be seized. An exploratory search for whatever might turn up is unconstitutional.[335] The search must begin with an object in mind. It must end when it is achieved. Wiretapping and bugging, however, are necessarily indiscriminate. What will be seized cannot be described beforehand because it is not known. It is not possible to tell what will be spoken on the phone or uttered in a place until it is spoken or uttered. The requirement of pre-seizure specificity, therefore, cannot be met. In addition, the seizure itself must be indiscriminate. The wiretap and the bug pick up all conversations, not just the guilty words. No matter who comes into the room or uses the phone, he will be overhead. It is not possible to listen selectively. The selection must take place, if at all, after all has been overheard and the privacy of all invaded. This sort of process is necessarily unconstitutional and unreasonable.

Again, there are no ultimately satisfying or easy answers here. Electronic surveillance is not just like search warrants. The analogy, however, is closer than is often supposed. The indiscriminate search and seizure objection confuses the distinction between initial search and ultimate seizure. Every search and seizure is at first indiscriminate. A practical example should suffice. Suppose a search warrant is issued for all carbon copies of letters used to order supplies for an illegal liquor distillery.[336] The letters are somewhere on the premises of the business, perhaps in any one of a number of filing cabinets or any one of a number of desks. To find all of the letters, the officers executing the search warrant would have to examine every piece of paper on the premises which might be a letter. No piece of paper would go unread. Only after all were initially and indiscriminately read would it be possible to make an ultimately discriminate seizure of those described by the search warrant.

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[327] *Lopez* v. *United States*, 373 U.S. 427, 465 (1963) (Brennan, J., dissenting).
[328] *Ibid.*
[329] See generally King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 GEO. WASH. L. REV. 240, 266-67 (1964); King, *Wiretapping Electronic Surveillance: A Neglected Constitutional Consideration*, 66 DICK. L. REV. 17 (1961).
[330] Schwartz, *On Current Proposals to Legalize Wiretapping*, 103 U. PA. L. REV. 157, 162 (1954).
[331] See, e.g., King, *supra* note 329, at 162.
[332] *Cf. Lopez* v. *United States*, 373 U.S. 427, 463 (1963) (Brennan, J., dissenting); Donnelly, *supra* note 319, at 682; Schwartz, *supra* note 330, at 163-64. Probably the best general treatment of the Fourth Amendment to be published in recent years is LANDYSKI, SEARCH AND SEIZURE AND THE SUPREME COURT (1966).
[333] See, e.g., *Stanford* v. *Texas*, 379 U.S. 476 (1965).
[334] See, e.g., *Steele* v. *United States*, 267 U.S. 498 (1925).
[335] See, e.g., *Lefkowitz* v. *United States*, 285 U.S. 452 (1932).
[336] *Cf. Marron* v. *United States*, 275 U.S. 192 (1927). Instructive analogies may also be made to the subpoena cases, where far-reaching "searches for evidence" have been sustained. *Cf. Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946). Apart from standing, consider a subpoena of a telegram, *Newfield* v. *Ryan*, 91 F.2d 700 (5th Cir. 1937), *cert. denied*, 302 U.S. 729 (1938).

This is similar to what occurs with the use of electronic surveillance devices. While it is not possible to specify beforehand the precise words which will be initially recorded and ultimately used, it is possible to describe the category within which they must fall. Conversations may range over many subjects, but they do admit of classification. Thus, the requirement of specificity would seem to be met if you could describe beforehand the class of conversation that you are seeking to overhear. This understanding of the constitutional requirement of specificity can be met. More need not be required. The constitution need not be read "with the literalness of a country parson interpreting the first chapter of Genesis." [337] It is, after all, "a Constitution we are expounding." [338] That other classes of speech will be incidentally or accidentally overheard raises serious questions about the balance of the scope of the invasion of privacy authorized, but it does not seem on closer analysis to pose an issue dealing with the indiscriminate or the general search and seizure. The problem may be dealt with by a careful articulation of pre-surveillance standards and limitations there enforced and subsequently re-enforced prior to the admission of any such seized evidence at trial.

Traditionally, the constitution has been interpreted to prevent the seizure of evidence per se.[339] Only fruits of a crime, instrumentalities of crime, or contraband may be constitutionally seized. For the state to seize what it does not have a paramount right to would involve a violation of the Fifth Amendment privilege against self-incrimination, a privilege which serves as an outside limitation on the notion of reasonableness found in the Fourth. An individual has no property right in the fruits of crime, since they belong to the victim. Things used in the commission of a crime are forfeited to the state under the ancient concept of *deodand*. There can be no property right in contraband, which by definition no man can own. Consequently, each is subject to lawful seizure by the government, because none can be lawfully retained by the citizen. Not so things which have evidentiary value only. Since they may be lawfully retained, they may not be lawfully seized. To permit them to be seized would constitute an unreasonable search and seizure. And what is more evidence per se than words surreptitiously overheard and recorded.[340] They are sought solely for their evidentiary value. No other legitimate governmental purpose is served by electronic surveillance. It is a search admittedly for evidence alone. As such, it always stands condemned as unreasonable under the Fourth Amendment.

There is, however, a short answer to this objection. The likelihood is that if a statute authorizing electronic surveillance were enacted and it were attacked on this ground the evidence per se rule and not the statute would give way.[341] The rule has survived in constitutional law until today only because it has not been applied. The instrumentalities category has been expanded to cover virtually every situation imaginable. Indeed, a camera has been held to be the instrumentality of the crime of rape.[342] The trend of decided cases has been to distinguish the rule away or to forthrightly reject it.[343] The Supreme Court, only this term, in *Schmerber* v. *California* [344] refused to find the rule applicable to the extraction of blood for use as evidence in an intoxication trial.

Faced with a test of an electronic surveillance statute, the Supreme Court could overrule the rule, restrict it to private papers, or find the words overheard themselves instrumentalities of a crime. It is highly questionable that any thoughtful appellate court would strike down an electronic surveillance statute on this ground alone. Indeed, the New York Court of Appeals in *People* v. *Berger* [345] has recently affirmed the constitutionality of its bugging statute over objections including this precise ground.

Under the Fourth Amendment, it has been traditionally thought that all searches must be on notice. While the warrant may be obtained ex parte, the subject has always known that the search occurred. Indeed, before entry into a home it is necessary to announce specifically your authority as an officer of the law and your purpose of arrest or search.[346] Surreptitious entry or entry with surreptitious purposes has been condemned.[347]

For these reasons, electronic surveillance is all the more objectionable. Necessarily, the wire-tapper places no warning noise on the line when he intercepts the calls. Like a thief in the night, the officer must secretly enter to install the bug. A citizen can take action against a government agent who openly enters and searches. Only in the case where the overheard conversations are sought to be used in open court may the rights of privacy previously invaded be upheld. Where the only use is for leads, or for no legitimate purpose at all, the citizen has no remedy. Nevertheless, the nagging suspicion remains: Am I subjected to electronic surveillance? Indeed, it is the surreptitious character of electronic surveillance more than any other which gives force and vitality to all other objections. And it is clear that unless it is surreptitious, it is useless.

This objection possesses almost unanswerable logic and substance. Nevertheless, it does not seem to pose an insuperable barrier to a carefully drawn scheme of authorization. First, it is clear that all searches need not be conducted on prior notice. When no one is at the place searched, notice comes to the party only through the inventory which must be left and filed with the court.[348] Second, the constitution does permit an entry into a home for a lawful governmental purpose without prior notice of authority and purpose where giving such notice would reasonably result in the destruction of evidence subject to seizure.[349] There is no reason why some sort of inventory procedures applicable to electronic surveillance warrants could not be worked out. Warrant procedures prior to use of electronic equipment and inventory procedures subsequent to its use would help limit the indiscriminate use of the devices. More importantly, they would make possible prior and subsequent judicial review of their use and possible abuse.

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[337] Beisel, Control Over Illegal Enforcement of the Criminal Law: Role of the Supreme Court 36 (1955), quoted in Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 Minn. L. Rev. 891, 912–13 (1960).

[338] *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) (Marshal, C.J.).

[339] See generally Note, *Evidentiary Searches: The Rule and the Reason*, 54 Geo. L.J. 593 (1966); Comment, *Limitations on Seizure of Evidentiary Objects—A Rule in Search of Reason*, 20 U. Chi. L. Rev. 319 (1953).

[340] See, *e.g.*, Schwartz, *supra* note 330, at 162.

[341] Kamisar, *supra* note 337, at 914–16.

[342] *State* v. *Chinn*, 231 Ore. 259, 373 P.2d 392 (1962).

[343] See, *e.g.*, *People* v. *Thayer*, 63 Cal. 2d 635, 408 P.2d 108 (1965) (Traynor, C.J.); *State* v. *Raymond*, 142 N.W.2d 444 (Iowa 1966); *State* v. *Biscaccia*, 45 N.J. 504, 213 A.2d 185 (1965) (Weintraub, C.J.).

[344] 384 U.S. 757 (1966).

[345] No. 250, July 18, 1966 (unreported), *cert. granted*, Dec. 5, 1966, limited to two questions: (1) Assuming the statute is constitutional, were the orders based on probable cause, and (2) can the statute be constitutional "as setting up a system which intrinsically involves trespassory intrusion into private premises, 'general' search for 'mere evidence,' and invasion of the privilege against self-incrimination." See Chicago Sun Times, Dec. 6, 1966, p. 26, col. 1. The *Berger* appeal may well offer an authoritative holding on the constitutional questions raised by the use of electronic equipment.

[346] See, *e.g.*, 18 U.S.C. § 3109 (1964); *cf. Miller* v. *United States*, 357 U.S. 301 (1958.)

[347] *Gouled* v. *United States* 255 U.S. 298 (1921).

[348] See, *e.g.*, Fed. R. Crim. Proc. 41(d).

[349] *Ker* v. *California*, 374 U.S. 23 (1963).

THE FIFTH AMENDMENT

The Fifth Amendment prohibits compelling a man to be a witness against himself. Traditionally, emphasis has been placed on the compulsory character of the process whereby the testimonial evidence has or has not been obtained in judging the application of the Amendment.[350] On its face alone, therefore, the Fifth Amendment would seem to have little or no application to the problems associated with electronic surveillance. Indeed, existing law makes the Amendment irrelevant.[351] The Amendment has been brought into the discussion only insofar as it has been thought to require the suppression of evidence seized in violation of the Fourth.[352]

Recent years, however, have seen increasing attention paid to the process whereby admissions can be lawfully obtained from those suspected of crimes. The emphasis has not been placed exclusively on the issue of actual compulsion. Instead, the courts have focused on the civilized character of the process itself in the context of an analysis of circumstances which give rise to the possibility or likelihood of real compulsion. Because of their actual holdings, however, a discussion of these cases must be placed in the context of the implications of the Sixth Amendment in the area of electronic surveillance.

THE SIXTH AMENDMENT

Sixth Amendment right to counsel objections to electronic surveillance build on *United States* v. *Massiah* [353] and *People* v. *Escobedo*.[354] In *Massiah* the Court held suppressible admissions electronically overheard and recorded, obtained from an indicted defendant represented by counsel. The Court felt that the interrogation so conducted outside the presence of counsel *after the trial process had begun* violated the defendant's Sixth Amendment right to counsel.

In *Escobedo* the Court held suppressible a confession obtained from a suspect in custody after arrest who had asked to see his retained counsel. The Court felt that this interrogation violated the defendant's right to counsel. The point of indictment was held not to be controlling. After the investigation had "focused" on the suspect and the "purpose" of the officers' actions was to seek admissions, the Court held that the right to counsel attached.[355] Admissions obtained outside of his presence would be unlawful.

The implications of these decisions in the area of the use of electronic equipment is obvious. Under an expanded reading of them, no use of wiretapping or bugging would be constitutionally possible. Electronic surveillance always seeks admissions. It has no other purpose. To avoid the condemnation of a general or exploratory search, the use of these techniques must always focus on a target. A joining of "focus" and "purpose" brings into operation the Sixth Amendment. Note, too, it is not possible to get a warrant from a magistrate under the Fifth or Sixth Amendment.

This past term, however, the Supreme Court gave indication of what in *Escobedo* it meant by "focus" and "purpose." In *Miranda* v. *Arizona*,[356] the Court pointed out that it had referred to "in custody interrogation" or questioning "after a significant deprivation of liberty." The Sixth Amendment right to counsel was not employed in and of itself but rather as an instrumental right. It attached to protect the Fifth Amendment consideration of the privilege against compulsory self-incrimination. With this explanation in mind, the apparent wide-ranging implications of joining *Escobedo* and *Miranda* to prevent the use of any directly or indirectly police-secured admissions seems inappropriate.[357] The Sixth Amendment thus takes its force in this area from the Fifth, and the Fifth Amendment is still keyed to compulsory self-incrimination—directly compulsory or circumstantially compulsory and "circumstantially compulsory" means "in custody interrogation." Out of custody seeking of admissions is not yet violative of the Fifth Amendment. It is, of course, possible that the Court could be led to adopt a contrary view. The point here is that nothing it has already done would require it to do so, and it has, in fact, not yet done it. The validity of any legislative scheme authorizing electronic surveillance is thus still an "open question." Under its recent decisions, the Court has not foreclosed legislative action in this area. If anything, the opinions of the justices have invited it.

POLICY CONSIDERATIONS

In addition to the above constitutional considerations, there are a number of objections, not of constitutional dimension, to any scheme which would authorize the use of electronic surveillance techniques. It has been suggested that the power to wiretap and bug, if granted, would be abused. More particularly, it is suggested that authorizing electronic surveillance techniques would give rise to blackmail and false convictions obtained by undetectable forged tapes.

Neither of these two objections seems to be of sufficient merit to warrant total rejection of any legislation in this area. Both pre-suppose bad faith in the police. If indeed the police are in bad faith—and it must be conceded some are, but it can hardly be contended all are—authorizing electronic surveillance in situations where society has a legitimate benefit to obtain from it will not really change this picture. Blackmail and false testimony will surely be unlawful under any scheme of authorization. It is unlawful today. The key question here is whether or not authorizing bugging and wiretapping will materially increase the incidence of already unlawful practices.

On balance, it does not seem that it would. Most law enforcement agencies today can already obtain, indeed already have obtained, by the use of traditional techniques, most of the information which could serve to blackmail individuals. Electronic surveillance would not give the agencies, as such, new information. Its use would only give the agency information usable in the context of a criminal prosecution. There is enough hearsay informant information around already. It is easily avail-

[350] See, *e.g.*, *Holt* v. *United States*, 218 U.S. 245, 252-53 (1910) (Holmes, J., "physical or moral compulsion"). *Cf. Hoffa* v. *United States*, 385 U.S. 293 (1966).
[351] *Olmstead* v. *United States*, 277 U.S. 438, 462 (1928).
[352] See, *e.g.*, Brandeis's dissent in *Olmstead*, *supra* note 351, at 471.
[353] 377 U.S. 201 (1964).
[354] 378 U.S. 478 (1964).
[355] *Id.* at 488-89.
[356] 384 U.S. 436 (1966).
[357] *United States* v. *Greir*, 345 F.2d 523, 524 (9th Cir. 1965). *But see* King, *Electronic Surveillance and Constitutional Rights: Some Recent Developments and Observations*, 33 GEO. WASH. L. REV. 240, 266-67 (1964). Admissions as such have been held to be outside of the *Escobedo* rationale. *Carter* v. *United States*, 362 F.2d 257 (5th Cir. 1966). *Cf. Hoffa* v. *United States*, 385 U.S. 293 (1966).

able to any police agency which will take the time and trouble to collect it to use for blackmail. It already contains the stuff of which blackmail is made.

The danger of the forged tape also seems unreal. If the police want to manufacture evidence, they have only to take the stand and lie. True, their testimony would be subject to cross-examination, but so would the circumstances surrounding the use of electronic tapes. Note, too, these tapes are already used in court. All that would be involved here would be the authorization of a new circumstance in which they would be used.

The danger of these two abuses occurring with such frequency that no use ought ever be made of the wiretap or the bug seems slight. It is certainly outweighed by the benefit to the administration of justice which can be reasonably foreseen to flow from their use.

It has also been suggested that whatever the constitutional objections, electronic surveillance is a "dirty business" [358] that should not be undertaken no matter how noble our goal. In short, the end never justifies the means. Those who suggest authorizing electronic surveillance stand convicted of advocating the "pernicious" [359] and "odious" [360] doctrine that the end does in fact justify the means.

To say that the end never justifies the means is to brush off as invalid per se the contention that electronic surveillance can find warrant in the need of society to meet the dangers posed by organized crime.[361] How is it so easy to show a distaste for bugging or wiretapping on the grounds of a high regard for privacy? What else is this argument but an application in reverse of an ends-means justification. Letting some criminals escape is justified on the grounds that privacy ought to be protected. The ends-means objection, simply stated, is internally and hopelessly illogical. It can only be given meaning if it is restated to say that not *any* means can be justified by *any* end.[362] This argument, in turn, is merely a restatement of the recognition that the judgment whether or not electronic surveillance ought to be authorized must be the product of a careful weighing of all the factors involved in the situation. If the case for the need for electronic surveillance can be made, and we are serious about organized crime, and the invasion of privacy is not all out of proportion, then we will have made the judgment that this means is warranted by this end.

Of far more serious character is the judgment that the limitations which would be hopefully built into any legislative scheme of authorization would not work. It is suggested that they would be inevitably circumvented and that there would be such a number of "spill-over" situations, where unlawful wiretapping or bugging would be engaged in, that the limitations would be nothing but a cruel hoax. The only way to avoid an unconscionable number of invasions of privacy without a correspondingly high gain to law enforcement, in short, is to place a total ban on all use of electronic surveillance.

Those who suggest that limitations can be circumvented usually point out that under a warrant procedure, for example, officers can always seek a friendly judge. A friendly review, of course, is no real protection. Further, it is noted that many judges fail to give close attention to search warrant applications today. What likelihood is it that they will give more attention to electronic surveillance warrants tomorrow?

Objections such as these, taken singly, have force. There is, however, no reason why they must be so taken. They assume, moreover, that no remedy is possible which will cut down on their effect. Forum shopping, for example, can be eliminated by having the legislation designate the judge. [363] There is no need necessarily to leave the option up to the applying agency. The danger that even so the judge will not give due attention to the *ex parte* application loses much of its force when it is placed in the context of a pre-trial review of the validity of the order required to make any evidence obtained legally admissible. At the second stage, which is an adversary proceeding, due attention would be given to the warrant. Note, too, the effect of a possible inventory provision. An aggrieved party would always be able to object after the fact, if the overhear is statutorily required to be brought to his attention. Placed in context these objections, of course, retain merit, but lose enough of their force so that it becomes possible to make the benefit out-weigh the harm.

The spill-over objection requires more extended discussion. Quite logically, it argues that a simple rule is easier to enforce than a complicated rule. If no law enforcement agent is ever allowed to use electronic devices, then it will be possible to enforce the ban. The difficulty with this argument is that no one seriously proposes that the ban be total. Virtually all concede that electronic devices ought to be used in some situations. Recording conversations with the consent of one of the parties is in a different category from wiretapping or bugging.[364] Nevertheless, the same equipment and techniques are often present in each instance. Trained men and equipment will remain whether we outlaw wiretapping and bugging or not. Further, it seems rather clear that the use of electronic surveillance techniques will be employed in any event in certain situations on the Federal level. No one is seriously proposing that they not be used when situations of national security and safety require it. Consequently, there will always be a limited exception even in a "total" ban on wiretapping and bugging.[365] Whatever benefit, therefore, might have been gained by opting for the total ban will never be realized.

There is another more fundamental defect in the spill-over theory. Under the situation of total ban, law enforcement agents would presumably still be enjoined to do battle with organized crime. They would still consider use of electronic equipment necessary to fulfill their task. Periodically, pressure would be put on them to get the job done. The techniques and equipment would be available. Under a limited authorization scheme, the situation would be exactly the same, but they would have a lawful option to take.

This situation would face them; one way they could use the equipment lawfully and achieve their goal; in another way, the use of equipment would frustrate their goal. The total ban or spill-over objection assumes,

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[358] *Olmstead* v. *United States*, 277 U.S. 438, 470 (1928) (Holmes, J.). It has rightly been observed that those "who seek to legalize law enforcement tapping or eavesdropping soon find that they are 'toiling uphill against that heaviest of all argumentative weights—the weight of a slogan.'" Kamisar, *The Wiretapping-Eavesdropping Problem: A Professor's View*, 44 MINN. L. REV. 891, 896 (1960).

[359] *Olmstead* v. *United States*, *supra* note 358, at 485 (Brandeis, J., dissenting).

[360] *On Lee* v. *United States*, 343 U.S. 747, 758 (1952) (Frankfurter, J., dissenting).

[361] See generally Kamisar, *supra* note 319, at 43–45.

[362] See generally, MARITAIN, MAN AND STATE 54–75 (1951).

[363] Williams, *The Wiretapping-Eavesdropping Problem: A Defense Counsel's View*, 44 MINN. L. REV. 855, 869 (1960). These objections are termed by Williams "an unwarranted reflection" on the judiciary. *Ibid.*

[364] *Id.* at 866.

[365] Supplemental Memorandum for the United States, *Black* v. *United States*, No. 1029, Oct. Term 1965, Sup. Ct. pp. 2–4.

nevertheless, that there would be more unlawful uses of electronic surveillance techniques if some uses were lawful and others unlawful than if all uses were unlawful. The likelihood of this being so in practice pre-supposes a tendency toward unlawful action on the part of the law enforcement agents that is not supported by experience. The police do, in fact, usually act within the law. Unlawful action is the exception, not the rule. Human conduct, moreover, is more likely to be controlled by regulations rather than prohibitions wherever there is a strong temptation to act. All our experience in the administration of justice points in the direction of this commonplace. The spill-over or total ban objection seems to ignore it. Nevertheless, it would deprive society of the benefit of any reasonable uses of electronic surveillance. It is likely, moreover, that privacy would not be materially increased. The possibility of outright unlawful electronic surveillance would remain, while spill-over would still occur from the total ban itself. Here, as elsewhere, sooner or later we will have to move some "keep-off-grass" signs and "pave the paths cut by trespassing feet" [366]—indeed—the best measure for really keeping the police off the grass at many points may well be taking down barriers at others.[367]

A PROPOSED STATUTORY FRAMEWORK

Ultimately, of course, it is not possible to be for or against (except dogmatically and therefore unreasonably) electronic surveillance without a concrete proposal to examine. Following are an outline and a draft of such a proposal.

A dilemma faces anyone who attempts to draft a statute dealing with electronic surveillance. On one hand, the statute must guard privacy to the maximum degree possible. On the other, it must authorize electronic surveillance to such an extent that the statute is practical. Many, if not most, of the objections which can be legitimately raised to electronic surveillance will apply to any statute, at least to some degree. Consequently, merely taking the step of enacting a statute, no matter how carefully it is drawn, is a step carrying with it a price. If the statute is not also practical, the price will be paid in vain. The following proposals seek to follow a middle course, both trying to grant enough power and trying to impose enough limitations. Only after actual experience under the statute will it be possible to know whether the attempt at balance has been properly struck. It is particularly for this reason that the statute should be examined and indeed enacted, if at all, only on a tentative basis. A provision attempting to insure this is the last section of the statute, providing only an eight-year life for the act.

Coverage. The first issue which must be faced is coverage. It seems clear that Federal law enforcement agents should be placed under the statute. Here the constitutional power of Congress is no problem if only Federal legislation is contemplated. Power to include state officers and private persons is also clear if the statute only attempts to cover wiretapping.[368] Difficulty could arise, however, if an attempt was made to reach not only state law enforcement agents but private parties in their use of electronic techniques other than wiretapping. Comprehensive legislation probably should be preferred. Hence Federal legislation taking up and preempting the field of wiretapping and bugging by Federal and state law enforcement agents would seem to be the best course.

State legislation outlawing private electronic surveillance could also be suggested, but in a sense, this goes beyond the mandate of the Commission to deal with law enforcement. Electronic recording techniques that involve the consent of one party, as opposed to wiretapping or bugging, should probably be left to the developing case law. It deals with issues different in kind from the privacy questions involved in electronic surveillance techniques employed in situations where the consent of one of the parties is not secured. [369] A comprehensive legislative treatment which would include this subject would probably be unwise if only because it is not needed. Issues such as authenticity [370] are clearly within the competency of the courts to develop standards on a case-by-case approach.

Should the decision to regulate state law enforcement agencies be reached, although it has not been employed before in this sort of situation, Section 5 of the Fourteenth Amendment would probably be broad enough to warrant congressional action in this area.[371] The commerce clause, of course, is adequate for both interstate and intrastate wiretapping.[372]

Limitations. Any scheme designed to regulate electronic surveillance techniques must, of course, pass the test of constitutional reasonableness. The task facing us, therefore, is to find ways of guaranteeing that the use of the devices will be discriminating, that is, employed only under limiting conditions. These limitations ought to take up: the persons against whom the techniques could and could not be used; the instruments which could or could not be tapped and the places which could or could not be bugged; the length of time during which the surveillance could be conducted; the justification which ought to be shown before the techniques could be employed; how, to whom, and when the justification would have to be made; the people who could or could not employ them; the kinds of investigation in which they could or could not be employed; the uses which could or could not be made of the information obtained; circumstances which would insure the accuracy of the information; procedures which would make public the extent of the use and usefulness of the program; and finally the sanctions, civil and criminal, which would be available to assure compliance with the statute.

Person. The limitations as to person should be based on four categories 1) national security, 2) organized criminal, 3) probable criminal, and 4) the privileged communication. It is, of course, beyond the scope of this paper to deal with the national security situation as such. The need for electronic surveillance here is assumed.

(1) Based on this assumption, on showing (the de-

[366] *Cf.* Fuller, *Freedom—A Suggested Analysis*, 68 HARV. L. REV. 1305, 1325 (1955).
[367] Kamisar, *supra* note 319, at 45.
[368] *Cf. Benanti* v. *United States*, 355 U.S. 96 (1957).
[369] Williams, *supra* note 363, at 866.
[370] See generally Annot., *Admissibility of Sound Recording in Evidence*, 58 A.L.R.2d 1024 (1958).
[371] *Cf. Strauder* v. *West Virginia*, 100 U.S. 303 (1879). Compare *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).
[372] *Cf. Weiss* v. *United States*, 308 U.S. 321 (1939).

tails of which will be considered below) of probable cause to believe that evidence of a violation of, or facts relating to, the "national security" statutes,[373] an electronic surveillance warrant authorizing the wiretapping or bugging of phones or places regularly used by the named individuals ought to be issued.

(2) Such warrants should also issue in the "organized criminal" situation. On a showing:

1. that an individual has been convicted of a felony, that is, a crime involving moral turpitude[374] punishable by over one year's imprisonment,
2. that there is reliable information[375] to believe that he is presently an organized criminal, that is, that he is presently engaged in "criminal activities"—a phrase the definition of which will be discussed below since it poses the issue of limiting the kinds of criminal investigations in which electronic surveillance should be employed,
3. and that he presently has two or more close associates who also meet the requirements of (1) and (2) above,

and that, therefore, there is probable cause to believe that evidence or facts relating to "criminal activity" may be obtained, an electronic surveillance warrant, as above, should issue, authorizing wiretapping and bugging.

Because of the far-reaching—but necessary—nature of this second use of electronic surveillance, a special provision should be made to guarantee that only a limited number of these warrants could be in use at any one time. Consequently, no more than ten per one million persons within the jurisdiction of the agency seeking the warrant on the county, and five on the state, level should be authorized. For example, there are aproximately 5,129,725 people in Cook County, Illinois.[376] Hence only fifty such warrants could be obtained. The state contains 10,081,158 people. Thus fifty warrants would be the limit. There are approximately 1,700,000 people in New York County.[377] Thus, only ten such warrants could be obtained. New York State has a population of 16,782,304.[378] Thus eighty warrants would be the limit. Any county or state having less than a million population could not obtain these warrants. Their use, therefore, would be limited to the major metropolitan areas or states, where the organized crime situation is the most pressing. In addition, since only a limited number could be obtained and the use of devices in this way is difficult and time-consuming, the agency would be forced to employ the technique only in a situation where it was necessary and then only against the top figures in organized crime. On the Federal level, a limitation of two per one million people would seem to be warranted. Three hundred and ninety-four warrants would seem to be enough.[379] More might be excessive. Indeed, these figures, although based on knowledgeable estimates, could be adjusted in time in either direction. Based on current estimates, for example, probably not more than six hundred Federal warrants would ever be issued in a year and this figure is on the high side.

(3) On a showing of probable cause to believe that evidence of, or facts relating to, a "criminal activity" would be obtained, an electronic surveillance warrant, as above, should issue. Again, note that the definition of "criminal activity" is a broad issue, which will be taken up below.

Obviously, any person who does not fit within any of the above three categories would be free of all direct lawful electronic surveillance. This would include the vast majority of citizens. To the degree that law enforcement agencies would follow the provision of the statute, since they now would have a lawful way of accomplishing their tasks, citizens could rest relatively secure in the knowledge that the law was affirmatively seeking to protect their privacy. If their conversations were overheard, it would be only incident to a lawful overhear or as a result of a honest mistake. This might not be too high a risk to ask each of us to run if it is necessary to guarantee a greater measure of justice in our society.

There are, however, some situations where special conversations, which the traditions of our people and our laws have always considered peculiarly sacred, could foreseeably be overheard incidentally where the balance of benefit and burden should be struck for privacy. Traditionally, the privileges, of husband-wife, doctor-patient, lawyer-client, and priest-penitent have been recognized.[380] There could be situations where a showing under "the national security," "organized criminal," or "probable criminal" could be made against a husband or wife, doctor, lawyer or clergyman. In this situation an electronic surveillance warrant authorizing the tapping of the phone or bugging of an area used by the individual would clearly result in innocent and intimate conversations being overheard. This risk seems too high to ask the citizen to run without some additional special showing of need. Therefore, no electronic surveillance warrants should be issued against a licensed physician, licensed lawyer or practicing clergyman no matter what showing could be made under the probable or organized criminal category. The balance of privacy and justice perhaps runs the other way when the national security warrant is at issue. The special protection which husband-wife conversations should be accorded will be noted below. In addition to refusing to authorize direct surveillance, the statute should also provide that any conversations accidentally or incidentally overheard, which would fall into these traditionally privileged categories, should not be used or disclosed by the investigating agencies. These additional protections to those conversations our society has traditionally held sacred should go a long way toward striking the proper balance between privacy and justice.

Place and Instrument. Limitation as to place and instrument ought also be imposed. Obviously, the work areas of doctors, lawyers, or clergymen ought as a general rule never be bugged (except under the national security category) to obtain evidence about individuals against

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[373] This category has been employed in a number of recent proposed statutes. See, *e.g.*, S. 1308, 88th Cong., 1st Sess. (1965). It includes any offense punishable by death or imprisonment for more than one year under Chapters 37, 105 or 115 of Title 18 of the United States Code or §§ 224-27 of the Atomic Energy Act of 1954, 68 Stat. 921, as amended, or conspiracy to commit any such offense. For criticism of this category, see generally Semerjian, *Proposals on Wiretapping in Light of Recent Senate Hearings* 45 B.U.L. Rev. 216, 234-38 (1965).

[374] The phrase "moral turpitude" is constitutionally definite. See *Jordon* v. *DeGeorge*, 341 U.S. 223, 229-30 (1951) (conspiracy to defraud held within phrase). It might have to be specially defined, however, to reach some organized crime activity. See Johnson, *Organized Crime: Challenge to the American Legal System*, 54 J. Crim. L., C. & P.S. 20 (1963). Johnson's articles should be consulted by anyone interested in organized crime.

[375] *Cf. Brinegar* v. *United States*, 338 U.S. 160 (1949). *Compare Beck* v. *Ohio*, 379 U.S. 89 (1964), *with Draper* v. *United States*, 358 U.S. 307 (1959), and *Jones* v. *United States*, 362 U.S. 257 (1960).

[376] 1966 World Almanac and Book of Facts 366 (1960 figures).

[377] *Id.* at 372.

[378] *Id.* at 374.

[379] The current national population estimate is 197,346,123. Chicago Sun Times, Sept. 17, 1966, p. 36, col. 2.

[380] See generally 8 Wigmore, Evidence § 2290 *et seq.* (attorney client); § 2332 *et seq.* (husband wife); § 2380 *et seq.* (physician patient) and § 2394 *et seq.* (priest penitent).

whom a proper showing could be made. Nevertheless, once again a balance must be struck. Unless we would want to permit criminals to arrange all of the meetings in the offices of friendly doctors, lawyers or clergymen, there ought to be a special exception to the general prohibition of the use of electronic surveillance techniques in these areas. If, one, a special showing could be made that the area was being used for such purposes and, two, that special precautions would be taken to reduce to a minimum the indirect overhears, a warrant ought to be issued for surveillance of even these areas. In addition, as a general rule (except in the national security category) homes, that is, places used primarily for domestic purposes, i.e., sleeping, eating, child rearing, loving, etc., should not be subjected to surveillance. This prohibition would help to protect husband-wife conversations. Again, however, on a special showing in addition to the usual probable cause as above, the warrant should issue. For example, if it were shown that several men, each of whom fell within the organized criminal category, were using one of their homes for meetings in the early afternoon, the warrant could issue, but the judge could also limit the time of surveillance to the afternoon. There would be no reason to continue the surveillance at times other than when the meetings were going on. Once again privacy and justice would each receive its due. A balance would be struck.

The tapping of phones is like putting in bugs. In most situations, it presents virtually the same questions. However, like the special area problems noted above, the tapping of public phones poses special problems. Again, we have a situation where we can reasonably foresee that a number of innocent calls will be overheard. The balance of privacy and justice, therefore, would seem to mandate a general rule (except in the national security category) that public phones should not be tapped absent a special showing of need and that the number of, or risk of, innocent calls being overheard will be cut to a minimum. For example, it would be one thing to authorize the tapping of a public phone in Grand Central Station used by hundreds of people each day and quite another to tap a public phone in a bar frequented almost exclusively by criminals and their close associates and seldom used by anyone but them. On a special showing of circumstances such as these, the judge ought to be able to authorize the tap. Even in the Grand Central situation, if the agents could tell beforehand, the tap could be placed on the particular phone which the individual used each day, and an agent with a radio could inform the other listening agent that the phone was going to be used. Hence, although the tap was of a public phone, the overheard calls could be limited to only the ones needed. The point is that it is not necessary to make blanket judgments even on such sensitive issues as tapping public phones.

Time. The electronic surveillance warrant should also have a time limitation. It should be put in initially for only forty-five days. If it is not productive, it should be withdrawn. A renewal should be granted only on a showing of productivity or an explanation of unproductivity. For example, if it could be shown that one day after the tap was put on, the individual took a three-month vacation, this should not necessarily count as an unproductive tap. "In" should mean "in and working." Note sometimes it may take several weeks to install a bug. The time should run from when the listening begins, but there should be a requirement that the device be put in as soon as possible. No arbitrary time limit should be placed on how long the device is allowed to operate. If it is productive it should be allowed to remain in operation. Indeed, this situation offers the clearest situation where the balance should be struck for justice. When you are certain, not just probably sure, that evidence can be obtained, there should be no reluctance to authorize the use of the equipment. For in this situation the danger of an invasion of innocent privacy is not present. No one should have a right to commit a crime in private if there is virtually no danger of innocent privacy being invaded.

Judicial Review. Law enforcement people should not be allowed to use electronic equipment without independent judicial review. No category of situations should be excluded from this general rule. The various showings should be made in writing [381] and under oath. The writing will guarantee that even if the reviewing judge does not give the application his full attention subsequent review can be based on an ascertainable record.

The statute itself should designate the judicial officers to whom application could be made.[382] Presently, search warrant practice permits Federal judges, United States Commissioners and city mayors to issue warrants.[383] This rule is obviously too permissive. Only a limited number of judicial officers should be permitted to issue electronic surveillance warrants. If the list were carefully drawn, this would limit forum shopping. On the Federal level, only the chief judge of the proper district court (or such judges as he should designate) or the chief judge of the proper circuit court (or such judges as he should designate) or the Chief Justice or proper Circuit Justice (or such district or circuit judges as they might designate) should be authorized to issue warrants. The proper district or circuit would, of course, be the district or circuit within which the conversation was to be overheard. Allowing circuit judges, the Chief Justice or the Circuit Justice to hear applications would make it possible in particularly sensitive investigations to maintain security, which might not always otherwise be possible. On the state level, a parallel system of alternatively designated judges should be worked out.

The only exception to prior judicial approval should be the emergency situation where there is no time to obtain a warrant.[384] Here emergency tapping and bugging should be permitted, but the agents should have to apply for an order within forty-eight hours. If the order is refused, all information obtained should be suppressed.

The statute should also be viewed as a discretionary grant of power to the judge. Even where a technical showing could be made, the judge should be empowered to deny or grant the warrant with appropriate modifica-

[381] *Cf. Giordenillo v. United States*, 357 U.S. 480 (1950).
[382] Williams, *supra* note 363, at 869.
[383] 18 U.S.C. § 3011 (1964).
[384] *Cf.* N.Y. Code Crim. Proc. § 813b.

tions based on his concrete balance of the best interests of justice and privacy.

Of course, each application should specify precisely all of the circumstances surrounding the proposed overhear, including information about all past applications. The judge should also be specifically empowered to request more information.

A showing of "probable cause" under the above categories should not automatically entitle the applying agent to an electronic surveillance warrant. Wiretapping and bugging should be the exception, not the rule. They are techniques which should not be used in every situation. Privacy is too important. Consequently, the affidavits should have to show that "normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried." This is the English standard for the use of wiretapping on the Home Secretary's warrant.[385]

Investigative Situations. Past proposals for wiretapping statutes have tackled the tough issue of the kinds of investigations in which the use of electronic surveillance should be authorized. All conclude that the use of this sort of technique should be restricted to serious cases. In some,[386] this goal has been achieved by enumeration of the list of crimes. In others,[387] a general limitation such as "felonies, that is, crimes involving moral turpitude, punishable by more than one year in prison," has been imposed.

How "criminal activity," used above, is defined will settle this question here. There is much to say for both positions. The need for the equipment is not a "need to solve" serious crimes so much as it is "an investigative need" in the context of this criminal investigation. Organized crime has not seen fit to limit itself to the commission of any pat list of crimes. Indeed, the attempt to formulate a list ultimately results in somewhat arbitrary inclusions and exclusions. Initially, however, it might be best to set out a list. If the list turns out to be workable—or needs to be broadened or narrowed—amendment will always (hopefully) be possible.

On the Federal level, it is suggested the list might include murder, kidnapping or extortion under Title 18 of the United States Code, any offense under Sections 201,[388] 1084,[389] 1952,[390] or 1751 [391] of Title 18, bankruptcy fraud, counterfeiting, or any offense under any law of the United States involving the manufacture, importation, concealment, buying, selling or otherwise dealing in narcotic drugs or marijuana, or a conspiracy to commit any of the above offenses. On the state level, the list should be limited to murder, kidnapping, extortion, bribery, gambling (where the penalty makes the crime a felony, that is, punishable by more than one year in prison), or dealing in narcotic drugs or marijuana, or any conspiracy involving the above offenses.

Applying Agencies. A careful limitation should also be placed on those Federal and state law enforcement agencies who could employ electronic surveillance techniques. There is no reason to allow such diverse agencies as Food and Drug, and Labor Department to wiretype or bug. The list should be limited to the Central Intelligence Agency, the Army, Air Force and Navy Intelligence Services, the Federal Bureau of Investigation, the Intelligence Division of the Internal Revenue Service, the Narcotics Bureau and the Secret Service. A judgment of the scope of the attempt at regulation must involve consideration of the degree to which security agencies should be included within the scheme of regulation.

Even with this limitation of agencies, the power should be further circumscribed by requiring that the Attorney General (or his designates) shall sign and responsibly review all applications. On the state level, the application should only be made over the signature of the Attorney General (or his designates) or the district attorney or state's attorney (or their designates). If use of these techniques were to be made by state investigating commissions or legislatures, arrangements would have to be made with the state's attorney general or district attorney.

Remedies for abuse by police agencies, including departmental discipline, civil fines and criminal penalties, must necessarily be surrounded with protections for the accused. It might well be expected, therefore, that on occasion the remedies might prove ineffectual. Involving the prosecuting officer, however, brings in individuals subject to the political process. No attorney general, state or Federal, and no district attorney could afford to permit abuses to occur. It might cause a disaster at the next election. In addition, the prosecuting officer is an officer of the court trained in law. The chances, therefore, that the power to use electronic surveillance will be abused out of misplaced zeal is lessened. Indeed, whatever the allegation of police abuse, no one has suggested and convincingly demonstrated that the district attorneys in New York, who have used the power to tap and bug under New York law extensively, have ever abused it. We can learn much from this experience.

Precautions for Accuracy. The custody of all applications and the accompanying papers should be wherever the court granting the application directs.

Tapes should be made of all conversations overheard. Reliance should not be placed on memory or notes. Tapes already recorded should be sealed by the authorizing court when the time for renewal arrives or, if not renewed, when the surveillance is terminated. The seal should be a prerequisite for admission unless a satisfactory showing could be made for its absence. Periodic sealing would lessen the opportunity to alter tapes. Copies could be made of the tapes for investigative purposes, but court use should be limited to those sealed. Custody of the sealed tapes should be wherever the court directs.

Disclosure. Disclosure of information electronically overheard should be limited to investigating agencies pursuing lawful investigations, to grand juries, and to courts and juries on special hearings or at trial or on

[385] DEVLIN, THE CRIMINAL PROSECUTION IN ENGLAND 65-69 (1958).
[386] *Cf.* S. 1308, 89th Cong., 1st Sess. (1965).
[387] *Cf.* S. 2189, 89th Cong., 1st Sess. (1965) (this provision was present prior to its ultimate introduction).
[388] Bribery.
[389] Transmission of gambling information.
[390] Interstate facilities in aid of racketeering.
[391] Injury to the President.

appeal. Other disclosures, for example in a Congressional hearing, should be made only on a showing to a proper court that the disclosure was in the public interest.

Inventory. The statute should also contain an inventory provision. Within one year, if not before, after the termination of an electronic surveillance warrant, notice should have to be given to the party or parties named in the overhear order that the warrant was issued and conversations were recorded. This would give the individual an opportunity to challenge the propriety of the issuance of the warrant. It would be, of course, too late to do anything about the search itself—this is the case now where a search warrant is issued—but it will give the individual his day in court. The deterrent and publicity effects of this provision could be expected to go a long way toward guaranteeing that the equipment would be carefully used. Note, too, that there would be no such thing as lawful surreptitious electronic surveillance. After a period of time the exact extent of the lawful use of electronic surveillance would be visible. This should do much to dispel the fear of the unknown now so often associated with the use of these techniques.

While the law should guarantee that all uses should ultimately become public, it is obvious that in some situations the balance of privacy and justice might be struck in such a way that a filing of the inventory could be postponed. On an in-camera showing that disclosure would not yet be in the public interest, a judicial officer should be empowered to postpone for a period of time the filing of the inventory. Such a showing might involve a situation where an investigation was still continuing or where a disclosure would compromise the national security.

The statute should also require that the Administrative Office of the Courts collect and annually report to Congress data on both state and Federal warrants. The annual report might include:

1. number of warrants applied for
2. number granted
   a. as applied for
   b. as modified
3. kind applied for and granted
4. follow up information
   a. arrests
   b. trials
   c. convictions

These data should also go a long way toward dispelling fear of the unknown. They should also give us some way to assess the use that is being made of the warrants.

Cooperation. The statute should place on private parties such as landlords or hotel owners and the telephone companies a statutory duty to cooperate with law enforcement agencies having warrants valid on their faces. Good faith cooperation should be a defense to any damage suits.

Overhearing incident to the normal operation and conduct of the telephone company's business should be excepted from the prohibition of the statute.

Remedies. All evidence directly or indirectly obtained in violation of the statute should be inadmissible in any criminal or civil proceeding in all state or Federal courts or other proceedings. Only persons aggrieved [392] by the unlawful electronic overhears should have standing to suppress the evidence. This would mean that there would be some limit—even arbitrary—to the damage an honest mistake could do to the long and costly investigations characteristic of organized crime matters. Some principle of deterrence by invoking the suppression sanction is clearly needed. The penalty need not exact a price in excess of that required to assure compliance. An unlimited right to suppress would exact too high a cost.

The harmless error rule ought also be made applicable where illegally seized [393] evidence is wrongfully admitted at a trial.

Absent a showing that pre-trial disclosure would not be in the public interest,[394] ten days prior to trial the government should have to give notice to the defense that it intends to use evidence directly or indirectly obtained through electronic surveillance. This would give the defense an opportunity to challenge its legality. Without a showing of good cause, a failure to make a motion to suppress should constitute a waiver of the right to object to the evidence at trial.[395] Collateral matters should always be settled before trial. Should the motion to suppress be granted, the judgment should be made appealable.[396] The importance of a uniform interpretation of the statute should outweigh any interest the defendant might have in preventing appellate review. The burden of proof to show illegality should initially rest on the defendants, but once the illegality is shown, the government should have the burden of proof to show that its evidence is not tainted.[397]

Any party aggrieved by an unlawful electronic overhear ought to be able to sue in any state or Federal court for actual and, where appropriate, punitive damages. Attorney fees should be awarded. Only willful violations of the statute should be made actionable. A good faith mistake of fact or law should be a defense.[398] All willful violations of the statute or bugging and wiretapping by Federal or state law enforcement agents not authorized by the statute should be made criminal.

Re-examination. The life of the statute should be limited by its own terms to eight years. It takes about four years to conduct major criminal investigations. It will take a while to litigate under the statute. After eight years, we should have built up a body of experience under the statute sufficient to assess its overall effect.

Finally, the statute should authorize the Department of Justice to contract for an independent empirical study to be made of the operation of the statute by competent social scientists. The study should include a review by a panel of independent experts chosen from all segments of American life, including but not limited to, lawyers, jurists, teachers, artists, and businessmen. At that time, we will be in a position to make a better informed judgment on its further need, its effect in the community, and what the ultimate balance of privacy and justice is in this area.

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[392] *Compare Jones* v. *United States*, 362 U.S. 257 (1960), *with People* v. *Martin*, 45 Cal. 2d 755, 290 P.2d 855 (1955).
[393] *Chapman* v. *California*, 35 U.S.L. WEEK 4197 (U.S. Feb. 20, 1967).
[394] *Cf.* FED. R. CRIM. PROC. 16(e).
[395] *Cf.* FED. R. CRIM. PROC. 16.
[396] Only under 18 U.S.C. § 1404 (1964) are decisions now appealable. *DeBella* v. *United States*, 369 U.S. 121 (1962).
[397] See generally MAGUIRE, EVIDENCE OF GUILT § 5.07 (1959).
[398] *Cf. United States* v. *Murdock*, 290 U.S. 389 (1933).

CONCLUSION

The long-term immunity from legal accountability that the major figures in organized crime have enjoyed constitutes a black record in the administration of justice in this country. It can truly be said all of us are being denied "due process of law." [399] More, however, is involved than the symbolic meaning of the failure here of justice. The motivation of the major organized crime figure is not that of the typical offender. Passion, poverty, ignorance, mental disease play a small part. Whatever the validity of the concept of deterrence elsewhere, in this area it seems to have a valid meaning. These people calculate how low the risks of conviction are and how high the rewards of success go. Change that balance and one can reasonably expect to change their behavior patterns. Today the young man in organized crime knows all he has to do is run the risk of conviction for a few years as he works his way up. When he arrives at a certain point, wealth, power and immunity from legal accountability are his. This success story of the top man can be, and has been, repeated ad nauseam.

For good or for ill, the law and its failures teach. People know when crime pays. Kids in the slums see the cop on the beat take money. They know the pusher seldom gets caught, and his wholesaler is virtally never touched. They learn this lesson better than any middle class values taught in the schools from which they drop out. The implication of the failure of our legal system to hold those who openly flaunt our laws accountable undermines the entire system. Not only is crime not deterred, it is indirectly promoted. No society can call itself civilized and allow this situation to continue.

The enactment of any one or a series of statutes designed to strengthen the evidence gathering process, of course, will not bring on the millennium. To realize only the potential possible from the statutes it will be necessary to implement them with a commitment of time, talent and personnel. Even then organized crime will not be ultimately eradicated and justice completely done. The point the Wickersham Commission made over thirty years ago needs to be made here: "Because these things are not absolutely attainable it does not follow that we should not strive for them, nor that they may not be attained to a high degree." [400] "Although organized crime cannot be completely eliminated from our society, this is no reason," as the Kefauver Committee put it, "for defeatism, for vigorous law enforcement can control [it] to the point where it is no longer a menace to our institutions." [401]

Attention, however, must be given to more than just the evidence gathering process. Other aspects of the legal system must be also re-examined in light of organized crime. Consideration should be given, for example, to the administration of the informant's privilege,[402] to the liberalization of pre-trial criminal discovery,[403] to the protection of witnesses,[404] to evidentiary rules such as that which requires accomplice testimony to be corroborated,[405] to search and seizure questions (e.g., no knock warrants,[406] positively in nighttime search warrants,[407] appealability of pre-trial order to suppress,[408] etc.) and to the whole question of sentencing the racketeer.[409]

Other approaches—not narrowly legal—must also be tried. Consideration, for example, should be given to our present commitments to the total outlawing of narcotics and gambling. Maybe, if alternative solutions could be worked out the sphere of organized crime activity

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[399] Lumbard, *The Lawyer's Responsibility for Due Process and Law Enforcement*, 12 SYRACUSE L. REV. 430 (1962).

[400] NATIONAL COMM'N ON LAW OBSERVANCE AND ENFORCEMENT, REPORT ON CRIMINAL PROCEDURE, No. 8, p. 4 (1931).

[401] THE KEFAUVER REPORT ON ORGANIZED CRIME 178 (Didier ed. 1951).

[402] The importance of the informant's privilege to law enforcement is brought out in HARNEY & CROSS, THE INFORMER IN LAW ENFORCEMENT (1960). Legal aspects are considered in 8 WIGMORE, EVIDENCE § 2374 (3d ed. 1940). The fear of the prosecution that disclosure constitutes a death sentence for the informant is real. Between 1961–65, twenty-five informants involved in the organized crime drive of the Department of Justice were killed, often tortured to death. See generally testimony of Nicholas deB. Katzenbach, *Invasions of Privacy, Hearings Before the Sen. Subcommittee on Administrative Practices and Procedures of the Comm. on the Judiciary*, 89th Cong., 1st Sess., pt. 3, at 1158 (1965).

[403] See generally Louisell, *Criminal Discovery Dilemma Real or Apparent*, 49 CAL. L. REV. 56 (1961). The recent revision of the Federal Rules of Criminal Procedure gives recognition to the dangers here. *Cf.* FED. R. CRIM. PROC. 16(e).

[404] On the whole, general state law is adequate to protect witnesses. Federal law, however, is sorely in need of reform. The Senate recently passed legislation which will go a long way toward remedying the situation. See generally 112 CONG. REC. 19880–81 (daily ed. Aug. 21, 1966).

[405] See *supra* note 48.

[406] The question is considered in Blakey, *The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California*, 112 U. PA. L. REV. 499 (1964). New York's recent "no knock" statute has been upheld as constitutional. There is a need for similar legislation elsewhere. N.Y. CODE CRIM. PROC. § 709; *People v. Delago*, 16 N.Y.2d 289, 213 N.E.2d 659 (1965), *cert. denied*, 383 U.S. 963 (1966).

[407] New York, Illinois, and California no longer have the requirement. N.Y. CODE CRIM. PROC. § 801; CAL. PEN. CODE § 1533; ILL. ANN. STAT. ch. 38, §§ 108–13 (Smith-Hurd 1964). Federal law retains it, FED. R. CRIM. PROC. 41(c). The omission can apparently withstand attack on Fourth Amendment grounds. *Voorhies v. Faust*, 220 Mich. 155, 189 N.W. 1006 (1922). The provision ought to be eliminated from Federal law. It constitutes an unwarranted impediment to night-time raids on illegal establishments run by organized crime.

[408] More important than any attempt at further substantive legislation designed to clarify or simplify search and seizure law would be the passage of a statute giving the government the right to appeal such orders. We are told that the suppression rule finds its rationale, at least in part, in the concept of deterrence. See, *e.g.*, *Elkins v. United States*, 364 U.S. 206, 217 (1960). Yet the predominant feature of search and seizure law is uncertainty. Note but a few of the comments of the Justices themselves. Chief Justice Vinson in *Trupiano v. United States*, 334 U.S. 699, 716 (1948), termed it a field "replete with complexities." Justice Black in *United States v. Rabinowitz*, 339 U.S. 56, 67 (1950), which but two years later overruled *Trupiano*, observed in no "other field has the law's uncertainty been more clearly manifested." Justice Clark commented in *Chapman v. United States*, 365 U.S. 610, 622 (1961): "For some years now the field has been muddy, but today the court makes it a quagmire." Justice Harlan, in *Ker v. California*, 374 U.S. 23, 40 (1963), commented on the lack of "predictability" of the "court's decisions in the realm of search and seizure." The point is expressed by Mr. Justice Cardozo: "Law as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." CARDOZO, THE GROWTH OF THE LAW 3 (1927).

Part of the "unknown and unknowable" character of search and seizure law is directly attributable to the inability of the government to appeal erroneous decisions of trial courts. All criminal cases raising search and seizure questions are, of course, initially heard by trial judges. Since the government cannot appeal criminal cases, search and seizure law has become largely "district court" law, and it is not entirely an exaggeration to say that there are as many rules as there are district court judges. Again a reference to Mr. Justice Cardozo for the inevitable consequence: "The output of a multitude of minds must be expected to contain its proportion of vagaries. So vast a brood includes the defective and the helpless." *Id.* at 5.

Even when search and seizure questions are now raised on appeal, the government is at a disadvantage. Having nothing further to lose, the argument of the defense counsel may, and usually does, take the broadest form, while the government, as a matter of practical necessity usually must seek merely to sustain the ruling of the trial judge. To urge more than simple affirmation by raising broad issues inevitably runs the risk of undermining the safety of the verdict. It is always much easier, of course, to quarrel with a broad argument than a narrow one. Cautious advocacy is the best short-run policy; it does not, however, leave room for an attempt by the government to try to develop a body of search and seizure law meeting the needs of both the individual and society, which are, after all, the same in the long run.

Under existing law, of course, the government has no right to appeal "the defective and the helpless." *DeBella v. United States*, 369 U.S. 121 (1962). Legislation has been introduced over the years designed to grant such a right. See, *e.g.*, S. 2060, 82d Cong., 1st Sess. (1951). In 1954, H.R. 7404, introduced by then Representative Keating of New York, was at least reported out of the House Judiciary Committee. H.R. 1684, 83d Cong., 2d Sess. (1954). Little opposition was expressed to the measure. See generally *Hearings Before Subcommittee No. 2 of the House Committee on the Judiciary* on H.R. 7404, 83d Cong., 2d Sess. (1954). The bill received, in fact, the endorsement of the American Bar Association, Criminal Law Section. *Id.* at 4. Unfortunately, however, apparently due to apathy, legislation like H.R. 7404 has never succeeded in passing Congress. The sole exception to the general rule of non-review is 18 U.S.C. § 1404 (1964), which is limited to narcotic cases, and it passed only as part of an overall treatment of the narcotic traffic.

With the right to appeal, the government would be in a favorable position to work for the simplification, clarification, and uniformity of the law through the appellate process. Suitable vehicles could be selected for appeal which would bring some order into the law.

Of course, any suggestion to grant the government a right of appeal in criminal cases cuts against the grain. The normal visceral reaction against government appeals in such cases, however, is misplaced here. The real issue in search and seizure questions is the propriety of governmental action, not the guilt or innocence of the defendant. Denying the government the right to appeal, in fact, denies to the real "defendant" in such situations a right of review.

The only legitimate objections to this kind of appeal center on the lack of a speedy trial or the possibility of double jeopardy. A possible violation of the double jeopardy clause may be avoided by limiting the right to motions made and sustained prior to the point at which jeopardy attaches. See *United States v. MacDonald*, 207 U.S. 120 (1907). The lack of a speedy trial could adequately be avoided by providing that such appeals be pressed with diligence and, perhaps, by giving them docket priority by statute.

[409] See generally NCCD, MODEL SENTENCING ACT (1963); Edwards, *Sentencing the Racketeer*, 9 CRIME & DEL. 391 (1963); Rector, *Sentencing the Racketeer*, 8 CRIME & DEL. 358 (1962); Bates, *Organized Crime and the Correctional Process*, *id.* at 390.

could be indirectly reduced. Here, of course, legalization is no easy answer. It seems clear that certain aspects of the use of narcotics or of gambling might still have to be regulated—would we ever permit teenagers to use heroin or to gamble on credit? [410] Indeed, certain areas of present organized crime activity may well be beyond the possibility of approach in an alternative way. Racketeering in unions and businesses and loan sharking come to mind.

What does seem relatively clear, however, is that unless we strengthen the evidence gathering process at all points—and in particular, authorize general immunity grants and electronic surveillance techniques—the job of bringing criminal sanctions to bear on the organized crime problem will not get done. What we can do through law will not be achieved. Indeed, we have every reason to expect that the situation will only further deteriorate.[411] How much of our available social capital we can afford to use up letting things slide as we have remains an open question. On balance, it seems that the process of corruption has gone too far already. No one knows how much further we can safely allow it to go. Wisdom would seem to indicate it best not to experiment any further by letting events "take their course."

Draft Statute

A Bill To prohibit electronic surveillance by persons other than duly authorized law enforcement officers engaged in the investigation or prevention of specified categories of offenses, and for other purposes.

Be it enacted by the Senate and House of Representatives of United States of America in Congress assembled,

SHORT TITLE

SEC. 1. This Act may be cited as the "Electronic Surveillance Control Act of 1967."

FINDINGS

SEC. 2. On the basis of its own investigations and of published studies, the Congress makes the following findings:

(a) Wire communications are normally conducted through the use of facilities which form part of an interstate network. The same facilities are used for interstate and intrastate communications. Effectively to protect the integrity of interstate communications and the privacy of parties to such communications, it is necessary for the Congress to prohibit interception of any wire communication using such facilities and to define on a uniform basis the circumstances and conditions under which such interception is permitted.

(b) Electronic, mechanical, or other intercepting devices are being used by public and private persons to overhear oral communications without the consent of one of the parties in private areas. The contents of these communications and evidence derived therefrom is being used by public and private persons as evidence in court and administrative proceedings. It is also being used by persons whose activities affect interstate commerce. The manufacture, distribution, and use of these devices are facilitated by interstate commerce. Effectively to protect the integrity of these court and administrative proceedings, to prevent the obstruction of interstate commerce, and to protect the privacy of these oral communications, it is necessary for Congress to prohibit the interception by public or private persons of all oral communications without the consent of one of the parties in private areas, to prohibit the manufacture, the distribution and the use of these devices, and to define on a uniform basis the circumstances and conditions under which such interception is permitted.

(c) Criminals make extensive use of wire and oral communications in their activities. The interception of such communications to obtain evidence of the commission of crime or to prevent its commission is an indispensable aid in the administration of justice.

PROHIBITIONS

SEC. 3. Title 18, United States Code, is amended by inserting immediately following section 2424 a new chapter, to be composed of sections 2510 through 2513 as follows:

"CHAPTER 120. WIRE AND ORAL COMMUNICATION PROHIBITIONS.

"SEC.
"2510. Interception of Wire and Oral Communications Prohibited.
"2511. Manufacture and Distribution of Wire and Oral Communication Intercepting Devices Prohibited.
"2512. Confiscation of Wire or Oral Communication Intercepting Devices.
"2513. Immunity of Witnesses.

"SEC. 2510. INTERCEPTION AND DISCLOSURE OF WIRE OR ORAL COMMUNICATIONS PROHIBITED.

"(a) Except as otherwise specifically provided in Chapter 240 of Title 18, United States Code, any person who—

"(1) willfully intercepts, attemps to intercept, or procures any other person to intercept, or attempt to intercept, any wire or oral communication; or

"(2) willfully discloses, or attempts to disclose, to any other person the contents of any wire or oral communication if the person disclosing that information knows or has reason to know that the information was obtained through the interception of a wire or oral communication; or

"(3) willfully uses, or attempts to use, the contents of any wire or oral communication if the person using that information knows or has reason to know that the infor-

[410] Note the growing concern in England that its experiment with legalized gambling is running into trouble with organized crime. Proposals are under consideration, *inter alia*, to cut out credit gambling and to require strict ownership licensing and registration. See N.Y. Times, Sept. 13, 1966, p. 49, col. 1, at 50, col. 2.

[411] Then Attorney General Robert F. Kennedy put it this way: "[U]nless the Federal Government is given the weapons to deal with this kind of problem, all we are going to do is have articles written, stories written, and hearings, and not really get the jobs done." Quoted in Permanent Subcomm. on Investigations of the Sen. Comm. on Gov't Operations, *Organized Crime and Illicit Traffic in Narcotics*, S. REP. No. 72, 89th Cong., 1st Sess. 53 (1965).

mation was obtained through the interception of a wire or oral communication—

"Shall be fined not more than $10,000, or imprisoned not more than five years, or both: *Provided,* That good faith reliance on a court order shall constitute a complete defense.

"(b) (1) It shall not be unlawful under this Chapter for an operator of a switchboard, or an officer, agent, or employee of any communication common carrier, whose facilities are used in the transmission of a wire communication to intercept, disclose, or use that communication in the normal course of his employment while engaged in any activity which is a necessary incident of the rendition of the service thereof or the protection of the rights or property of the carrier thereof.

"(2) It shall not be unlawful under this Chapter for an officer, employee, or agent of the Federal Communications Commission, in the normal course of his employment and in discharge of the monitoring responsibilities exercised by the Commission in the enforcement of the Federal Communications Act, to intercept a wire or oral communication while it is being transmitted by radio, or to disclose or use the information thereby obtained.

"(c) Nothing in this Chapter shall be deemed to limit the constitutional power of the President to obtain information by such means as he deems necessary to protect the Nation from actual or potential attack or other hostile acts of a foreign power or to protect military or other national security information against foreign intelligence activities. The contents of any wires or oral communication intercepted by authority of the President in the exercise of the foregoing power may be received in evidence in any judicial trial or administrative hearing only where such interception was reasonable, but shall not be otherwise used or divulged except as is necessary to implement that power or on a showing of good cause before a judge of competent jurisdiction.

"SEC. 2511. MANUFACTURE AND DISTRIBUTION OF WIRE OR ORAL COMMUNICATION INTERCEPTING DEVICES PROHIBITED.

"(a) Except as otherwise specifically provided in Chapter 240 of Title 18, United States Code, any person who—

"(1) willfully sends through the mail, or sends, or carries in interstate or foreign commerce any electronic, mechanical, or other intercepting device, knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the interception of wire or oral communications; or

"(2) willfully manufactures or assembles any electronic, mechanical, or other intercepting device, the design of which renders it primarily useful for the purpose of the interception of wire or oral communications knowing or having reason to know that such device or any component thereof has been or will be sent through the mail or transported in interstate or foreign commerce; or

"(3) willfully places in any newspaper, magazine, handbill, or other publication any advertisement of—

"(A) any electronic, mechanical, or other intercepting device, the design of which renders it primarily useful for the purpose of the interception of wire or oral communications; or

"(B) any other electronic, mechanical, or other intercepting device, where such advertisement promotes the use of such device for the purpose of the interception of wire or oral communications knowing or having reason to know that such advertisement will be sent through the mail or transported in interstate or foreign commerce—

"Shall be fined not more than $10,000, or imprisoned not more than five years, or both.

"(b) It shall not be unlawful under this Chapter for a common carrier, or an officer, agent, or employee, or person under contract thereto, in the usual course of its business, or the United States, or any State, or political subdivision thereof, or any officer, agent, or employee, or person under contract thereto, in the usual course of its activities, to send through the mail, send, or carry in interstate or foreign commerce, or manufacture, or assemble, any electronic, mechanical, or other intercepting device knowing or having reason to know that the design of such device renders it primarily useful for the purpose of the interception of wire or oral communications.

"SEC. 2512. CONFISCATION OF WIRE OR ORAL COMMUNICATION INTERCEPTING DEVICES.

"Any electronic, mechanical, or other intercepting device used, sent, carried, manufactured, or assembled in violation of section 2510 or 2511 of this Chapter shall be seized and forfeited to the United States. All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of vessels, vehicles, merchandise, and baggage for violation of the customs law; the disposition of such vessels, vehicles, merchandise, and baggage or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect to such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof; except that such duties as are imposed upon the collector of customs or any other person with respect to the seizure and forfeiture of vessels, vehicles, merchandise, and baggage under the customs laws shall be performed with respect to seizures and forfeitures of electronic, mechanical, or other intercepting devices under this section by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General.

"SEC. 2513. IMMUNITY OF WITNESSES.

"Whenever in the judgment of a United States attorney the testimony of any witness, or the production of books, papers, or other evidence by any witness, in any case or proceeding before any grand jury or court of the United

States involving any violation of this Chapter, or any conspiracy to violate such Chapter, is necessary to the public interest, he, upon the approval of the Attorney General, shall make application to the court that the witness shall be instructed to testify or produce evidence subject to the provisions of this section, and upon order of the court such witness shall not be excused from testifying or from producing books, papers, or other evidence on the ground that the testimony or evidence required of him may tend to incriminate him or subject him to a penalty or forfeiture. But no such witness shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he is compelled, after having claimed his privilege against self-incrimination, to testify or produce evidence, nor shall testimony so compelled be used as evidence in any criminal proceeding (except prosecution described in the next sentence) against him in any court. No witness shall be exempt under this section from prosecution for perjury or contempt committed while giving testimony or producing evidence under compulsion as provided in this section."

AUTHORIZATIONS AND LIMITATIONS

SEC. 4. Title 18, United States Code, is amended by inserting immediately following section 3771 a new chapter, to be composed of sections 3800 through 3805 as follows:

"CHAPTER 240. INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS AUTHORIZATIONS AND LIMITATIONS.

"Sec.
"3800. Prohibition of Use as Evidence of Intercepted Wire or Oral Communications.
"3801. Authorization for Interception of Wire or Oral Communications.
"3802. Authorization for Disclosure and Use of Intercepted Wire or Oral Communications.
"3803. Procedure for Interception of Wire or Oral Communications.
"3804. Reports Concerning Intercepted Wire or Oral Communications.
"3805. Recovery of Civil Damages Authorized.
"3806. Definitions.

"SEC. 3800. PROHIBITION OF USE AS EVIDENCE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS.

"Whenever any wire or oral communication has been intercepted, no part of the contents of such communication or no evidence derived therefrom may be received in evidence in any proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee or other authority of the United States, or any State, or political subdivision thereof, if the disclosure of that information would be in violation of Chapter 120, Title 18, United States Code.

"SEC. 3801. AUTHORIZATION FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS.

"(a) The Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, may authorize an application to a Federal judge of competent jurisdiction for, and such judge, after making the findings required by section 3803 (c) of this Chapter, may grant, in conformity with section 3803 of this Chapter, leave to permit the Federal Bureau of Investigation, or other Federal agency having responsibility for the investigation of the offense as to which such application is made, to intercept wire or oral communications when such interception may provide evidence of—

"(1) any offense punishable by death or by imprisonment for more than one year under Chapters 37 (Espionage), 105 (Sabotage), or 115 (Treason), of Title 18, United States Code, or sections 224 to 227, inclusive, of the Atomic Energy Act of 1954 (68 Stat. 921), as amended;

"(2) any offense involving murder, kidnapping, or extortion punishable under Title 18, United States Code;

"(3) any offense punishable under sections 201 (Bribery), 224 (Sports Bribery), 1084 (Transmission of Gambling Information), 1503 (Obstruction of Justice), 1751 (Injury to President), 1952 (Racketeering), or 1954 (Welfare Fund Bribery), Title 18, United States Code;

"(4) any offense involving counterfeiting punishable under sections 471, 472, or 473, Title 18, United States Code;

"(5) any offense involving bankruptcy fraud, the manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic drugs or marihuana punishable under any law of the United States; or

"(6) any conspiracy to commit any of the foregoing offenses.

"(b) The attorney general of any State, or the principal prosecuting attorney of any political subdivision thereof, if such person is authorized by a statute of that State, enacted in conformity with this Chapter, to make application to a State court judge of competent jurisdiction for leave to intercept wire or oral communications, may apply for, and such State judge, after making the findings as required by section 3803(c) of this Chapter, may grant, in conformity with section 3803 of this Chapter, leave to intercept wire or oral communications within that State when such action may provide evidence of the commission of the crimes of murder, kidnapping, gambling (if that offense is punishable as a felony), bribery, extortion, or dealing in narcotic drugs or marihuana punishable under any law of that State, or any conspiracy involving the foregoing offenses.

"SEC. 3802. AUTHORIZATION FOR DISCLOSURE AND USE OF INTERCEPTED WIRE OR ORAL COMMUNICATIONS.

"(a) Any investigative or law enforcement officer who has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom in accordance with this Chapter may disclose such contents to another investigative or law enforcement officer to the extent that such disclosure is appropriate to the proper performance of the official duties of the officers making and receiving the disclosure.

"(b) Any investigative or law enforcement officer who has obtained knowledge of the contents of any wire or oral communication or evidence derived therefrom in accordance with this Chapter may use any information therein contained in the proper discharge of his official duties.

"(c) Any person who has received, by any means authorized by this Chapter, any information concerning a wire or oral communication or evidence derived therefrom intercepted in conformity with this Chapter may disclose the contents of that communication while giving testimony under oath or affirmation in any criminal proceeding in any court of the United States, or of any State, or in any Federal or State grand jury proceeding.

"(d) The contents of any wire or oral communication or evidence derived therefrom intercepted in conformity with this Chapter may otherwise be disclosed only upon a showing of good cause before a judge of competent jurisdiction.

"SEC. 3803. PROCEDURE FOR INTERCEPTION OF WIRE OR ORAL COMMUNICATIONS.

"(a) *Contents of Application.*—Each application for authorization or approval under this Chapter shall be made in writing upon oath or affirmation, and shall state the applicant's authority to make such application. Each application shall include the following information:

"(1) Who authorized the application;

"(2) A full and complete statement of the facts and circumstances relied upon by the applicant;

"(3) The nature and location of the wire communications facilities involved or the place where the oral communication is to be intercepted;

"(4) A full and complete statement of the facts concerning all previous applications, known to the individual authorizing the application, made to any judge for leave to intercept wire or oral communications involving the same communication facilities or places, or any of them, or involving any person named in the application as committing, having committed, or being about to commit an offense, and the action taken by the judge on each such application; and

"(5) If a warrant under section 3803, subsection (c) (1) of this Chapter is applied for, the number of warrants then outstanding on the Federal, State, or political subdivision thereof, level.

"(b) *Additional Evidence in Support of Application.*—The Judge may require the applicant to furnish additional testimony or documentary evidence in support of the application.

"(c) *Grounds for Issuance.*— Upon such application the judge may or may not enter an *ex parte* order as requested or as modified granting leave to intercept wire or oral communications over any facilities or within any place within the territorial jurisdiction of the court in which the judge is sitting, if the judge determines on the basis of the facts submitted by the applicant that there is probable cause for belief—

"(1) (A) That an individual has been convicted of a crime involving moral turpitude if that offense is punishable as a felony;

"(B) that there is reliable information to believe that he is presently engaged in any offense enumerated in section 3801 of this Chapter;

"(C) that he presently has two or more close associates who meet the requirements of (A) and (B) above; and

"(D) that the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, or are leased to, listed in the name of, or are commonly used by a person who meets the requirements of (A), (B), and (C) above; or

"(2) (A) an offense for which such an application may be filed under section 3801 of this Chapter is being, has been, or is about to be committed;

"(B) facts concerning that offense may be obtained through such interception;

"(C) normal investigative procedures have been tried and have failed or reasonably appear to be unlikely to succeed if tried; and

"(D) the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, in connection with the commission of such offense, or are leased to, listed in the name of, or commonly used by, a person who has committed, is committing, or is about to commit such offense.

"(d) *Limitations on Issuance.*

"(1) The warrants described in section 3803, subsection (c) (1) of this Chapter shall be issued at a rate dependent upon the population of the United States, State, or political subdivision thereof. At one time, there shall not be more than two warrants outstanding per one million persons on the Federal level, five per one million persons on the State level, or ten per one million persons on the political subdivision thereof level.

"(2) Where the facilities from which wire or oral communications are to be intercepted are public, no warrant shall issue unless the judge, in addition to the requirements of section 3803, subsection (C) (1) or (2) of this Chapter, determines that—

"(A) such interception will be so conducted in such a way as to minimize or eliminate the number of interceptions of wire communications not otherwise subject to interception under this Chapter; and

"(B) there is a special need to authorize the interception of wire communications over such facilities.

"(3) Where the facilities from which, or the place where, the wire or oral communications are to be intercepted are being used, or are about to be used, or are leased to, listed in the name of, or commonly used by, a licensed physician, licensed lawyer, or practicing clergyman, or are premises used primarily for habitation or other domestic purposes, no warrant shall issue unless the judge, in addition to the requirements of section 3803, subsection (c) (1) or (2) of this Chapter determines that—

"(A) such interceptions will be so conducted in such a way as to minimize or eliminate the number of interceptions of privileged wire or oral communications between licensed physicians and patients, licensed lawyers and clients, practicing clergymen and confidants, or husband and wife; and

"(B) there is a special need to authorize the interception of wire or oral communications over such facilities or in such places: *Provided,* That no such privileged wire or oral communication so intercepted shall be disclosed or used other than as it is necessary in the disclosure or use of wire or oral communications whose disclosure or use is authorized under this Chapter.

"(e) *Contents of Order.*—Each order granting leave to intercept any wire or oral communication shall specify—

"(1) the nature and location of the communications facilities as to which, or the place where, leave to intercept is granted;

"(2) each offense as to which information is to be sought;

"(3) the identity of the agency authorized to intercept the communications; and

"(4) the period of time during which such interception is authorized.

"(f) *Time Limit and Extensions of Order.*—No order entered under this section may grant leave to intercept any wire or oral communication for any period exceeding forty-five days. Extensions of the order may be granted for periods of not more than twenty days each upon further application made in conformity to subsection (a) of this section and upon the findings required by subsection (c) of this section.

"(g) *Emergency Interceptions.*—Notwithstanding any other section of Chapter 120, or Chapter 240, Title 18, United States Code, any investigative or law enforcement officer who determines that an emergency situation exists requiring immediate action to intercept any wire or oral communication for which a warrant could be obtained under Chapter 240 and which would otherwise constitute, if intercepted, a violation of Chapter 120 solely because of the failure to obtain such warrant may intercept such wire or oral communication provided that an application for a warrant is made in accordance with Chapter 240, within forty-eight hours after the interception has occurred, or begins to occur, for the approval of the interception. In the event such application for approval is denied, the contents of any wire or oral communication intercepted shall be treated as provided for in section 3800 of this Chapter and in an inventory under section 3803 of this Chapter shall be filed.

"(h) *Recording and Sealing of Contents of Intercepted Wire or Oral Communications and Applications.*

"(1) The contents of any wire or oral communication intercepted under the provisions of this Chapter shall, if possible, be recorded on tape or wire. Immediately upon the expiration of the period of the warrant, or renewals thereof, such tapes or wire recordings shall be made available to the judge issuing such warrant and sealed under his directions. Custody of the tapes or wire recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate tapes or wire recordings may be made for use pursuant to the provisions of the section 3802(a) and (b) of this Chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence thereof, shall be a prerequisite for the disclosure of the contents of any wire or oral communication or evidence derived therefrom under section 3802(c) or (d).

"(2) Applications made and orders granted under this Chapter shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. They shall not be disclosed except in accordance with this Chapter. They shall not be destroyed except on order of the issuing or denying judge and in any event shall be kept for ten years.

"(3) Any violation of the provisions of this subsection shall be punished as contempt of the issuing or denying judge.

"(i) *Inventory.*—Within a reasonable time but not later than one year after the termination of the period of the warrant or renewals thereof, the issuing judge shall cause to be served notice on the person or persons named in the warrant of—

"(1) the fact of the entry of the order;

"(2) the date of the entry and the period of authorized or approved interception; and

"(3) the fact that during the period wire or oral communications were or were not intercepted and recorded: *Provided,* That on an *ex parte* showing of good cause to a judge of competent jurisdiction the serving of a notice of inventory under this subsection may be postponed.

"(j) *Notice of Intention.*—The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any criminal proceeding in a Federal court, or in a State court, unless each defendant, not less than ten days before the trial, has been furnished with a copy of the court order under which the interception was authorized or by which the interception was approved. This ten day period may be waived by the judge if he finds that it was not possible to furnish the defendant with the above information ten days before the trial and that the defendant will not be prejudiced by the delay in receiving such information.

"(k) *Motion to Suppress.*

"(1) Any aggrieved person in any trial, hearing or proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative commit-

tee or other authority of the United States, or any State, or political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication or evidence derived therefrom on the grounds that—

"(A) the communication was unlawfully intercepted;

"(B) the order of authorization or approval under which it was intercepted is insufficient on its face;

"(C) there was no probable cause for believing the existence of the grounds on which the order of authorization or approval was issued; or

"(D) the interception was not made in conformity with the order of authorization or approval.

"Such motion shall be made before the trial, hearing, or proceeding unless opportunity therefor did not exist or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication or evidence derived therefrom shall be treated as provided for in section 3800 of this Chapter.

"(2) In addition to any other right to appeal, the United States shall have the right to appeal from an order granting a motion to suppress under this Chapter where the United States Attorney shall certify to the judge or other official granting such motion that the appeal is not taken for purposes of delay. Any appeal under this Chapter shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

"Sec. 3804. Reports Concerning Intercepted Wire Or Oral Communications.

"(a) Within thirty days after the refusal to grant or termination of the period of the warrant or renewals thereof, the issuing Federal or State judge shall cause to be transmitted to the Administrative Office of the United States Courts a report including—

"(1) the fact that an authorization or approval warrant was applied for;

"(2) the fact that it was granted as applied for or as modified;

"(3) the period of time including renewals for which it was issued;

"(4) the kind of warrant applied for under section 3803, subsection (c) (1) or (2) of this Chapter;

"(5) the offense or offenses specified in the warrant; and

"(6) the identity of the applying investigative or law enforcement officer's agency, and who authorized the application.

"(b) Within thirty days after the termination of the investigation, in connection with a warrant or renewal thereof was sought, or the trial or trials resulting therefrom, the Attorney General, or any Assistant Attorney General of the Department of Justice specially designated by the Attorney General, or the attorney general of the State, or the principal prosecuting attorney for any political subdivision thereof, shall cause to be transmitted to the Administrative Office of the United States Courts a report including—

"(1) the information specified in subsection (a) of this section;

"(2) the number of arrests resulting from the interceptions and the offenses for which the arrests were made;

"(3) the number of trials resulting from the interceptions and the offenses for which the arrests were made;

"(4) the number of motions to suppress made under this Chapter, and the number granted or denied; and

"(5) the number of convictions resulting from the interceptions and the offenses for which the convictions were obtained.

"(c) In March of each year the Director of the Administrative Office of the United States Courts shall transmit to the Congress a full and complete report concerning the number of applications for authorization or approval which were made, granted, or denied during the preceding calendar year. Such report shall include a summary of the data required to be filed with the Administrative Office by subsections (a) and (b) of this section.

"Sec. 3805. Recovery Of Civil Damages Authorized.

"Any person whose wire or oral communication is intercepted, disclosed, or used in violation of section 2510 of Chapter 120, Title 18, United States Code, shall have a civil cause of action against any person who intercepts, discloses, or uses or procures any other person to intercept, disclose, or use such communication. Such person shall be entitled to recover from any such person or persons:

"(1) actual damages but not less than liquidated damages computed at the rate of $100 a day for each day of violation or a minimum recovery of $1,000;

"(2) punitive damages; and

"(3) attorney's fee and other litigation costs reasonably incurred: *Provided,* That good faith reliance on a court order shall constitute a complete defense.

"Sec. 3806. Definitions.

"As used in Chapters 120 and 240, Title 18, United States Code—

"(1) The term "wire communication" means any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection between the point of origin and the point of reception furnished or operated by any person engaged as a common carrier in providing or operating such facilities for the transmission of interstate or foreign communications;

"(2) The term "oral communication" means any communication uttered within a private area not audible outside of that area through the normal senses, or through subnormal senses corrected to not better than normal;

"(3) The term "moral turpitude" shall include, but not be limited to, murder, extortion, arson, bribery, per-

jury, tax evasion, gambling (if that offense is punishable as a felony), the lending of money, or thing of value, at usurious rates, counterfeiting, bankruptcy, fraud, or any offense involving narcotics, or any conspiracy to commit any of the foregoing offenses;

"(4) The term "person aggrieved" means an individual who was a party to any intercepted wire or oral communication or any individual against whom the interception was directed;

"(5) The term "interstate communication" means any communication transmitted (a) from any State to any other State, or (b) within the District of Columbia or any possession of the United States;

"(6) The term "foreign communication" means any communication transmitted between the United States and any foreign country;

"(7) The term "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any possession of the United States;

"(8) The term "intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any intercepting device by any person other than the sender or receiver of such communication or a person given prior authority to by either;

"(9) The term "intercepting device" means any device or apparatus whatsoever other than an extension telephone instrument furnished to the subscriber or user by a communication common carrier in the ordinary course of its business as such carrier or a hearing aid or similar device which corrects subnormal hearing to not better than normal;

"(10) The term "contents," when used with respect to any wire or oral communication, includes any information concerning the identity of the parties to such communication or the existence, contents, substance, purport, or meaning of that communication;

"(11) The term "person" means any officer, agent, or employee of the United States, or any State, or political subdivision thereof, or any individual, partnership, association, joint stock company, trust, or corporation;

"(12) The term "investigative or law enforcement officer" means any officer of the United States, or of a State, or political subdivision thereof, who is empowered by law to conduct investigations of or to make arrests for offenses described in section 3801 of this Chapter and any attorney authorized by law to prosecute or participate in the prosecution of such offenses; and

"(13) The term "judge of competent jurisdiction" means—

"(a) the chief judge of a United States district court, or such judge as he shall designate, or the chief judge of a United States court of appeals, or such judge as he shall designate, or the Circuit or Chief Justice of the United States, or such judge as he shall designate.

"(b) a judge of any court of general criminal jurisdiction of a State who is authorized by a statute of that State to enter orders granting leave to intercept any wire or oral communications."

STUDY

SEC. 5.

(a) Within one year prior to the termination of this Act, the Attorney General shall cause to be conducted by competent social scientists, an independent study of the operation of this Act. Following the completion of such study the Attorney General shall cause the results of such study to be reviewed by a Council of Advisers to be composed of nine individuals to be designated by him from all segments of life in the United States, including but not limited to, lawyers, teachers , artists, businessmen, newspapermen, jurists, policemen, and community leaders. Within sixty days following the completion of such review, the Attorney General shall report to the President and the Congress the results of such study and review together with the views and recommendations of the Council and the Attorney General.

(b) The Attorney General shall furnish to the Council an executive secretary and such secretarial, clerical, and other services as are deemed necessary to the conduct of its business. The Attorney General may call upon other agencies of the Government for statistical data, reports, and other information which will assist the Council in the performance of its duties.

(c) Appointed members of the Council shall be paid compensation at the rate of $50 per diem when engaged in the work of the Council, including travel time, and shall be allowed travel expenses and per diem in lieu of subsistence as authorized by law (5 U.S.C. 73b–2) for persons in the Government service employed intermittently and receiving compensation on a per diem, when actually employed, basis.

(d) Any member of the Council is hereby exempted, with respect to such appointment, from the operation of sections 281, 283, and 1914, Title 18, United States Code, and section 190 of the Revised Statutes (5 U.S.C. 99), except as otherwise specified in paragraph (2) of this subsection.

(2) The exemption granted by paragraph (1) of this subsection shall not extend—

(A) to the receipt or payment of salary in connection with the appointee's Government service from any source other than the private employer of the appointee at the time of his appointment, or

(B) during the period of such appointment, to the prosecution or participation in the prosecution, by any persons so appointed, of any claim against the Government involving any matter with which such person, during such period, is or was directly connected by reason of such appointment.

ANALYSIS

SEC. 6(a). The table of contents of "Part I Crimes" of Title 18, United States Code, is amended by inserting after

"117. White Slave Traffic . . . . 2421"

a new chapter reference as follows:

"120. Wire or Oral Communication Prohibitions."

and (b) the table of contents to "Part II Criminal Pro-

cedure" of Title 18, United States Code, is amended by inserting after

"Rules of Criminal Procedure . . . . 3771"

a new chapter reference as follows:

"240. Wire or Oral Communication Authorizations and Limitations."

COMMUNICATIONS ACT AMENDMENT

SEC. 7. The text of section 605 of the Communications Act of 1934 (48 Stat. 1103, 47 U.S.C. 605) is amended to read as follows:

"No person receiving, or assisting in receiving, or transmitting, or assisting in transmitting, any interstate or foreign communication by wire or radio shall divulge or publish the existence, contents, substance, purport, effect, or meaning thereof, except through authorized channels of transmission or reception, to any person other than the addressee, his agent, or attorney, or to a person employed or authorized to forward such communication to its destination, or to proper accounting or distributing officers of the various communicating centers over which the communication may be passed, or to the master of a ship under whom he is serving, or in response to a subpoena issued by a court of competent jurisdiction, or on demand of other lawful authority; and no person not being authorized by the sender shall intercept any radio communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person; and no person not being entitled thereto shall receive or assist in receiving any interstate or foreign communication by radio and use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto; and no person having received any intercepted radio communication or having become acquainted with the contents, substance, purport, effect, or meaning of the same or any part thereof, knowing that such information was so obtained, shall divulge or publish the existence, contents, substance, purport, effect, or meaning of the same or any part thereof, or use the same or any information therein contained for his own benefit or for the benefit of another not entitled thereto: *Provided*, That this section shall not apply to the receiving, divulging, publishing, or utilizing the contents of any radio communication broadcast, or transmitted by amateurs or others for the use of the general public, or relating to ships in distress."

SEPARABILITY

SEC. 8. If any provision of this Act or the application thereof to any person or circumstance is held invalid, the other provisions of this Act and the application of any provision to other persons or circumstances shall not be affected thereby.

TERMINATION

SEC. 9. Upon the expiration of eight years following the enactment of this Act, the foregoing provisions of the Act other than section 5 shall terminate and thereafter shall have no force or effect.

ECONOMIC ANALYSIS AND ORGANIZED CRIME

by Thomas C. Schelling

Contents

At the level of national policy, if not of local practice, the dominant approach to organized crime is through indictment and conviction, not through regulation, accommodation, or the restructuring of markets and business conditions. This is in striking contrast to the enforcement of antitrust or food-and-drug laws, or the regulation of industries affecting the public interest. For some decades, antitrust problems have received the sustained professional attention of economists concerned with the structure of markets, the organization of business enterprise, and the incentives toward collusion or price cutting. Racketeering and the provision of illegal goods (like gambling) have been conspicuously neglected by economists. There exists, for example, no analysis of the liquor industry under prohibition that begins to compare with the best available studies of the aluminum or steel industries, air transport, milk distribution, or public utility pricing.

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Presently, Dr. Schelling is a Professor of Economics and a faculty member of the Center for International Affairs at Harvard University. Prior to joining the Harvard faculty in 1958, Professor Schelling was with the Department of Economics at Yale University for 5 years. Professor Schelling served from 1948 to 1953 with the Economic Cooperation Administration Mission in Denmark, the Office of the ECA Special Representative in Paris, the Special Assistant to the President for Foreign Affairs, the Office of the Director for Mutual Security, and the Foreign Operations Administration.

Professor Schelling has been a regular lecturer on military policy at several war colleges and the Foreign Service Institute. Also, he has been a consultant to the Departments of State and Defense, the Arms Control and Disarmament Agency, the RAND Corporation (he took a leave from Harvard during 1958–59 to serve with RAND), the Institute for Defense Analyses, and other organizations concerned with national security. He is a member of the Defense Science Board, Department of Defense, and a member of the advisory panel for the Bureau of European Affairs Department of State. During 1960–63, he served as a member of the Scientific Advisory Board of the U.S. Air Force. During 1961–64, he was a member of the Research Advisory Board of the Committee for Economic Development. He has been the author of many articles on economy. His most recent book, "Arms and Influence," was published by Yale University Press in May 1966.

Evidence of the lack of professional attention to the economy of the underworld is the absence of reliable data even on the magnitudes involved, of techniques for estimating them—even of a conceptual scheme for distinguishing profits, income, turnover, transfers, waste, destruction, and the distribution of gains and losses due to crime. Yet a good many economic and business principles that operate in the "upperworld" must, with suitable modification for change in environment, operate in the underworld as well, just as a good many economic principles that operate in an advanced competitive economy operate as well in a Socialist or a primitive economy. They operate differently, though, and one has to look carefully to see them.

In addition to sheer curiosity there are good policy reasons for encouraging a more professional, "strategic" analysis of the criminal underworld, an analysis that would draw heavily on modern economics and business administration. Such an analysis, in contrast to "tactical" intelligence aimed at the apprehension of individual criminals, could help in identifying the incentives and the limitations that apply to organized crime, in evaluating the different kinds of costs and losses due to crime, in restructuring laws and programs to minimize the costs, wastes, and injustices that crime entails, and in restructuring the business environment in which organized crime occurs with a view to reducing crime or, at least, its worst consequences.

A number of questions need to be pursued. Many are professionally challenging and ought to appeal to economists and others whose talents and energies could be enlisted in the unending campaign waged by the authorities concerned with law enforcement. As an example, what

market characteristics determine whether a criminal activity becomes "organized?" Gambling, by all accounts, invites organization—extortionate monopoly organization based on intimidation of small operators and competitors—while abortion, by all accounts, does not. In the upperworld, automobile manufacture is characterized by large firms while machine tool production is not; banking is subject to concentration while the practice of law is not; collusive price fixing occurs in the electrical machinery industry but not in the distribution of fruits and vegetables; retail price maintenance can be legally enforced in the branded liquor industry but not in the market for new cars. The reasons may not be entirely understood, but they are amenable to study. The same should not be impossible for illegal gambling, extortion, abortion, and contraband cigarettes.

SOME ECONOMICS OF ORGANIZED CRIME

A useful distinction that we can borrow from the legitimate economy and apply to the economy of organized crime is the difference between an organized economy and an organized business. We should distinguish—within the organized underworld itself—between the organized economy within which criminal business operates and the highly organized criminal enterprise (firm), in particular the monopolistic enterprise.

Only some crime is organized in the second sense, in large-scale continuing firms with the internal organization of a large enterprise, and in particular with a conscious effort to control the market. Gambling syndicates and the better organized protection rackets qualify for this category.

Other criminal businesses, like "unorganized" robbery, would not meet the definition of "organized crime" in the restricted sense of a criminal firm. They nevertheless operate in, and participate in, a highly "organized" economic framework. That is, these "unorganized" but professional criminals are part of the underworld communication system, recruitment system, marketing system, and even diplomatic system (in relations with the world of law enforcement), and may consider themselves part of a highly organized criminal society.

Still other crimes, including those committed by amateur criminals but also apparently by abortionists, embezzlers, and ordinary dishonest businessmen, are outside the organized economy of the underworld. They may, however, have intermittent contact with it or make occasional use of the services available in it. In some cases the police themselves constitute part of this underworld society (at least from the point of view of the lone-operating prostitute or abortionist, or the regular purveyor of liquor to minors).

Our interest at this point will be in the firms and trade associations that qualify as "organized crime" in the more restricted sense. But the two cannot be entirely separated. The organization of the underworld itself is undoubtedly affected, perhaps in a dominant way, by the occurrence of large-scale monopolist organizations and cartels. Indeed, the role of "government" within the underworld, including diplomatic relations with the legitimate world, may have to be played by large organizations originating from market forces, not political forces. It may require a large firm or cartel to represent the underworld in its relations with the legitimate world, to impose discipline and procedures for the adjudication of disputes, and to provide a source of recognizable leadership.

In fact, some of the central questions (to be investigated) about the functioning of the highly organized criminal firms are the extent to which they condition the underworld itself. This includes the extent to which organized crime lives off the underworld rather than directly off the upperworld, the extent to which the underworld benefits or loses by this kind of market dominance and leadership, and the extent to which relations of the underworld with the legitimate world depend on the emergence of some large, economically viable organization with the incentive and capability to centralize diplomatic and financial relations.

A closely related question is the extent to which organized crime itself depends on at least one major market occurring in which the returns to tight and complex organization are large enough to support a dominant monopoly firm or cartel. Not all businesses lend themselves to centralized organization; some do, and these may provide the nucleus of well-financed entrepreneurship and the extension of organizational talent into other businesses that would not, alone, support or give rise to an organized monopoly or cartel.

A strategic question is whether a few "core" criminal markets provide the organizational stimulus for organized crime. If the answer turns out to be yes, then a critical question is whether this particular market, so essential for the "economic development" of the underworld and the emergence of organized crime, is one of the black markets dependent on "protection" against legitimate competition; or is, instead, an inherently criminal activity? This question is critical because black markets always provide, in principle, the option of restructuring the market, of increasing competition as well as reducing it, of compromising the original prohibition in the larger interest of weakening organized crime, in addition to selectively relaxing the law or its enforcement. If, alternatively, the core industry is one that rests principally on violence, on the intimidation of customers (extortion) or competitors (monopoly), then compromise and relaxation of the law are likely to be both ineffectual and unappealing. Restructuring the market to the disadvantage of such criminal business is accordingly a good deal harder.

A TYPOLOGY OF UNDERWORLD BUSINESS

One of the interesting questions in analyzing organized crime is why some underworld business becomes organized and some remains unorganized; another is what kinds of organization we should expect to occur. These questions indicate that a workable classification of organiza-

tions has to be broader than simply "organized crime." A tentative breakdown is suggested as follows:

BLACK MARKETS

A large part of organized crime involves selling commodities and services contrary to law. In the underworld, this can include dope, prostitution, gambling, liquor under prohibition, abortion, contraceptives in some States, pornography, and contraband or stolen goods. Most of these tend to be consumer goods.

In what is not usually considered the underworld, black-market goods and services include gold, rationed commodities and coupons in wartime, loans and rentals above controlled prices, theater tickets in New York, and a good many commodities that, though not illegal per se, are handled outside legitimate markets or are diverted from subsidized uses.

In some cases (i.e., gambling) the commodity is to be excluded from all consumers; in others (i.e., cigarettes) some consumers are legitimate and some (i.e., minors) not. In some cases what is illegal is the failure to pay a tax or duty. In some cases, it is the price of the transaction that makes it illegal. In some it is public hazard—carrying explosives through tunnels, producing phosphorus matches in disregard of safety regulations. In some cases (i.e., child labor, illegal immigrant labor) it is buying the commodity, not selling it, that is proscribed.

Some black markets tend to be "organized" and some not. In some black markets both parties to the transaction know that the deal is illegal; in others only one party to the transaction is aware of illegality. The innocent party to the transaction may have no way of knowing whether the goods were illegally obtained or are going into illegal channels.

RACKETEERING

Racketeering includes two kinds of business, both based on intimidation. One is extortion; the other, criminal monopoly.

"Criminal monopoly" means the use of criminal means to destroy competition. Whether one destroys a competitor, or merely threatens to make him go out of business, by deterring new competition, by the threat of violence or by other unfair practices, the object is to get protection from competition when the law will not provide it (by franchise, tariff protection). Such protection cannot be achieved through legal techniques (such as price wars, control of patents, or preclusive contracts).

We can distinguish altogether three kinds of "monopoly": Those achieved through legal means, including greater efficiency than one's competitors, or the inability of the market to support more than one firm; those achieved through means that are illegal only because of antitrust and other laws intended to make monopoly difficult; and monopolies achieved through means that are criminal by any standards, means that would be criminal whether or not they were aimed at monopolizing a business.

It is evident from the history of business abuses in the 19th and 20th centuries that "unfair competition" of a drastic sort, including violence, has not been confined to the underworld. So it is useful to distinguish between firms that, in excess of zeal and deficiency of scruples, engage when necessary in ruthless and illegal competition, and between the more strictly "racketeering" firms whose profitable monopoly rests entirely on the firm's propensity for criminal violence. It is the latter that I include under "criminal monopoly"; the object of law enforcement in the other case is not to destroy the firm but to curtail its illegal practices so that it will live within the law. If the whole basis of business success is the use of strong-arm methods that keep competition destroyed or scared away, it is a pure "racket."

"Extortion" means living off somebody else's business by the threat of criminal violence or by criminal competition. The protection racket lives off its victims, letting them operate and pay tribute. If one establishes a chain of restaurants and destroys competitors or scares them out of business, he is a monopolist. If one merely threatens to destroy people's restaurant business, taking part of their profits as the price for leaving them alone, he is an extortionist; he likes to see them prosper so that his share will be greater.

For several reasons it is difficult to distinguish between "extortion" that, like a parasite, wants a healthy host, and "criminal monopoly" that is dedicated to the elimination of competitors. First, one means of extortion is to threaten to cut off the supply of a monopolized commodity—labor on a construction site, trucking, or some illegal commodity provided through the black market. In other words, one can use a monopoly at one stage in the production process for extortionate leverage on the next.

Second, extortion itself can be used to secure a monopoly privilege. Instead of taking tribute in cash, a victim signs a contract for the high-priced delivery of beer or linen supplies. The result looks like monopoly but arose out of extortion. (To a competing laundry service this is "unfair" competition; criminal firm *A* destroys competitor *B* by intimidating customer *C*, gaining an exclusive right to his customers.)

Evidently extortion can be organized or not; there are bullies and petty blackmailers, whose business is localized and opportunistic. But in important cases extortion itself has to be monopolized. Vulnerable victims may have to be protected from other extortionists. A monopolistic laundry service, deriving from a threat to harm the business that does not subscribe, may have to destroy or intimidate not only competing legitimate laundry services but also other racketeers who would muscle in on the same victim. Thus, while organized criminal monopoly may not depend on extortion, organized extortion needs a large element of monopoly.

BLACK-MARKET MONOPOLY

Just as monopoly and extortion may go together in racketeering, monopoly and black markets go together.

Indeed, any successful black marketeer enjoys a "protected" market in the same way that a domestic industry is protected by a tariff, or butter by a law against margarine. The black marketeer gets automatic protection, through the law itself, from all competitors unwilling to pursue a criminal career. The law gives a kind of franchise to those who are willing to break the law. But there is a difference between a "protected industry" and a "monopolized industry;" abortion quacks are protected by the laws against abortion, and charge prices accordingly, but apparently are seldom monopolized, while gambling and prostitution are often organized monopolies, locally if not regionally, within a market from which the bulk of their competitors are excluded by the law and the police. Thus abortion is a black-market commodity but not a black-market monopoly; a labor racket is a local monopoly but not a black-market one; the narcotics traffic has both elements: the monopolization of an illegal commodity.

CARTEL

An interesting case is the "conspiracy in restraint of trade" that does not lead to single-firm monopoly but to collusive price fixing, and is maintained by criminal action. If the garment trade eliminates cut-throat competition by an agreement on prices and wages, hiring thugs to enforce the agreement, it is different from the monopoly racket discussed above. If the government would make such agreements enforceable (as it does with various retail-price-maintenance laws in some States) the businesses might be happy and in no need of criminally enforcing discipline on themselves. Similarly a labor organization can engage in criminal means to discipline its members, even to the benefit of its members, who may be better off working as a block rather than as competing individuals; if the law permits enforceable closed-shop agreements or dues collection, the criminal means becomes unnecessary.

CHEATING

"Cheating" means all the things that a business can do to cheat customers, suppliers, tax authorities, and so forth. Tax evasion, adulteration of goods, some kinds of bankruptcy, are always available in greater or lesser degree to any business firm; all it takes is a dishonest or unscrupulous employee or proprietor and some cheating can occur. (The main distinction between cheating and straightforward stealing is that the victim—tax collector, customer, supplier—either does not realize that he has been cheated or has no recourse at law.) The only relation between this kind of dishonest business practice and the underworld, or organized crime, is that criminals have special needs and uses for businesses in which they can cheat. They may want a "front" in which to disguise other earnings; they may want to make money in legitimate business and, being criminally inclined, have a propensity to go into business where it is advantageous to cheat. If they already have connections by which to corrupt law enforcement, they will have a comparative advantage toward the kind of cheating that depends on bribery and intimidation.

ORGANIZED CRIMINAL SERVICES

A characteristic of all the businesses listed above is that they involve relations between the underworld and the upperworld. The ultimate victim or customer is not a career criminal, possibly not a criminal at all except insofar as the transaction in question is illegal. But just as businesses in the upperworld need legal services, financial advice and tax advice, credit, enforcement of contract, places to conduct their business, communication facilities, even advertising, so in the underworld there has to be a variety of business services that are "domestic" to the underworld itself. These can be organized or unorganized. They are in the underworld, but not because they do to the underworld what the underworld does to the legitimate world. And, of course, they can operate in both worlds; the tax lawyer who advises a gambling casino can help them break the law and still have other customers in legitimate businesses.

CORRUPTION OF POLICE AND POLITICS

Legitimate businesses have been known, through bribery and intimidation, to corrupt legislatures and public officials. Criminal organizations can do likewise and are somewhat like lobbies in that respect. The gambling rackets have as great a stake in antigambling laws as the dairy farmers in margarine laws or textile manufacturers in tariffs. But organized criminals have more need and more opportunity for corrupting officials whose job is law enforcement, especially the police. They need protection from the police; they can use police support in excluding competitors; they can even seek recruits among the police. What is special about the police is that they operate in both the upperworld and the underworld and do so in a more official capacity than the lawyers who have customers in both worlds.

THE INCENTIVES TO ORGANIZATION

Any firm prefers more business to less, a large share of a market to a small share. But the inducements to expansion and the advantages of large-scale over small are especially present in some markets rather than others.

The simplest explanation for a large-scale firm, in the underworld or anywhere else, is high costs of overhead or other elements of technology that make small-scale operation impractical. The need to utilize fully equipment or specialized personnel often explains at least the lower limit to the size of the firm.

Second is the prospect of monopolistic price increases. If most of the business can be cornered by a single firm, it does not merely multiply its profits in proportion to its expansion but can, if it keeps new competition from entering the market, raise the price at which it sells illegal serv-

ices. Like any business, it does this at some sacrifice in size of the market; but if the demand for the goods is inelastic, the change in profit margin will be disproportionate to the reduction in output. Decentralized individual firms would have just as much to gain by pushing up the price at which they sell, but without discipline it will not work. Each firm will attempt to undercut its competitors, and profit margins will be shaved back to where they were. Thus where entry can be denied to newcomers, centralized price setting will yield monopoly rewards to whoever can organize the market. With discipline, a cartel can do it; in the absence of such discipline a merger may do it; but intimidation, too, can lead to the elimination of competition and the conquest of a monopoly position by a single firm.

Third, the larger the firm, and especially the larger its share in the whole market, the more "external" costs will become formal and attributable to the firm itself. "External costs" are those that fall on competitors, customers, by-standers, and others with whom the firm deals.

Collection of all the business within a single firm causes the costs that individual firms inflict on each other to show up as costs (or losses) to the larger centralized firm now doing the business. This is an advantage to it. It is an advantage because the costs were originally there but neglected; now there is incentive not to neglect them.

Spoiling the market in various ways is often an external cost. So is violence. While racketeers have a collective interest in curtailing violence in order to avoid trouble with the public and the police, the individual racketeer has little or no incentive to reduce the violence connected with his own crime. There is an analogy here with, say, the whaling industry, which has a collective interest in not killing off all the whales. The individual whaler will pay little attention to what he is doing to the future of the industry when he maximizes his own take. But a large organization will profit by imposing discipline, by holding down the violence if the business is crime, by holding down the slaughter of females if the business is whaling.

There are also other "external economies" that can become internalized to the advantage of the centralized firm. Lobbying has this characteristic, as does cultivating relations with the police. No small bookie can afford to spend money influencing gambling legislation, but an organized trade association or monopoly among those who live off illegal gambling can collectively afford to influence legislation to protect their monopoly from legitimate competition. Similarly with labor discipline: the small firm cannot afford to teach a lesson to the industry's labor force, since most of the lesson is lost on other people's employees, but a single large firm can expect the full benefit of its labor policy. Similarly with cultivating the market: if a boss cultivates the market for dope by hooking some customers, or cultivates a market for gambling in a territory where the demand is still latent, he cannot expect much of a return on his investment since opportunistic competitors will take advantage of the market he creates. Patent and copyright laws are based on the notion that the investment one makes in inventing something, or in writing a song, has to enjoy monopoly protection, or else the thing is not worth inventing or the song not worth writing. Anything that requires a long investment in cultivating a consumer interest, a labor market, and ancillary institutions or relations with the police can be undertaken only by a fairly large firm that has reason to expect enjoyment of most of the market and a return on its investment.

Finally, there is the attraction of not only monopolizing a particular market but also of achieving a dominant position in the underworld itself, and participating in its governing. To the extent that large criminal business firms provide governmental structure to the underworld, helping to maintain peace, setting rules, arbitrating disputes, and enforcing discipline, they are in a position to set up their own businesses and exclude competition. Constituting a kind of "corporate state," they can give themselves the franchise for various "state-sponsored monopolies." They can do this either by denying the benefits of the underworld government to their competitors or by using the equivalent of their "police power" to prevent competition. (They may even be able to use the actual police power if they can dominate diplomatic and financial relations with the agencies of law enforcement.) Where the line between business and government is indistinct, as it appears to be in the underworld, dominant business firms become regulators of their own industries, and developers of state monopolies.

EVALUATING THE STRUCTURE OF GAINS AND LOSSES

In evaluating the consequences of organized crime an arithmetical accounting approach gives at best a crude bench mark as to magnitudes, and not even that for the distribution of gains and losses. The problem is like that of estimating the comparative incidence of profits taxes and excise taxes, the impact of a minimum-wage law on wage differentials, or the social costs of reckless driving and hurricanes. Especially if we want to know who bears the cost, or to compare the costs to society with the gains to the criminals, an analysis of market adjustments is required. Even the pricing practices of organized crime need to be studied.

Consider, for example, the illegal wire service syndicate in Miami that received attention from Senator Kefauver's committee. The only aspect of the situation that received much explicit attention was the estimated loss of State revenues due to the diversion of gambling from legal race tracks, which were taxable, to illegal bookmakers, whose turnover was not taxable. No accounting approach would yield this magnitude; it depended (as was pointed out in testimony) on what economists call the "elasticity of substitution" between the two services—on the fraction of potential race track business that patronized bookmakers. Some people bet at the track out of preference; some who patronize bookmakers would be diverted to the track if that were the only place they could gamble; and to some of the bookmaker's customers, the race track is either unavailable or unappealing.

(There may even be some who bet at the location that offers the more attractive odds.)

Similar analysis is required to determine at whose expense the syndicate operated, or what the economic consequences of the syndicate's removal would have been. The provision of wire service was of small economic significance. It accounted, on a cost basis, for less than 5 percent of the net income of bookmakers (of which the syndicate took approximately 50 percent). And cheaper wire service might have been available in the absence of the syndicate, whose function was not to provide wire service but to eliminate wire-service competitors.

The essential business of the syndicate was to practice extortion against bookmakers—to demand half their earnings against the threat of reprisals. The syndicate operated like a taxing authority, levying a substantially ungraduated tax on the earnings of bookmakers. (It also provided some reinsurance on large bets.) It apparently did not attempt to limit the number of bookmakers so long as they paid their "taxes."

How much of this tax was passed along to the customer (on the analogy of a gasoline or sales tax) and how much was borne by the bookie (on the analogy of an income or profits tax) is hard to determine without knowledge of the demand for betting. If the customer tends to bet a certain amount per month, the tax would be rather easily passed along to the customer in the form of less advantageous odds. If the customer tends to budget his losses, allowing himself to lose only a certain average amount per month (betting more when he wins and less when he loses), the total take of the bookmakers would tend to be a constant not much affected by the spread between buying and selling rates in the market for bets; and the tax would tend to be borne by bookmakers. Alternatively, if the customer tends to bet less when the odds are less favorable, as a consumer of some commodity may buy less when the price rises, the bookie's net earnings will be limited by a declining market and a smaller volume of total business. The incidence of the tax will then be shared between bookmakers and customers, but some bookmakers will leave the business and some customers go unsatisfied to an extent not measured by the revenue yield.

If we assume that bookmakers' earnings are approximately proportionate to the volume of turnover (equal to the product of turnover times rate spread) and that their customers, though sensitive to the comparative odds of different bookmakers, are not sensitive to the profit margin and that they tend, consciously or implicitly, to budget their total bets and not their rate of loss, we can conclude that the tax is substantially passed along to the customer.

In that case the bookmaker, though nominally the victim of extortion, is victimized only into raising the price to his customers, somewhat like a filling station that must pay a tax on every gallon sold. The bookmaker is thus an intermediary between an extortionate syndicate and a customer who pays the tribute voluntarily on the price he is willing to pay for his bets.

The syndicate in Miami relied heavily on the police as their favorite instrument of intimidation. It could have been the other way around, the police using the syndicate as their agency to negotiate and collect from the bookmakers. If the syndicate had had no other way of intimidating bookmakers, and if the police had been organized and disciplined as a monopoly, it would have been the police, not the syndicate, that we should put at the top of our organizational pyramid. From the testimony, though, it is evident that the initiative and entrepreneurship came from the syndicate, which had the talent and organization for this kind of business, and that the police lacked the centralized authority for exploiting to their own benefit the power they had over the bookmakers. Leadership came from the syndicate; and, though collectively the police dispensed the power that intimidated the bookmakers, organizationally they were unable to exploit it on their own. Presumably—though there were few hints of this in the hearings—the syndicate could have mobilized other techniques for intimidating the bookmakers; the police were the chosen instrument only so long as the police share in the proceeds was competitive with alternative executors of the intimidating threats.

What the long-term effect was on police salaries would depend on how widespread and nondiscriminatory the police participation was, especially by rank and seniority in service. Recruiting would be unaffected if police recruits were unaware of the possible illegal earnings that might accrue to them; senior members of the force who might otherwise have quit the service or lobbied harder for pay increases would presumably agitate less vigorously and less successfully for higher wages if their salaries were augmented by the racket. One cannot easily infer that part of the "tax" paid by the bookmaker's customer subsidized the police force to the benefit of nonbetting taxpayers; mainly it supported a more discriminatory and irregular earnings pattern among the police—besides contributing, unwittingly, to a demoralization of the police that would have made it a bad bargain for the taxpayer anyway.

This is just a sketch, based on the skimpy evidence available, of the rather complex structure of "organized gambling" in one city. (It is not, of course, the gambling that is organized; the organization is an extortionate monopoly that nominally provides a wire service but actually imposes a tribute on middlemen who pass most of the cost along to their voluntary customers.) Similar analysis would be required to identify the incidence of costs and losses (and gains of course) of protection rackets everywhere. Monopoly priced beer deliveries to bars or restaurants, if the price is uniformly high among competing bars and restaurants, will lead to a rise in the price the customers pay for beer. Vending machines installed in bars and restaurants under pain of damage or nuisance can raise the price of machine-sold commodities if the increase is uniform among competing establishments. But it may also tax away whatever profit the establishment formerly made from the sale of the item. The latter "tax" is probably passed along to the customer only to the extent that it reduces the attractiveness of the bar and restaurant business and causes some decline in the market.

These considerations are important because they help to explain the extent and nature of the victim's resistance. A bar that has to pay an extortionate price for its beer can seek relief in either of two ways. It can seek to avoid paying that extortionate or monopolized price; alternatively, it can insist that its supplier achieve similar concessions from all competing bars, to avoid a competitive disadvantage. An individual bar may suffer little if the wholesale price of beer goes up; it suffers if competitors' prices do not go up.

The logical extreme of this economic phenomenon is "self-imposed" extortion: if all the bars jointly organize, and sign exclusive contracts with their own firm for distribution of beer, charging themselves higher prices for their beer, they achieve a technique for disciplining themselves with respect to a collusive price increase. No individual bar has an incentive to cut the new high price of beer, and they enjoy their beer profits in the form of dividends from their own wholesale company. If, of course, they can police themselves with respect to an agreement on the price of beer, they have no need of the jointly owned wholesale company, the function of which is merely to enforce the agreed higher price of beer. There is evidence that in the garment trades, and some others, price discipline has been enforced by the direct threat of damage to the price cutter; and there is no economic anomaly in a potential price cutter's favoring such discipline.

Other aspects of the "costs" of crime, the incidence of these costs, and the incentive effects of these costs, need to be similarly analyzed. Insurance, for example, spreads the costs and makes them less uncertain. (It also raises them through the costs of insurance itself.) There can be no doubt that people, who would ordinarily stay home if they lacked liability and collision insurance, drive on slippery roads, just as there is no doubt that over-insured buildings have invited arson, that insured homeowners are a little less careful about locking their doors, insured travelers a little less careful with their cameras and suitcases, and theft-insured drivers a little less careful about locking their cars. The extreme is reached in a fake burglary or holdup which, unlike arson, does not sacrifice the value of the insured property. The incentive effects are appreciated by those laws, by police efforts to discourage the payment of ransom in kidnapping cases, and by occasional efforts of the police to keep insurance companies from buying back stolen jewelry and thus provide a market for stolen jewels.

Besides insurance, there are other important aspects of the costs and losses due to crime. One is "self-protection," in the form of locks, alarms, guards and watchmen, and other specialized commodities and expenses that are unmistakably a response to the threat of crime. (Whether they actually reduce crime, or mainly divert it to other targets, could be an important question if there were a good way of answering it.) These items are unlikely to be overlooked and not difficult to tabulate although such things as modifications in the design of buildings would be hard to estimate and probably not worth estimating. But a wide range of other expenses taking the form of "protective adaptation" would be left out of that tabulation, and might indeed be worth estimating.

An obvious one is the use of taxis where, if the streets were safer, people would walk or, if the subways were safer, would use cheaper transport. Less obvious and harder to disentangle is the role of crime-avoidance in choosing a place of residence. Crime may be so mixed with other disagreeable environmental factors, and so many other neighborhood characteristics determine residential choice, that no simple technique will provide a good estimate, and even the best estimates will be unreliable. In view of the number of people whose choice of residence is determined by how safe for play streets are because of the volume of automobile traffic, it is evident that the degree of adaptation can be significant.

A special reason for examining some of these costs—as distinct from merely the costs entailed by the crimes that are executed—is to get a better idea of what it is worth to reduce crime and to whom it is worth it. (If the beneficiaries of crime reduction ought to pay for the cost of reducing crime, or can be induced to pay for it, it is worthwhile knowing who they are.) There is a tendency to think of the "costs" of crime as the costs inflicted on society by the crimes that occur. Evidently if private protection and law enforcement were so effective that no crime occurred, the costs of crime would be nil—but the costs of living in an environment of potential crime could be high. Evidently, too, if streets became so dangerous that nobody walked, street crime could disappear while the "cost" would be enormous. There is no direct relation between the level of crime and the costs of crime; a given percentage reduction in crimes executed does not mean necessarily a similar reduction in the costs and losses due to crime.

EVALUATING COSTS AND LOSSES

One consequence of the analyses suggested here should be a better appreciation of just what it is about crime that makes it deplorable. Crime is bad, as cancer is bad and war is bad; but even in the case of cancer one can distinguish among death, pain, anxiety, the cost of treatment, the loss of earnings, the costs of uncertainty about life expectancy, the effects on the victim and the effects on his family. Similarly with crime. It is offensive to society that the law be violated. But crime can involve a transfer of wealth from the victim to the criminal, a net social loss due to the inefficient mode of transfer, the creation of fear and anxiety, violence from which nobody profits, the corruption of the police and other public officials, costs of law enforcement and private protection, high prices to customers, unfairness of competition, loss of revenue to the State, and even loss of earnings to the criminals themselves who in some cases may be ill-suited to their trade. There may be important trade-offs among these different costs and losses due to crime in the different ways that government can approach the problem of

crime. There will be choices between reducing the incidence of crime and reducing the consequences of crime, and other choices that require a more explicit identification and evaluation of the magnitude and distribution of the gains and losses due to crime.

If there were but one way to wage war against crime, and the only question was how vigorously to do it, there would be no need to identify the different objectives (cost and consequences) in devising the campaign. But if this is a continual campaign to cope with some pretty definite evils, without any real expectation of total victory or unconditional surrender, resources have to be allocated and deployed in a way that maximizes the value of a compromise. The different consequences are divided among quite different parts of the population, so that the immediate victim of a gambling syndicate is itself a criminal class (illegal bookmakers) or the immediate victims of a high-priced criminal monopoly service are indifferent so long as their individual competitive positions are not harmed.

When we turn to the black-market commodities, it is harder to identify just what the evils are. In the first place, a law-abiding citizen is not obliged to consider the procurement and consumption of these illegal commodities as inherently sinful, as entailing negative value to society. We have constitutional procedures for legislating prohibitions. The outvoted minority is bound to abide by the law but not necessarily to agree with it. The minority can campaign to become a majority and legalize liquor after a decade of prohibition, legalize contraceptives in states where they have been prohibited, prohibit the importation of firearms, legalize marijuana, or make it a crime to sell plastic model cement to minors. Even those who vote to ban gambling or saloons or dope may do so not because they consider the consumption sinful but because some of the consequences are bad enough to make it preferable to prohibit all consumption if selective or discriminating prohibition is infeasible. If it is infeasible to prohibit the sale of alcohol to alcoholics, or gambling to minors, we have to forbid all of it in order to forbid the part that we want to eliminate.

The only reason for rehearsing these arguments is to remind ourselves that the evil of gambling, dope, prostitution, pornography, smoking among children, or the dynamiting of trout, is not necessarily proportionate to how much of it goes on. The evil may be much greater or much less than will be suggested by the gambling or the consumption of narcotics that actually occurs. One might conclude that the consumption of narcotics that actually occurs is precisely the consumption that one wanted to eliminate. One might equally conclude that the gambling laws eliminate the worst of the gambling, and what filters through the laws is fairly innocuous (or would be, if its being illegal per se were not harmful to society), and that the gambling laws thus serve the purpose of selective discrimination in their enforcement if not in their enactment.

The evils of abortion are particularly difficult to evaluate, especially because it is everybody's privilege to attach his own moral or theological values to the commodity. Are the disgust, anxiety, humiliation, and physical danger incurred by the abortionists' customers part of the net cost to society, or is it positively valued as punishment for the wicked? If a woman gets an abortion, do we prefer that she have to pay a high price or a low one, and do we count the black-market price that she pays as a cost to society, as a proper penalty inflicted on the woman, or merely as an economic waste? If a woman gets a safe, cheap abortion abroad, is this a legitimate bit of international trade, raising the national income like any gainful international trade, or is it even worse than her getting an expensive, more disagreeable, more dangerous abortion at home because she evaded the punishment and the sense of guilt?

These are not entirely academic questions. There are serious issues of public policy in identifying just what it is we dislike about criminal activity, and especially in deciding where and how to compromise. The case of prostitution is a familiar and clear-cut example. Granting the illegality of prostitution, and efforts to enforce the law against it, one may still discover that one particular evil of prostitution is a hazard to health—the spread of venereal disease, a spread that is not confined to the customers, but transmitted even to those who had no connection with this illicit commodity. There may be some incompatibility between a campaign to eradicate venereal disease and a campaign to eradicate prostitution. Specifically, one may legislate a public health service for prostitutes and their customers even at the expense of "diplomatic recognition" of the enemy. One may need to provide certain kinds of immunity both to prostitutes and to their customers, to an extent required by medical and public health services. One may not; just as one may not want the Commerce Department to keep income figures out of the hands of the taxing authorities, or courts to exempt witnesses from self-incrimination. The point is that a hard choice can arise, and ideology gives no answer. If two of the primary evils connected with a criminal activity are negatively correlated, one has to distinguish them, separately evaluate them, and make up his mind.

Similarly with abortion. At the very least one could propose clinical help to women seeking abortion for the very limited purpose of eliminating from the market those who are actually not pregnant, providing them the diagnosis that an abortionist might have neglected or preferred to withhold. Going a step further, one may want to provide reliable advice about post-abortion symptoms to women who may otherwise become infected, or may hemorrhage, or otherwise suffer from ignorance. Still a step further, one might like to provide even an abortionist with a degree of immunity so that he could call for emergency treatment, for a woman in such need, without danger of self-incrimination. None of these suggestions yet compromises the principle of illegality; they merely apply to abortion some of the principles that would ordinarily be applied to hit-and-run driving or to an armed

256-177 O - 67 - 9

robber who inadvertently hurts his victim and prefers to call an ambulance.

One has to go a step further, though, on the analogy with contraception, and ask about the positive or negative value of scientific discovery, or research and development, in the field of abortion itself. Cheap, safe, and reliable contraceptives are now considered a stupendous boon to mankind. What is the worth of a cheap, safe, and reliable technique of abortion, one that involves no surgery, no harmful or addicting drugs, no infection, and preferably not even reliance on a professional abortionist? (Apparently the laws in some States make it illegal to perform an abortion but not to undergo one, except to the extent that undergoing abortion makes the patient an accomplice to the crime.) Or suppose some of the new techniques developed in Eastern Europe and elsewhere for performing safer and more convenient abortions became technically available to abortionists in this country, with the consequence that fewer patients suffer but also the consequence that more abortions are procured? How do we weigh these consequences against each other? Each of us may have his own answer, and a political or judicial decision is required if we want an official answer. But the question cannot be ignored.

The same questions would arise in the field of firearm technology. Do we hope that nonlethal weapons become available to criminals, so that they kill and damage fewer victims, or would we deplore it on grounds that any technological improvement available to criminal enterprise is against the public interest? Do we hope to see less damaging narcotics become available, perhaps cheaply available through production and marketing techniques that do not lend themselves to criminal monopoly, to compete with the criminally monopolized and more deleterious narcotics, or is this a "compromise" with crime itself?

Evidently judgments of this sort are made, even if only implicitly. Consider the reaction to gangland killings, of which the number in the Boston area alone, in recent years, is reported to be 44. People seem appalled that they can occur, because they are evidence of the existence of organized crime and of the impotence of the law to deal with it. People seem less concerned that they do occur, because they eliminate individuals who may be considered to be undeserving of the protection of the law anyhow. And the question whether these killings denote a deterioration of peace and discipline within the underworld or a tightening of discipline, whether the result will be more crime or less, more violence or less violence outside the underworld itself, more illegal gains taken from the innocent or more illegal gains taken from black market customers, or more illegal gains taken from criminals themselves, or less, is an important matter of "strategic" intelligence and evaluation. Like the Red Guard in China, it is a significant phenomenon that needs to be understood, and one that goes beyond the immediate beatings and killings and display of arrogance and disdain for the law.

SHOULD CRIME BE ORGANIZED OR DISORGANIZED?

It is usually implied, if not asserted, that organized crime is a menace and has to be fought. Evidently the crime itself is a menace; and if the crime would disappear with the weakening or elimination of the organization, the case for deploring organization, and combating it altogether, would be a strong one. If the alternative is "disorganized crime"—if the criminals and their opportunities will remain, with merely a lesser degree of organization than before—the answer is not so easy.

There is at least one strong argument for favoring the monopoly organization of some forms of crime. It is the argument about "internalizing" some of the costs that fall on the underworld itself but go unnoticed, or ignored, if criminal activity is decentralized. The individual hijacker might be tempted to kill a truck driver to destroy a potential witness, perhaps to the dismay of the underworld, which may suffer from the public outrage and the heightened activity of the police. A monopoly or a trade association could impose greater discipline. This is not a decisive argument, nor does it apply to all forms of organization nor necessarily to all criminal industries if it applies to a few; but it is an important point.

It may be that modern society "contracts out" some of its regulatory functions to the criminals themselves. Surely some of the interests of organized crime coincide with those of society itself—minimization of gangland feuds, minimization of all those violent byproducts of crime, even a kind of negotiated avoidance of certain classes of crime. If society has no legal means of policing some kinds of crime, or lacks the political authority to compromise directly with the criminals, maybe what society does is to let the underworld itself provide some of the necessary discipline; that may require the existence of organizations strong enough to impose discipline. That is, organizations that can offer or withhold employment, punish recklessness, and at least passively try to stick to the business of criminal transfer of cash and property rather than destruction of wealth and harm to people.

Just as in war one may hope that the enemy government remains intact, thus assuring that there is an authority to negotiate with and to discipline the enemy troops themselves, maybe in the war on crime it is better that there be a "command and control" system intact on the other side.

If so, it should not be taken for granted that we want all crime to be less organized. It may even be that we should prefer that some kinds of crime be better organized than they are. If abortion, for example, will not be legalized and cannot be eliminated, there may be ways to minimize some of the extremely deleterious side effects of the rather dirty black market in abortion. One of the ways might be better organization; and though a policy of actually encouraging such organization would be too anomalous to be practical (and perhaps not wise if it were practical), a choice might arise between acquiescing in a degree of organization or preventing it.

A large organization could probably not afford to mutilate and even kill so many women. It could impose higher standards. It would have some interest in quality control and the protection of its "goodwill," of a kind that the petty abortionist is unlikely to have. As it is, the costs external to the enterprise—the costs that fall not on the abortionist but on his customer or on the reputation of other abortionists—are of little or no concern to him, and he has no incentive to minimize them. By all accounts, criminal abortion is conducted more incompetently and more irresponsibly than the illegal control of gambling.

COMPROMISING WITH ORGANIZED CRIME

It is customary to deplore the kinds of accommodation that the underworld reaches, sometimes, with the forces of law and order, with the police, with the prosecutors, with the courts. Undoubtedly there is corruption of public officials, including the police—bad not only because it frustrates justice and enforcement of the law but also because it lowers the standards of morality among the public officials themselves. On the other hand, officials concerned with law enforcement are in the frontline of diplomacy between the legitimate world and the underworld. Aside from the approved negotiations by which criminals are induced to testify, to plead guilty, to surrender themselves, and to tip off the police, there is undoubtedly sometimes a degree of accommodation between the police and the criminals—tacit or explicit understandings analogous to what in the military field would be called the limitation of war, the control of armament, and the development of spheres of influence. A little coldblooded appeasement is not necessarily a bad thing; it was bad at Munich mainly because it failed, but it does not always fail.

The problem seems to be this. In other fields of criminal business, that is, of criminal activity by legitimate business firms, such as conspiracy in restraint of trade, tax evasion, illegal labor practices, or the marketing of dangerous drugs, regulatory agencies can be established to deal with the harmful practices. One does not have to declare war on the industry itself, only on the illegal practices; regulation and even negotiation are recognized techniques for coping with those practices. But when the business itself is criminal it is harder to have an acknowledged policy of regulation and negotiation. In the international field one can coldbloodedly accommodate with the enemy, or form expedient alliances, limit warfare and come to understandings about the kinds of external violence that will be resisted or punished and the kinds of activities that will be considered nonaggressive, or domestic, or within the other side's sphere of influence. Maybe the same approach is somewhat necessary in dealing with crime itself. And if we cannot acknowledge it at the legislative level, it may have to be accomplished in an unauthorized or unacknowledged way by the people whose business requires it of them. These people are those whose responsibility is to oppose crime—by enforcing the law, by apprehending criminals, or by any other techniques that minimize the costs, the losses, and violence due to criminal activity.

THE RELATION OF ORGANIZED CRIME TO ENFORCEMENT

It is important to distinguish between the black-market monopolies dealing in forbidden goods, and the racketeering enterprises, like extortion and the criminal elimination of competition. It is the black-market monopolies that depend on the law itself. Without the law and some degree of enforcement, there is no presumption that the monopoly organization can survive competition—or, if it could survive competition once it is established, that it could have arisen in the first place as a monopoly in face of competition. Some rackets may also depend on the law itself, some labor rackets, some blackmail, even some threats to enforce the law with excessive vigor. But it is the black-market crimes—gambling, dope, smuggling, etc.—that are absolutely dependent on the law and on some degree of enforcement. That is, without a law that excludes legitimate competition, the basis for monopoly probably could not exist.

In fact, there must be an optimum degree of enforcement from the point of view of the criminal monopoly. With virtually no enforcement, either because enforcement is not attempted or because enforcement is infeasible, the black market could not be profitable enough to invite criminal monopoly (or not any more than any other market, legitimate or criminal.) With wholly effective enforcement, and no collusion with the police, the business would be destroyed. Between these extremes there may be an attractive black market profitable enough to invite monopoly.

Organized crime could not, for example, possibly corner the market on cigarette sales to minors. Every 21-year-old is a potential source of supply to every 19-year-old who is too young to buy his own cigarettes. No organization, legal or illegal, could keep a multitude of 21-year-olds from buying cigarettes and passing them along to persons under 21. No black-market price differential great enough to make organized sale to minors profitable could survive the competition. And no organization, legal or illegal, could so intimidate every adult so that he would not be a source of supply to the youngsters. Without any way to enforce the law, organized crime would get no more out of selling cigarettes to children than out of selling them soft drinks.

The same is probably true with respect to contraceptives in those states where their sale is nominally illegal. If the law is not enforced, there is no scarcity out of which to make profits. And if one is going to intimidate every drugstore that sells contraceptives in the hope of monopolizing the business he may as well monopolize toothpaste or comic books unless the law can be made to intimidate the druggists with respect to the one commodity that organized crime is trying to monopolize.

What about abortions? Why are they not organized? The answer is not easy, and there may be too many special characteristics of this market to permit a selection of the critical one. First, the consumer and the product have unusual characteristics; nobody is a regular consumer the way a person may regularly gamble, drink, or take dope. A woman may repeatedly need the services of an abortionist, but each occasion is once-for-all. Second consumers are probably more secret about dealing with this black market, and secret especially among intimate friends and relations, than are the consumers of most banned commodities. Third, it is a dirty business and too many of the customers die; and while organized crime might drastically reduce fatalities, it may be afraid of getting involved with anything that kills and maims so many customers in a way that might be blamed on the criminal himself rather than just on the commodity that is sold. We probably don't know which reason or reasons are crucial here, but it would be interesting to know. (In particular it would be worth knowing whether organized abortion is less harmful than unorganized.)

BLACK MARKETS AND COMPETITION

An important difference between black-market crimes and most of the others, like racketeering and robbery, is that they are "crimes" only because we have chosen to legislate against the commodity or service they provide. We single out certain consumer goods and services as harmful or sinful; for reasons of history and tradition, as well as for other reasons, we forbid dope but not tobacco, forbid gambling in casinos but not on the stock market, forbid extramarital sex but not gluttony, forbid erotic stories but not mystery stories. We do this for reasons different from those behind the laws against robbery, parking in front of fire hydrants, and tax evasion.

It is, in other words, a matter of policy that determines the black markets. Cigarettes and firearms are two borderline cases. We can, as a matter of policy, make the sales of guns and cigarettes illegal. We can also, as a matter of policy, make contraceptives and abortion illegal. Times change, policies change, and what was banned yesterday can become legitimate today; what was freely available yesterday can be banned tomorrow. Evidently there are changes in policy on birth control; there may be changes on abortion and homosexuality, and there may be legislation restricting the sale of firearms.

The pure black markets, in other words, in contrast to the rackets, tend to reflect some moral tastes, economic principles, paternalistic interests, and notions of personal freedom in a way that the rackets do not. A good example is contraception. We can change our policy on birth control in a way that we would not change our policy on armed robbery. And evidently we are changing our policy on birth control. The usury laws may to some extent be a holdover from medieval economics; and some of the laws on prostitution, abortion, and contraception were products of the Victorian era and reflect the political power of various church groups. One cannot even deduce from the existence of abortion laws that a majority of the voters, especially a majority of enlightened voters, opposes abortion; and the wise money would probably bet that the things that we shall be forbidding in 50 years will differ substantially from the things we forbid now.

One of the important questions is what happens when a forbidden industry is subjected to legitimate competition. We need more study of this matter. Legalized gambling is a good example. What has happened to Las Vegas is hardly reassuring. But the legalization of liquor in the early 1930's rather swamped the criminal liquor industry with competition. Criminals are alleged to have moved into church bingo, but they have never got much of a hold on the stockmarket. What happens when a forbidden industry is legitimized needs careful analysis; evidently criminals cannot always survive competition, evidently sometimes they can. A better understanding of market characteristics would be helpful. The question is important in the field of narcotics. We could easily put insulin and antibiotics into the hands of organized crime by forbidding their sale; we could do the same with a dentist's novocaine. (We could, that is, if we could sufficiently enforce the prohibition. If we cannot enforce it, the black market would be too competitive for any organized monopoly to arise.) If narcotics were not illegal, there could be no black market and no monopoly profits, and the interest in "pushing" it would probably be not much greater than the pharmaceutical interest in pills to reduce the symptoms of common colds. This argument cannot by itself settle the question of whether, and which narcotics or other evil commodities, ought to be banned, but it is an important consideration.

The greatest gambling enterprise in the United States has not been significantly touched by organized crime. That is the stockmarket. (There has been criminal activity in the stockmarket, but not on the part of what we usually call "organized crime.") Nor has organized crime succeeded in controlling the foreign currency black markets around the world. The reason is that the market works too well. Furthermore, Federal control over the stockmarket, designed mainly to keep it honest and informative, and aimed at maximizing the competitiveness of the market and the information for the consumer, makes tampering difficult. Ordinary gambling ought to be one of the hardest industries to monopolize, because almost anybody can compete, whether in taking bets or providing cards, dice, or racing information. Wire services could not stand the ordinary competition of radio and Western Union; bookmakers could hardly be intimidated if the police were not available to intimidate them. If ordinary brokerage firms were encouraged to take accounts of customers and buy and sell bets by telephone for their customers, it is hard to see how racketeers could get any kind of grip on it. And when any restaurant or bar or country club or fraternity house can provide tables and sell fresh decks of cards, it is hard to see how gambling can be monopolized any more than the soft drink business, the television business, or any other. Even the criminal-skilled-labor argument probably would not last once it

became recognized that the critical skills were in living outside the law, and those skills became obsolete with legalization.

We can still think gambling is a sin and try to eliminate it; we should probably try not to use the argument that it would remain in the hands of criminals if we legalize it. Both reason and evidence seem to indicate the contrary.

Essentially the question is whether the goal of somewhat reducing the consumption of narcotics, gambling, prostitution, abortion, or anything else that is forced by law into the black market, is or is not outweighed by the costs to society of creating a criminal industry. In all probability, though not with certainty, consumption of the proscribed commodity or service is reduced. Evidently it is not anywhere near to being eliminated because the estimates of abortions run to about a million a year, the turnover from gambling is estimated in the tens of billions of dollars per year, and dope addiction seems to be a serious problem. The costs to society of creating these black markets are several.

First, it gives the criminal the same kind of protection that a tariff might give a domestic monopoly: it guarantees the absence of competition from people who are unwilling to be criminal, and guarantees an advantage to those whose skill is in evading the law.

Second, it provides a special incentive to corrupt the police, because the police not only may be susceptible to being bought off, but also can be used to eliminate competition.

Third, a large number of consumers who are probably not ordinary criminals—the conventioneers who visit houses of prostitution, the housewives who bet on horses, the women who seek abortions—are taught contempt, even enmity, for the law, by being obliged to purchase particular commodities and services for criminals in an illegal transaction.

Fourth, dope addiction may so aggravate poverty for certain desperate people that they are induced to commit crimes or can be urged to commit crimes because the law arranges that the only (or main) source for what they desperately demand will be a criminal source.

Fifth, these big black markets may guarantee enough incentive and enough profit for organized crime so that the large-scale criminal organization comes into being and maintains itself. It may be—this is an important question for research—that without these important black markets crime would be substantially decentralized, lacking the kind of organization that makes it enterprising, safe, and able to corrupt public officials. In economic development terms, these black markets may provide the central core (or infrastructure) of underworld business, capable of branching out into other lines.

A good economic history of prohibition in the 1920's has never been attempted, so far as I know. By all accounts, though, prohibition was a mistake. Even those who do not like drinking and want to prohibit it have to reach the conclusion that prohibition was a mistake. It merely turned the liquor industry over to organized crime. In the end we gave up—probably not only because there was disagreement whether drinking was bad, or, if it were, whether it was properly a political question—but also because the attempt was an evident failure and an exceedingly costly one in its social byproducts. It may have given underworld business in the United States what economic developers call the takeoff into self-sustained growth.

INSTITUTIONAL PRACTICES

A variety of institutional practices in the underworld needs to be better understood. What, for example, is the effect of the tax laws on extortion? Why does an extortionist put cigarette machines in a restaurant or provide linen service? Do the tax laws make it difficult to disguise the payment of tribute in cash but easy to disguise it (and make it tax deductible) if the tribute takes the form of a concession or the purchase of high-priced services? Why does a gambling syndicate bother to provide "wire services" when evidently its primary economic function is to shake down bookies by the threat of hurting their businesses or themselves, possibly with the collusion of the police? The Kefauver hearings indicate that the wire service syndicate in Miami took a standard 50 percent from the bookies. The 50 percent figure is itself remarkable. Equally remarkable is the fact that the figure was uniform. Similarly remarkable is the fact that the syndicate went through the motions of providing a wire service when it perfectly well could have taken cash tribute instead. There is an analogy here with the car salesman who refuses to negotiate the price of a new car but is willing to negotiate quite freely the allowance on the used car that one turns in. The underworld seems to need institutions, conventions, traditions, and recognizable standard practices much like the upper world of business.

A better understanding of these practices might lead not only to a better evaluation of crime itself but also to a better understanding of the role of tax laws, social security laws, and various regulatory laws on the operation of criminal business.

Even the resistance to crime would be affected by measures designed to change the cost structure. Economists make an important distinction between a lump sum tax, a profits tax, and a specific or ad valorum tax on the commodity an enterprise sells. The manner in which a criminal monopolist or extortionist prices his service or demands his tribute should have a good deal to do with whether the cost is borne by the victim or passed along by the customer. The uniform "tax" levied by the racketeer on all his customers may merely be passed along in turn to their customers, with little loss to the immediate victims if the demand in their own market is inelastic. Similarly, legal arrangements that make it difficult to disguise illegal transactions and make it a punishable offense to pay tribute, might help to change the incentives.

In a few cases the deliberate stimulation of competing enterprises could be in the public interest. Loansharking could be somewhat combatted by the deliberate creation of new and specialized lending enterprises. And

some of the worst side effects of crime itself might be mitigated by the developing of institutions to deal directly with the criminal underworld. Examples would be the provision of public health services to prostitutes, confidential medical advice to dope addicts, and clinics for the determination of pregnancy so that at least the women who are not pregnant need not participate in a traumatic illegal experience that is unnecessary.

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