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**ORGANIZED CRIME: CHALLENGE TO THE AMERICAN LEGAL SYSTEM**

**Part II—The Legal Weapons: Their Actual and Potential Usefulness in Law Enforcement**

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This article is the second of three installments, the first of which appeared in Volume 53, Number 4 of the *Journal*, at page 399. This series of articles is based upon a thesis which the author prepared while a graduate student at the Northwestern University School of Law.

Mr. Johnson's first installment contained an assessment of the effects of organized crime on American society and an analysis of the factors which have made organized crime difficult to suppress through traditional methods of law enforcement. The second installment summarizes the various legal countermeasures available to an honest prosecutor—particularly a local prosecutor—in combating organized crime. These measures involve techniques designed to weaken criminal organizations through convicting their leaders, reducing their profits, and denying them access to services and facilities necessary to their illegal enterprises. The third installment will be a survey of the legal countermeasures available to minimize the effects of political corruption upon the prosecutive effort against organized crime. This survey will encompass means for substituting another prosecutive agency where the local prosecutor is corrupt or ineffectual, sanctions to discourage a corrupt official from improper acts, methods of minimizing the effects of improper acts when they do occur, and techniques to maximize the effect of an honest official where others in the law enforcement machinery appear to be under the control of organized crime.—EDITOR.

It would be unrealistic to suggest that organized crime can be overcome merely by new applications of old laws or by enacting some new ones. Organized crime is not merely a legal problem. It is a social-political-economic-legal problem. Various aspects of the problem admit in varying degrees to a legal solution. There are certain aspects for which no change in the law could possibly be of assistance. Certainly one cannot legislate public arousal. On the other hand, just as certainly, there are procedural and substantive legal techniques which can minimize the effects of the size, wealth, and systematic methods of criminal organizations and the political corruption which they have been able to engender.

In the two remaining installments of this article, an attempt will be made to survey a wide spectrum of possible legal approaches to the problem of organized crime. Two broad categories of legal ap-

proaches are to be discussed. In this installment are catalogued the legal weapons available to an essentially honest and dedicated law enforcement body in combatting organized crime. These various legal weapons embody three distinct approaches to the containment of organized crime: the conviction of organization leaders; the curtailment of organization profits; and the denial of facilities necessary to organization enterprises.

The final installment of the article, to appear in a subsequent issue of the *Journal*, will be concerned with the problem of political corruption. In that installment, a second broad category of legal approaches will be discussed, approaches which may be utilized to minimize the rotting effects of corruption on the law enforcement effort against organized crime.

I. CONVICTING "MANAGEMENT-LEVEL" MEMBERS  
OF A CRIMINAL ORGANIZATION

In order to operate its far flung enterprises, any criminal organization must commit a variety of

\* The views expressed in this article are the views of the author and are not meant to reflect those of the United States Department of Justice or the Organized Crime and Racketeering Section of that Department.

crimes. The more frequent though less serious infractions are those which continuously occur because the normal operation of an organization's businesses is illegal. For instance, every moment that an organization gambling house is open, it is violating several state laws and city ordinances.

But the pattern of organized crime reveals this is not the full extent of an organization's criminal activities. A disturbing number of subsidiary crimes—often crimes of violence—are also part of the business techniques employed by organized crime. Extortion, assault, arson, and murder are accepted methods for acquiring and perpetuating monopolies in the lines of endeavor the organization has chosen to enter. Despite the frequency and seriousness of the crimes committed by the organization, the management-level members of the organization, for reasons explored in the first installment of this article,<sup>134</sup> are extremely well insulated and exceedingly difficult to convict for the crimes committed by the organization. There are two logical alternative approaches to this problem. One is to develop legal techniques which will ease the conviction of members for the crimes committed by an organization. The other is to seek to convict these men for their personal crimes unrelated to the organization's criminal activities. Both approaches have been employed with infrequent, though sometimes dramatic success.

#### A. Convicting Management-Level Members for the Criminal Activities of a Criminal Organization

To effectively prosecute a crime overlord for the criminal acts committed by the criminal syndicate which he directs requires two essential steps. First, a prosecutive theory must be available which will render his particular role in the activity a crime. Inasmuch as he does not commit that criminal act himself, his liability, if any, must be founded upon his indirect, often far-removed, but crucial connection with organization activities. Second, evidence must be developed which will establish that the organization leader in fact had the requisite connection with the criminal act of which law enforcement officers have knowledge.

#### 1. Theories Rendering Criminal the Connection of Management-Level Organization Members with Organization Activities

The prosecutive theory most often employed in attempts to connect management-level organiza-

<sup>134</sup> The factors which render organization leaders virtually immune from prosecution for organization activities are summarized in Part I of this series, 53 J. CRIM. L., C. & P. S. 399, at 416-18 (1962).

tion members to the criminal acts committed by a criminal organization is conspiracy.<sup>135</sup> For men whose function is to plan and direct rather than perpetrate criminal acts this is the most feasible technique to employ. The conspiracy theory has much to recommend it as a technique for ensnaring the well-insulated leadership of organized crime. The fundamental essence of a conspiracy obviates the necessity of establishing that the organization leader himself committed a physical act amounting to a crime or that he even committed an overt act in furtherance of the object of the conspiracy. It is sufficient if he can be shown to have been a party to the conspiratorial agreement.<sup>136</sup> Thus, the backstage role which a leading racketeer ordinarily plays in organization criminal activities does not immunize him from criminal liability. Moreover, once he is shown to be a member of the conspiracy, all out-of-court statements of his co-conspirators which are made in furtherance of the conspiracy are admissible against an organization leader.<sup>137</sup> Accordingly, statements of other organization members to third parties can be used to convict its leading figures.

In some jurisdictions, conspiracy has an enhanced potential as a theory for convicting top hoodlums because of a lenient attitude toward the degree of connection required between the criminal act and the prime object of the conspiracy. In these jurisdictions, a participant in a conspiracy is responsible for all crimes committed by his co-conspirators in furtherance of the conspiracy, regardless of whether or not it can be established that he knew of the acts or participated in these crimes.<sup>138</sup>

<sup>135</sup> The essential elements of a conspiracy charge are: (1) an agreement between two or more persons with the (2) intent to commit an (3) anti-social act or acts (some jurisdictions require that it be an act or acts prohibited by the criminal law) and accompanied by (4) the commission of some overt act in furtherance of the agreement (this latter element is not required in all jurisdictions). For a recent exhaustive survey of the law of conspiracy, consult Comment, *Developments in the Law: Criminal Conspiracy*, 72 HARV. L. REV. 920 (1958-1959). See also, Arens, *Conspiracy Revisited*, 3 BUFFALO L. REV. 242 (1954), and Note, *The Conspiracy Dilemma: Prosecution of Group Crime or Protection of Individual Defendants*, 62 HARV. L. REV. 276 (1948), both of which consider the conspiracy device as it has developed in response to the challenge of organized crime.

<sup>136</sup> "Overt acts proved against one or more of the [co-conspirators] may be looked to as against all of them. . . ." State v. Carbone, 10 N.J. 329, 91 A.2d 571 (1952).

<sup>137</sup> United States v. Levi, 276 F.2d 604 (2d Cir. 1960), cert. den. 363 U.S. 812; State v. Carbone, *supra* note 136.

<sup>138</sup> "[S]o long as the partnership in crime continues, the partners act for each other in carrying it fore-

Thus, if it can be proved that a criminal organization exists and that one of its members in furtherance of its overall objectives committed a given criminal act, the organization leadership will be subject to prosecution under a conspiracy charge. This obviates the difficult problem of proving what occurs within the inner sanctum of a criminal organizations' planning council in order to establish the criminal responsibility of organization leaders. In the great majority of jurisdictions, the principal limitation on this doctrine of vicarious criminal liability is the requirement that the act for which a conspirator is held responsible be at least reasonably foreseeable to him as a potential result of the concerted effort toward the group's objectives.<sup>139</sup>

One of the chief limitations upon conspiracy as an effective theory for linking an organization leadership to its illegal activities is that in most jurisdictions the penalty exacted for conspiring to engage in given criminal conduct cannot be greater than that which could be imposed upon an individual for the substantive act.<sup>140</sup> Since most of the crimes associated with the normal business operations of an organization, particularly gambling and shylocking, carry nominal criminal penalties, the time and expense required to prepare an elaborate conspiracy case against management-level members of the organization is seldom justified even in those rare situations where it is possible to establish such a case. Consequently, conspiracy is a device which on the whole has been reserved for

tying management-level organization members to the more serious criminal acts. This is an even more difficult undertaking than establishing their connection with the regular business operation of the organization. The conviction of Louis "Lepke" Buchalter for one of the murders committed at his direction by the infamous "Murder, Inc.," is one of the few successful examples of this technique.<sup>141</sup> Similarly, some management-level organization members have succumbed to conspiracy cases for violating narcotics laws.<sup>142</sup>

Another technique for rendering organization leaders criminally responsible for organization crimes is that pioneered in some of the new gambling codes which have created specific crimes, carrying substantial criminal sanctions, to cover the acts which management-level members of the organization are likely to commit themselves in conjunction with the normal operation of the organization's enterprises. For example, in Wisconsin it is made criminal to "share in the proceeds" of a gambling enterprise.<sup>143</sup> Although they do not ordinarily handle the dice table, or hold title to a gambling casino in their own names, management-level organization members do "share in the proceeds" of these activities. Of course, it would be naive to suggest that this legislation or legislation like it sweeps away all problems and paves the way to successful prosecution of all management-level organization members. But it is an important step forward. By isolating the acts committed by management-level organization members in conjunction with the organization's activities and assigning a greater penalty to such acts than would be warranted against the acts of lesser members of the organization, legislators can make it worthwhile for law enforcement agencies to prosecute management-level organization members for their role in organization enterprises.

ward. It is settled that 'an overt act of one partner may be the act of all without any new agreement specifically directed to that act.' *United States v. Kissel*, 218 U.S. 601, 608. . . . The governing principle is the same when the substantive offense is committed by one of the conspirators in furtherance of the unlawful project." *Pinkerton v. United States*, 328 U.S. 640 (1946). *Accord*, *Pereira v. United States*, 347 U.S. 1 (1954); cases collected in Comment, *Developments in the Law: Criminal Conspiracy*, *supra* note 135.

<sup>139</sup> *Pereira v. United States*, 347 U.S. 1 (1954).

<sup>140</sup> Many statutes contain a stipulation that in no case may the penalty imposed for violating the conspiracy provision be greater than would be imposed for committing the substantive offense which was the object of the conspiracy. "If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor." 18 U.S.C. §371 (1950). See also, *e.g.*, ANNOT. CALIF. CODES (Penal) §182 (1955); WIS. STAT. ANN. §939.31 (1957). In some states conspiracy is a misdemeanor even if the object of the conspiracy is a felony. See, *e.g.*, CONS. LAWS NEW YORK ANN. (Penal) §580 (1960 Supp.). In New York, however, conspiracies to commit certain felonies, most notably murder, extortion, and narcotics peddling, are singled out for treatment as felonies. See CONS. LAWS NEW YORK ANN. (Penal) §580-a (1960 Supp.).

## 2. Obtaining Evidence Against Management-Level Members of Criminal Organizations

Central to the problem of convicting organization leaders under any prosecutive theory which links them with the substantive crimes committed by an organization is that of adducing sufficient admissible evidence to establish the requisite association

<sup>141</sup> For an interesting and factual account of the entire Lepke investigation and prosecution see TURKUS, *MURDER, INC.* (1958).

<sup>142</sup> See, *e.g.*, *United States v. Bruno*, 105 F.2d 921 (2d Cir.) *rev'd*, 308 U.S. 287 (1939); *United States v. Masciale*, 236 F.2d 601 (2d Cir. 1956), *aff'd*, 356 U.S. 386.

<sup>143</sup> WISC. STAT. ANN. 945.03 (1) (1957).

with the organization's criminal activities. Our legal system relies almost exclusively upon the direct testimony of human eye witnesses to establish the facts upon which criminal guilt must rest. At the same time, organized crime, as discussed in the first installment of this article,<sup>144</sup> has generated pressures which make it extremely difficult to obtain voluntary testimony against criminal syndicates from human witnesses. Two basic approaches to this fundamental obstacle to effective action against organized crime are suggested. On the one hand, legal steps can be initiated which will tend to induce persons who are potential witnesses against a criminal organization to offer their testimony despite the threats or rewards which the organization may wave before them. Alternatively, the stifling of the testimony of human witnesses by organized crime can be counteracted through obtaining and introducing evidence not derived from the voluntary testimony of human witnesses. Both of these approaches will be considered in the subsequent sections of this article.

a. *Inducing Potential Witnesses Against Organization Leaders To Testify Truthfully*

Four separate techniques will be discussed which tend to encourage potential witnesses to testify: (a) Legally compelling potential witnesses to offer relevant information against organized crime during investigation and at formal judicial proceedings; (b) Granting immunity from prosecution to lesser members of criminal organizations; (c) Discouraging acts and threats calculated to intimidate witnesses from testifying against criminal organizations; (d) Discouraging false testimony by witnesses either during investigation or at formal judicial proceedings.

(1) *Legally Compelling Potential Witnesses To Offer Relevant Information Against Organized Crime During Investigation and at Formal Judicial Proceedings.* Any potential witness against a criminal organization is confronted with many forces tending to suggest silence as his best course of conduct. If these persons are to be induced to come forward and testify, society must manage to generate some countervailing pressures. Many witnesses will not speak out because they are unwilling to risk punishment which they fear will be visited upon them by the organization if they do testify.

<sup>144</sup> The rewards and punishments with which criminal organizations influence potential witnesses are discussed in Part I of this series, 53 J. CRM. L., C. & P. S. 399, 416-18 (1962).

And these witnesses will remain silent unless society renders silence equally risky. This can be done by invoking criminal penalties upon any person who fails to volunteer any relevant information which he possesses concerning the activities of organized crime. Of course, society cannot with good conscience place persons in this dilemma unless full provision is made to insure that the organization is never able successfully to carry out its threatened violence against the witness.

At the present time, very few American jurisdictions impose any criminal penalties upon those who fail to convey information within their knowledge to proper authorities at early stages of criminal investigation. However, certain states have broadly drawn misprison-of-felony<sup>145</sup> statutes

<sup>145</sup> "To constitute the offense of misprison of felony there must be mere knowledge of the fact that a felony is to be committed or has been committed and neglect either to prevent its commission or to bring the offender to justice, after its commission." MILLER, CRIMINAL LAW 466 (1934).

The foregoing statement represents the usual formulation of the common law crime of misprison of felony. The crime was defined and applied in its full common law meaning in *State v. Biddle*, 124 Atl. 804 (Del. 1923), to a woman who had been present at a robbery, without participation in the robbery, but who had failed to convey her knowledge of the crime to the authorities. In *State v. Wilson*, 80 Vt. 249, 67 Atl. 533 (1907), the court pointed out the distinction between misprison of felony and an accessory.

"Misprison of felony is an offense at common law, and is described as a criminal neglect either to prevent a felony from being committed or to bring the offender to justice after its commission, but without such previous concert with or subsequent assistance of him as will make the concealer an accessory before or after the fact."

If the above styled version of the crime of misprison of felony prevailed in the United States, a clearly enforceable duty to disclose material information concerning criminal acts would be imposed upon all citizens. However, the concept of misprison of felony has been sharply limited even in those few jurisdictions where it exists. One frequent limitation is the requirement that the witness have some evil motive for his neglect to inform, i.e., that he have a specific intent to thwart justice.

"On the question of intent, . . . the motive prompting the neglect of a misprison must be in some form evil as respects the administration of justice." *State v. Wilson*, *supra*, 67 Atl. at 534.

A second limitation is the requirement which pertains in several jurisdictions, that the witness take positive steps toward concealment of the crime or the criminal rather than merely negatively failing to report his knowledge to lawful authority. See, e.g., *United States v. Farrar*, 38 F.2d 515 (D. Mass. 1930), *aff'd*, 281 U.S. 624, in which the court held that there are two elements to a violation of 18 U.S.C. §4, the federal misprison of felony statute. There must be both a positive act of concealment and a failure to disclose. Consequently, the defendant, who had purchased liquor from a bootlegger and failed to disclose the sale, but who

which under certain circumstances do punish the failure to offer such evidence to law enforcement officials. Unfortunately, even in those states which have this type of statute, it is seldom of use against organized crime. In most jurisdictions, these statutes apply only to treason or serious felonies.<sup>146</sup> Since many of the illegal business operations conducted by criminal organizations involve only misdemeanor offenses, no affirmative enforceable duty rests upon those who witness organization crimes to come forward or even respond to questioning even in those states which have some form of compulsory disclosure statutes.

This type of provision is bound to incur stiff opposition. It tends to place the innocent person who happened to witness an organization crime in a very precarious position, facing prison if he fails to speak and possible physical injury or death if he does. It is a drastic measure which probably deserves and will receive more support if confined to individuals who themselves are tarnished somewhat by their dealings with organized crime. Thus, it might be feasible to modify existing gambling statutes to remove the criminal liability for patronizing an illegal gambling operation but impose an enhanced penalty for being a patron *and* refusing to offer relevant evidence against the operation.<sup>147</sup>

At a later stage of investigation, before a grand

had taken no other step to conceal the felony of selling liquor, was held not liable for violation of 18 U.S.C. §4. *Accord*, *Bratton v. United States*, 73 F.2d 795 (10th Cir. 1934); *United States v. Worcester*, 190 F. Supp. 548 (D. Mass. 1960).

<sup>146</sup> See, e.g., PA. STATS. ANN. (Purdon), §4202; 18 U.S.C. §4.

<sup>147</sup> Pennsylvania has a statute of this nature. However, it is applicable only to a peculiar type of offense, far removed from the preserves of organized crime—the sale of cigarettes to minors. The statute imposes a penalty on a minor found to possess cigarettes only if he refuses to furnish information concerning the person from whom he purchased the cigarettes.

"Whoever, being a minor, and being in possession of a cigarette or of cigarette paper, and being by any police officers, constable or juvenile court officer, truant officer, or teacher in any school, asked where and from whom such cigarettes or cigarette paper was obtained, refuses to furnish such information, shall, upon conviction thereof in a summary proceeding, being of the age of sixteen (16) years or upwards, be sentenced to pay a fine not exceeding five dollars (\$5), or to undergo an imprisonment in the jail . . . not exceeding five (5) days, or both." PA. STAT ANN. (Purdon) §4649.

If this societal pressure is not considered disproportionate when held over the head of a young boy or girl merely to prevent the spread of cigarette smoking among teenagers, it would not seem inappropriate that similar pressures be invoked to encourage testimony which is necessary to curb the power of an organization posing a threat to the entire society.

jury or similar formal investigatory agency,<sup>148</sup> witnesses normally can be compelled to provide information concerning crimes of which they have knowledge. Contempt, either by statute or common law, is almost universally available to compel information from a recalcitrant grand jury witness.<sup>149</sup> Thus, if a victim or an incidental bystander witness can be identified and called before an investigative grand jury, his testimony often can be procured. At least, a countervailing pressure will be exerted upon him to give such testimony, and this pressure may be sufficient to overcome any fear of reprisal which a criminal organization may have engendered.

(2) *Granting Immunity From Prosecution to Lesser Members of Criminal Organizations.* Before the legal compulsions described in the foregoing section can be employed to obtain evidence from organization members, their legal right to refuse to testify must be removed. Unlike other witnesses to organization crimes, these men are implicated directly or indirectly in the offenses about which their testimony is desired. Any evidence they might provide would tend to incriminate them. Consequently, when any attempt is made to invoke criminal sanctions against organization members to compel them to give evidence either to the police or to a grand jury, they are constitutionally privileged to remain silent.<sup>150</sup> In order to render these witnesses amenable to the same sanctions available to compel testimony from ordinary witnesses, it is necessary to obviate the possibility that their testimony can be used to convict them. Accordingly, some method must be afforded of immunizing organization witnesses from prosecution for the acts about which their testimony is required. In many jurisdictions this method is available in the form of "immunity" statutes.<sup>151</sup> Some states

<sup>148</sup> A summary of the various bodies, legislative, judicial, executive, and administrative, which in one jurisdiction or another are empowered to compel testimony is contained in 8 WIGMORE, EVIDENCE §2195 (McNaughton rev. 1961).

<sup>149</sup> *People v. Finkel*, 157 Misc. 781, 284 N.Y. Supp. 725 (1935). Moreover, a witness who does not refuse to answer questions put to him before a grand jury, but attempts to stymie the inquiry by giving evasive answers can likewise be held in contempt. *Loubriel v. United States*, 9 F.2d 807 (2d Cir. 1926); *Finkel v. McCook*, 247 App. Div. 57, 286 N.Y. Supp. 755 (1936).

<sup>150</sup> "The privilege is that of the person under examination as witness. . . ." 8 WIGMORE, *op. cit. supra* note 148, at §2270.

<sup>151</sup> These immunity statutes, both state and federal, are summarized in 8 WIGMORE, *op. cit. supra* note 148, at §2281, n.11.

have general immunity statutes which allow the immunization of witnesses in the investigation of any crime.<sup>152</sup> In other states, immunity can be extended only in the investigation of certain enumerated crimes.<sup>153</sup> A grant of immunity also is often authorized in the implementation of regulatory legislation, particularly in the federal jurisdiction.<sup>154</sup> Whatever the source or the purpose of the immunity grant, it is effective to exempt the immunized person from prosecution within the jurisdiction for any crimes about which he testifies.<sup>155</sup> And, once the immunity is effective, the witness cannot invoke his constitutional privilege to avoid self-incrimination, since self-incrimination is impossible. He can be legally compelled to testify.<sup>156</sup>

Because of the insulation of organization leaders

<sup>152</sup> See, e.g., ILL. REV. STAT., ch. 38, §714.1.

"Whenever, in any investigation before a grand jury or trial in a court of record of any person charged with a criminal offense (either felony or misdemeanor), it shall appear to the court that any person called as a witness in behalf of the prosecution is a material witness and that his testimony or any evidence he may produce, documentary or otherwise, would tend to incriminate him, on motion of the State's Attorney the court may cause an order to be entered of record that such witness be released from all liability to be prosecuted or punished on account of any transaction, matter or thing concerning which he may be required to testify or produce evidence, documentary or otherwise; and such order shall forever after be a bar to any indictment, information or prosecution against the witness for any felony or misdemeanor shown in whole or part by such testimony or evidence, documentary or otherwise, except for perjury committed in the giving of such testimony. . . ."

<sup>153</sup> See, e.g., N.Y. PENAL CODE §2447. This section sets forth the procedure for granting immunity. However, immunity is available only in the investigation of offenses which contain a provision incorporating section 2447 by reference.

<sup>154</sup> See, e.g., 15 U.S.C. §49 (Federal Trade Act); 29 U.S.C. §209 (Fair Labor Standards Act); 42 U.S.C. §2201 (c) (Atomic Energy Act); 12 U.S.C. §1820 (d) (Federal Deposit Insurance Corp. Act); 15 U.S.C. §78 u(d) (Security and Exchange Act of 1934).

<sup>155</sup> However, it is not necessary to the validity of an immunity statute that it immunize the witness from prosecution by other states or the federal government. *United States v. Murdock*, 284 U.S. 140 (1939). A witness compelled to testify after a grant of immunity in a state proceeding can then be prosecuted on the basis of that testimony in a federal court. *Feldman v. United States*, 322 U.S. 487 (1944). For an excellent discussion of the interaction of Federal and state immunity statutes, see Note, *Federal-State Cooperation in the Area of Self-Incrimination and Double Jeopardy*, 55 Nw. U.L. REV. 110 (1960).

<sup>156</sup> "While the constitutional provision in question is justly regarded as one of the most valuable prerogatives of the citizen, its object is fully accomplished by the statutory immunity and we are therefore of opinion that the witness was compellable to answer. . . ." *Brown v. Walker*, 161 U.S. 591, 610 (1896). *Accord*, *Ullmann v. United States*, 350 U.S. 422 (1956).

from the crimes committed by their organizations, the availability of the immunity technique is of extreme importance to the conviction of management-level organization members. To connect the leaders with the crime, it will be necessary to extract testimony from at least some of the underlings. Unfortunately, this technique is not available in all states. Moreover, the Uniform State Witness Immunity Act, which has been adopted by Illinois<sup>157</sup> and has influenced immunity legislation in other states, is virtually useless against organized crime. That Act carries the proviso that no person can be compelled to testify in a state proceeding if the court can apprehend any possibility of incrimination under the laws of another state or of the federal government.<sup>158</sup> Since there is at least the possibility that federal jurisdiction might attach in regard to almost any crime committed by a criminal organization, immunity can seldom, if ever, be effectively extended to organization members in a state which has enacted the Uniform Act, or a similar provision.

In some instances it is desirable to attempt to glean testimony from a witness to whom it is not feasible to extend immunity. In some jurisdictions it is possible to influence such a person to waive his rights against self-incrimination by threatening him with loss of a valuable position or privilege if he does invoke the Fifth Amendment. Thus, in some states the testimony of public employees can usually be obtained without extending immunity, because their positions are automatically forfeit if they claim the privilege.<sup>159</sup> Similarly, various state

<sup>157</sup> ILL. REV. STAT., ch. 38, §714.1.

<sup>158</sup> The proviso reads: "[T]he court shall deny a motion of a State's Attorney made under this section and shall not enter an order releasing such witness from such liability if it shall reasonably appear to the court that such testimony or evidence . . . would subject such witness to an indictment, information or prosecution . . . under the laws of another State or of the United States. . . ."

In Illinois, this proviso has been so construed as virtually to swallow up the power of the state to grant immunity under the statute. In *People v. Burkert*, 7 Ill. 2d 506, 131 N.E.2d 495 (1956), the Illinois Supreme Court held that a witness is entitled to refuse to testify despite a grant of immunity where there is even a possibility of incrimination under federal law, no matter even how obscure the connection between the requested testimony and potential federal violation.

<sup>159</sup> See, e.g., LA. REV. STAT. No. 253, §7 (1940), *repealed*, LA. REV. STAT. No. 104, §40 (1944). Wigmore was one of the most vocal proponents of such a modification of the privilege against self-incrimination.

"In a period and a jurisdiction where corruption in various forms becomes rife, the principle of waiver may need to be systematically invoked for persons who

business and professional licenses and similar privileges can be revoked if the licensee refuses to waive his self-incrimination rights.<sup>160</sup> Presumably, these privileges could also be indefinitely revoked for failing to testify as to some pertinent question during the inquiry.

Of course, granting immunity to an organization member will not always guarantee that truthful testimony can be elicited from him even under threat of contempt. The tradition of silence is deeply ingrained in the fabric of many criminal organizations. How deeply ingrained was dramatically illustrated during the grand jury probes which grew out of the ill-famed Apalachin conference of top level organization leaders in 1958. Several participants in the conference who had been immunized spent up to two years in prison rather than reveal the purpose or content of the meeting.

(3) *Discouraging Acts and Threats Calculated To Intimidate Witnesses From Testifying Against Criminal Organizations.* In addition to exerting countervailing pressures upon potential witnesses to encourage them to give evidence against organized crime, society must undertake measures which will tend to diminish the inhibitory pressures employed by criminal organizations against these same witnesses. To accomplish this, severe penalties must be inflicted upon anyone who uses threats or bribes in an attempt to influence persons who have observed crimes to refrain from furnishing truthful testimony. A witness or juror will respond more readily to exhortations regarding his public duty to testify or to the threat of imprisonment for contempt if his fears concerning physical reprisal at the hands of a criminal organization are minimized. To accomplish this purpose, severe penalties must be inflicted upon anyone who uses threats or bribes in an attempt to influence witnesses.

Most jurisdictions already have statutes which punish certain forms of interference with selected classes of witnesses. These include bribery statutes,<sup>161</sup> subornation of perjury laws,<sup>162</sup> obstruction

of justice<sup>163</sup> and in some cases catch-all statutes which punish any incitement of a witness to commit perjury or refrain from attending a legal proceeding.<sup>164</sup> However, most of these are inadequate in one respect or another. Many extend this protection only to witnesses who have been subpoenaed to appear before a grand jury, at a trial, or in some other formal proceeding.<sup>165</sup> To be effective the sanctions must apply against any attempt to tamper with any person who possesses material knowledge concerning a crime.<sup>166</sup> The sanction must be available whether or not the witness has been formally subpoenaed, interviewed by the authorities, or is even known to the police. Otherwise a criminal organization will make its threats early and thereby discourage potential witnesses from coming forward initially with information.

Moreover, in most states the penalties attaching to these crimes are not commensurate with the gravity of their corrupting effect.<sup>167</sup> It is common to find bribery punished more severely than the use of threats or violence to influence a witness, although the latter is a more common technique for quieting potential witnesses against a criminal or-

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violation of [the perjury section] which the person knows to be false." See also, N.Y. PENAL CODE §§1632, 1632-a.

<sup>163</sup> See, e.g., ILL. REV. CRIM. CODE, art. 31-4.

"A person obstructs justice when, with intent to prevent the apprehension or obstruct the prosecution or defense of any person, he knowingly commits any of the following acts: . . .

(b) Induces a witness having knowledge material to the subject at issue to leave the State or conceal himself. . . ." See also, 18 U.S.C. §1503.

<sup>164</sup> See, e.g., PURDON'S PA. STATS. ANN. §4324.

"Whoever unlawfully dissuades, hinders, or prevents, or attempts to dissuade, hinder, or prevent any witness from attending and testifying before any . . . judicial tribunal, when so required by virtue of any legal process or otherwise, is guilty of a misdemeanor."

<sup>165</sup> See, e.g., *United States v. Scoratow*, 137 F. Supp. 620, 621 (W.D. Pa. 1956), in which the court held: "There appears to be no case which holds that interference with witnesses in an investigation being conducted by the Federal Bureau of Investigation, or any similar instrumentality of the government, violates Section 1503 [the Federal obstruction of justice statute]. . . ." Cf. *United States v. Perlstein*, 126 F.2d 789 (3rd Cir. 1942).

<sup>166</sup> The relevant provision of the recently enacted Illinois Criminal Code appears to meet these minimal requirements. See note 163 *supra*.

<sup>167</sup> See, e.g., ILL. REV. STAT. §31-4, which imposes a maximum penalty of three years, N.Y. PENAL CODE §2441, which makes the prevention of witnesses' attendance only a misdemeanor, and PURDON'S PA. STAT. §4324, which calls for a maximum penalty of one year.

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are candidates for public office and for persons who propose to contract with the Government for goods and services." 8 WIGMORE, EVIDENCE, §2275a, at 436.

<sup>160</sup> See, e.g., LA. REV. STAT. §38: 2182.

<sup>161</sup> See, e.g., N.Y. PENAL CODE, §2440.

"A person who gives or offers or promises to give, to any witness or person about to be called as a witness, any bribe, upon any understanding or agreement that the testimony of such witness shall be thereby influenced . . . is guilty of a felony."

<sup>162</sup> See, e.g., ILL. REV. CRIM. CODE, art. 32-3.

(a) A person commits subornation of perjury when he procures or induces another to make a statement in



ganization.<sup>168</sup> Tampering with witnesses and jurors is an offense which strikes at the very foundations of our society, and as practiced by organized crime demands the imposition of the most severe sanctions. A criminal organization will not be dissuaded even momentarily from bringing all available pressures against a witness who threatens to jeopardize vital organization functions or personnel by the possibility that misdemeanor statutes will be violated.

(4) *Discouraging False Testimony by Witnesses Either During Investigation or at Trial.* Assuming that through a combination of legal pressures and moral suasion, a witness to an organization crime can be induced to make some statement concerning the crime, it remains necessary to encourage truthfulness and completeness in the statement. The witness must feel a compulsion not only to speak but to speak truthfully, since organized crime will be attempting to encourage lies if it cannot induce silence. In general, these statements will occur at one of two stages—either during the informal police investigation, or during formal judicial proceedings.

During police interrogation of persons who may have evidence relevant to a crime, a reluctant witness confronted with a question from the police often may either deny outright any knowledge of the crime, or may provide false information concerning the crime he observed. In several jurisdictions, it is a crime to make a false statement to a police officer.<sup>169</sup> Accordingly, in these states a false description of the crime the witness observed would be punishable. However, ordinarily a false denial of any knowledge of a crime is not an offense.<sup>170</sup>

Once a witness is called in a formal judicial pro-

ceeding and is placed under oath, his statements are all made under pain of perjury. Unfortunately, perjury in many jurisdictions is an unwieldy enforcement sanction entwined in technicalities and bearing the added load of an enormous burden of proof required for conviction. Most of these statutes require that the offending statement be one which was signed or sworn to by the witness and must concern a matter material to the investigation.<sup>171</sup> The most onerous aspect of this standard of proof is the so-called "two-witness" rule, which requires that the government establish the falsity of the witness's statement by the testimony of two other witnesses.<sup>172</sup> In most jurisdictions this rule has been watered down to a requirement of one witness and corroboration.<sup>173</sup> But contradictory statements under oath are not sufficient to convict.<sup>174</sup> Consequently, if a witness is the only one who observed an event, or if there is only one other who did, he can lie in a judicial proceeding with impunity. Moreover, he can change his testimony from one proceeding to another, from truth to falsity, without fear of legal sanction. Some states, including New York, have abolished the "two-witness" rule.<sup>175</sup> And New York has made contradictory statements under oath presumptive evidence of the guilt of the witness in a perjury prosecution.<sup>176</sup>

<sup>171</sup> *Shaffer v. Kintzer*, 1 Binn. (Pa.) 542 (1809).

Generally a witness's statement is considered material if it will tend to prove the issues involved in the proceeding or would tend to corroborate or discredit evidence which does bear on these issues. *Commonwealth v. DeCost*, 35 Pa. Super. 88 (1907).

<sup>172</sup> *Commonwealth v. Leitch*, 185 Pa. Super. 261, 137 A.2d 909 (1958).

<sup>173</sup> *Weiler v. United States*, 323 U.S. 606 (1945); *People v. Darcy*, 139 P.2d 118, 59 Cal. App. 2d 342 (1943); *Commonwealth v. Antico*, 22 A.2d 204, 146 Pa. Super. 293 (1941).

<sup>174</sup> See, e.g., *Duval v. State*, 104 So. 2d 789, 791 (Fla. 1958), quoting with approval *Hall v. State*, 136 Fla. 644, 187 So. 392, 404.

"It is quite generally held that it is not sufficient to prove a charge of perjury by merely proving that the defendant had, at different times, testified to two opposite things irreconcilable with each other. There must be testimony outside the defendant's own contradictory statements as to which of such statements is false . . ." *Williams v. State*, 41 So. 2d 605, 34 Ala. App. 462 (1949), cert. denied 41 So.2d 608, 252 Ala. 445; 70 C. J. S., Perjury, §68, pp. 37-38. But see, *Commonwealth v. Sumrak*, 25 A.2d 605, 148 Pa. Super. 412 (1942).

<sup>175</sup> New York has abolished the two-witness rule by statute. See N.Y. PENAL CODE, §1627. California has by court decision adhered to a "one-witness" rule rather than a "two-witness" rule. *People v. O'Donnell*, 132 Cal. App. 2d 840, 283 P.2d 714 (1955).

<sup>176</sup> "In any prosecution for perjury the falsity of the testimony or statement set forth in the indictment or information shall be presumptively established by

<sup>168</sup> Compare, e.g., N.Y. PENAL CODE §2440, which renders the bribery of witnesses a felony, with N.Y. PENAL CODE §814, which renders the use of threats to dissuade a witness from attending a proceeding (see *People v. Leik*, 265 N.Y. 580, 193 N.E. 329 (1934)) merely a misdemeanor. Also of dubious rationality are the respective penalties imposed for perjury and subornation of perjury in the new Illinois Criminal Code. A person who commits perjury faces a possible 14 years imprisonment, while the individual or gang which induced him through threats, bribery, or other pressure to commit the act of perjury can receive a maximum of only five years.

<sup>169</sup> See, e.g., *United States v. Stark*, 131 F. Supp. 190 (D. Md. 1955) (false statement to FBI agent conducting investigation); *Brandon v. United States*, 268 F.2d 559 (9th Cir. 1959) (false statement to Internal Revenue agents).

<sup>170</sup> *United States v. Davey*, 155 F. Supp. 175 (S.D.N.Y. 1957). Cf., *United States v. Philipe*, 173 F. Supp. 582 (S.D.N.Y. 1959).

Because of the generally heavy penalties provided, a modern perjury statute stripped of the debilitating technicalities of common law perjury can be a strong deterrent to false testimony in any hearing to which it applies.<sup>177</sup> Even witnesses who have been subjected to threats of physical harm if they give evidence against a criminal organization will face the countervailing legal threat of a perjury prosecution if they fail to testify truthfully. The prevailing rule in American jurisdictions is that threats or other forms of duress do not justify a witness in committing perjury in a judicial proceeding.<sup>178</sup> Since the witness is isolated from immediate harm in the court room and is able to call upon the protection of law enforcement officers, courts do not deem the danger sufficiently immediate to render the act of offering false testimony necessary.<sup>179</sup>

*b. Obtaining and Introducing Evidence Which Is Not Derived From the Voluntary Testimony of Human Witnesses.*

Even in jurisdictions which have available all the techniques discussed in the previous section for procuring voluntary testimony against organized crime (and these jurisdictions are few), the evidence necessary to establish a prosecutable case against organization leaders often will not be forthcoming. The fellow members of a criminal organization whose testimony is so critical to any prosecution against the organization leadership will remain particularly reluctant despite the pressures which

proof that the defendant has testified . . . under oath to the contrary thereof on any occasion in which an oath is required by law . . . " N.Y. PENAL CODE §1627.

In its recently enacted revised criminal code, Illinois has included a similar provision. See ILL. REV. CRIM. CODE art. 32-2.

<sup>177</sup> See, e.g., ILL. REV. CRIM. CODE §32-2, and CALIF. PENAL CODE §118, which provide a maximum penalty of 14 years imprisonment for perjury; PURDON'S PA. STATS. ANN., which imposes a maximum of seven years, and N.Y. PENAL CODE §1620a, which sets a maximum penalty of five years.

<sup>178</sup> See cases collected at 40 A.L.R.2d 914.

<sup>179</sup> "[T]he single question is whether a man may justify or excuse deliberate perjury against the life and liberty of others on the ground that he was coerced to the perjury by fear engendered by the threats of others. . . . [T]he impelling danger, however, should be present, imminent, and impending, and not to be avoided. Such was not the character of the duress here; and the appellant was not only possessed of the power and right of protecting himself, but he also could have appealed to the law to shield him from the threatened danger." *Bain v. State*, 67 Miss. 557, 7 So. 408, 409 (1890). *But cf.*, *People v. McClintic*, 193 Mich. 589, 160 N.W. 461; *Hall v. State*, 136 Fla. 644, 187 So. 392 (1939).

society may exert. Accordingly, the potential for convicting the leaders of organized crime can be enhanced immeasurably by reducing the dependence upon voluntary human testimony. Three other classes of evidence will be considered which may be particularly valuable in prosecutions of organization leaders for the criminal acts committed by their subordinates in a criminal organization. These include: (a) statements of human witnesses obtained and introduced without their consent; (b) physical evidence obtained without the consent of the custodian; and (c) statutory presumptions employed to replace human testimony in establishing a *prima facie* case.

(1) *Statements of Witnesses Obtained and Introduced Without Their Consent.* Despite any legal or moral pressures the government is able to bring to bear upon persons who have witnessed organization crimes, seldom will it be able to procure voluntary testimony from all the witnesses necessary to link these crimes to the organization leaders who ordered them. Accordingly, successful prosecution of a leading figure in organized crime often will require techniques which allow the government to obtain and use testimony without the consent of the witness. These techniques generally entail some form of eavesdropping. All forms of eavesdropping have a common purpose and some common characteristics. In each, a third person, ordinarily connected officially with the law enforcement body, places himself in a position with or without the assistance of certain mechanical and electronic devices from which he can overhear and often record the conversations of suspected persons. From what is overheard, the law enforcement agents, without the consent of the speakers, glean statements which may be admissible or obtain investigative leads which may lead to other evidence which will convict organization leaders.

The most common and useful type of eavesdropping is "wiretapping," the interception of telephone conversations. State legislatures and courts have varied widely in their reaction to this investigative technique. The new Illinois Criminal Code, for example, renders criminal any form of electronic eavesdropping, including, of course, wiretapping.<sup>180</sup>

<sup>180</sup> Article 14 of the Illinois Criminal Code of 1961 is concerned with the crime of "Eavesdropping."

"An eavesdropping device is any device capable of being used to hear or record oral conversation whether such conversation is conducted in person, by telephone, or by any other means. . . ." ILL. REV. CRIM. CODE art. 14-1.

"A person commits eavesdropping when he: (a) Uses

New York, on the other hand, has established a procedure for affording the state legal authority to intercept telephone communications upon a showing of probable cause to believe evidence of a crime will be disclosed thereby.<sup>181</sup> However, the United States Supreme Court, in a 1957 decision, *Benanti v. United States*,<sup>182</sup> cast a cloud over the

an eavesdropping device to hear or record all or any part of any oral conversation without the consent of any party thereto; or (b) Uses or divulges any information which he knows or reasonably should know was obtained through the illegal use of an eavesdropping device." ILL. REV. CRIM. CODE art. 14-2.

"Any evidence obtained in violation of this Article is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings." ILL. REV. CRIM. CODE, art. 14-5.

<sup>181</sup> The relevant provisions of the New York Penal Code are sections 738, 739, 740, 813-a, and 813-b. Section 738 defines the crime of eavesdropping as encompassing any unconsented-to recording or overhearing of a telephone communication or unconsented-to recording or overhearing of a conversation or discussion. Section 740 renders the crime of eavesdropping as defined in section 738 a felony punishable by two years imprisonment. Section 739 exempts from criminality acts of eavesdropping which are performed pursuant to an ex parte order granted according to the provisions of section 813, which reads in part as follows:

"Sec. 813-a. An ex parte order for eavesdropping . . . may be issued by any justice of the supreme court or judge of a county court . . . upon oath or affirmation of a district attorney, or of the attorney general or of an officer above the rank of sergeant of any police department . . . that there is reasonable ground to believe that evidence of crime may be thus obtained and particularly describing the person or persons whose communications . . . are to be overheard or recorded. . . ." Section 813-b sanctions eavesdropping by law enforcement officials without an order if they have reasonable grounds to believe evidence of a crime can be obtained thereby and if an order is sought within 24 hours of the initiation of the wiretap or other eavesdropping.

Other states have resolved the problem of curbing promiscuous eavesdropping by unscrupulous private detectives and suspicious husbands without unduly hampering the law enforcement effort through the expedient of exempting law enforcement officials entirely from the eavesdropping ban. The various eavesdropping statutes are summarized in the REPORT OF THE NEW YORK STATE JOINT LEGISLATIVE COMMITTEE TO STUDY ILLEGAL INTERCEPTIONS OF COMMUNICATIONS, at 54-71. The admissibility of wiretapping evidence is discussed in annotations at 53 A.L.R. 1485, 66 A.L.R. 397 and 134 A.L.R. 614.

<sup>182</sup> 355 U.S. 96 (1957). In *Benanti* the Supreme Court was concerned with the admissibility in a federal court of evidence obtained as the result of a wiretap conducted by state officers. The Court held such evidence inadmissible on the grounds that its divulgence in a federal court proceeding would be a violation of section 605 of the Federal Communications Act. As yet the Court has declined to rule evidence which has been obtained in contravention of section 605 to be inadmissible in a state proceeding. *Schwartz v. Texas*, 344 U.S. 199 (1952). In *United States ex rel Graziano v. McMann*, 275 F.2d 284 (2d Cir. 1950), *cert. den.*, 365 U.S. 854, the Court re-

New York law by holding that divulgence of any interception by whomever conducted violates federal law despite its status under state law.

To counteract *Benanti* and return to the government's arsenal this invaluable and often essential technique for obtaining evidence against organized crime, the United States Department of Justice has, as a part of its anti-organized crime package, proposed new legislation which would modify the ban against wiretapping presently contained in the Federal Communications Act.<sup>183</sup> In essence, the bill

fused to review a Second Circuit holding that evidence obtained through a wiretap by New York officers pursuant to an authorization under N.Y. Penal Code sec. 813-a was admissible in a state proceeding. The New York courts have adopted the position that evidence procured through a wiretap is admissible in a New York proceeding even though the wiretap and the divulgence in the state court both constitute violations of section 605. *People v. Grant*, 14 Misc. 2d 182, 179 N.Y.S.2d 384 (1958). *Cf.*, *Horlen Check Cashing Corp. v. Bell*, 296 N.Y. 15, 68 N.E.2d 854 (1946). Pennsylvania has taken a similar position. *Commonwealth v. Voci*, 138 A.2d 232, 185 Pa.Super. 563 (1958), *aff'd*, 143 A.2d 652, 393 Pa. 404, *cert. den.*, 358 U.S. 885.

Despite these decisions upholding the use of wiretap evidence in state proceedings, *Elkins v. United States*, 364 U.S. 206 (1960), and *Mapp v. Ohio*, 367 U.S. 643 (1961), pose a constant threat to the validity of state laws which sanction the admission in state proceedings of evidence obtained through a wiretap conducted by state officers. As a result of these recent Supreme Court decisions, evidence obtained by state officers during an illegal search and seizure has been rendered inadmissible in state as well as federal courts. What the Supreme Court has done to the law of search and seizure with these decisions, it may well do with regard to wiretap evidence in the near future. Moreover, any such ban would apply to wiretaps on all wire or wireless communications, intrastate as well as interstate, inasmuch as the Court already has held that section 605 applies to intrastate communication. *Weiss v. United States*, 308 U.S. 321 (1939).

<sup>183</sup> The relevant portion of section 605 of the Federal Communications Act (47 U.S.C. §605) reads as follows: "[I]f a person not being authorized by the sender shall intercept any communication and divulge or publish the existence, contents, substance, purport, effect, or meaning of such intercepted communication to any person . . ."

This statute was first held to bar the admission of evidence derived from a wiretap conducted by law enforcement agents in *Nardone v. United States*, 302 U.S. 379 (1938). In *Weiss v. United States*, 308 U.S. 321 (1939), it was held to apply to intrastate as well as interstate communication. The Supreme Court has limited the scope of this statute only in rendering it inapplicable to eavesdropping on one end of a telephone conversation, *Silverman v. United States*, 365 U.S. 505 (1961), or to listening on an extension with the permission of one of the participants, *Rathbun v. United States*, 355 U.S. 107 (1957), in making the wiretap evidence inadmissible only against participants in the conversation, *Goldstein v. United States*, 316 U.S. 114 (1942), and thus far in restricting the ban to use of the evidence in federal proceedings. *Schwartz v. Texas*, 344 U.S. 199 (1952).

would allow federal officers legally to intercept telephone conversations upon authorization by the Attorney General in investigations of certain types of crime associated with national security. It would also legitimize wiretapping by state and federal officers pursuant to court order in investigations of a class of crimes typically perpetrated by organized crime.<sup>184</sup>

Other forms of eavesdropping also are often essential elements in investigations of organized crime. These fall into two logical categories: eavesdropping in which the conversation can be overheard by the eavesdropper wherever located without the assistance of any electronic or mechanical device, and eavesdropping which cannot be conducted without the employment of some device.<sup>185</sup> The legal status of the former type of eavesdropping is not in doubt in most states, even if the person eavesdropping utilizes an electronic device to preserve the conversation.<sup>186</sup> The underlying rationale is that the recording merely preserves and corroborates what the human witness can testify to concerning the content of the conversation.<sup>187</sup>

<sup>184</sup> S. 2813, H.R. 10185, 87th Cong., 2d Sess. (1962).

<sup>185</sup> Not all courts or legislatures, by any means, have followed even implicitly this logical division. Illinois, for instance, has by statute barred the use of any type of device in overhearing or preserving a conversation, irrespective of the necessity of using the device or the location of the device. See note 180, *supra*. See also N.Y. PENAL CODE §738-2, which renders it a crime for a person not a participant in a conversation "wilfully and by means of an instrument" to overhear or record the conversation.

<sup>186</sup> The general underlying rationale which justifies ordinary eavesdropping and the full utilization of evidence procured thereby was well stated by the Court of Appeals for the Second Circuit in a case which actually involved the more difficult question of the use of an electronic device which magnified the eavesdropping power of the government agents.

"There was only an instance of eavesdropping which alone, though an invasion of privacy, is not a violation of a recognized legal right to privacy. Conspirators who discuss their unlawful schemes must take the risk of being overheard and the risk of having what is overheard used against them provided there is otherwise no trespass by the listener or violation of a statutory right to use a means of communication thus made immune from interception." *United States v. Goldman*, 118 F.2d 310 (2d Cir. 1951), *cert. den.*, 313 U.S. 588, *aff'd*, 316 U.S. 129. *Cf.*, *Olmstead v. United States*, 277 U.S. 438 (1928); *Silverman v. United States*, 365 U.S. 505 (1961).

<sup>187</sup> *Hutson v. State*, 296 S.W.2d 245, 164 Cr. 24 (Tex. Ct. Crim. App. 1956); *People v. Malotte*, 292 P.2d 517, 46 Cal.2d 59 (1956), *app. dism.*, 352 U.S. 805. *Cf.*, *On Lee v. United States*, 343 U.S. 747 (1952), in which an informant carrying a concealed microphone and transmitting device engaged the defendant in conversation, which conversation was transmitted to law

However, in Illinois, even this use of an electronic instrument would appear to be illegal.

The legal status of the second species of eavesdropping is less settled. This form of eavesdropping usually involves secreting microphones on premises occupied by persons whose conversations may be relevant, or pointing highly sensitive listening instruments in the direction of the conversation. There are no constitutional restrictions on electronic eavesdropping as such.<sup>188</sup> However, in *Silverman v. United States*,<sup>189</sup> the Supreme Court held the implanting of a "spike mike" in a common wall, which had the effect of turning the entire heating system into a giant microphone, was a violation of the Fourth Amendment, and the evidence procured thereby was suppressed. The apparent holding of the case is that the use of eavesdropping techniques is unconstitutional where it requires that the officers must commit a trespass upon private premises in order to place the eavesdropping device in position to receive the conversation.<sup>190</sup> Subject to this constitutional limitation, state legislators appear free to authorize law enforcement officers to employ this valuable evidence-gathering technique against organized crime.

The conversations overheard through wiretapping or other forms of eavesdropping not only yield leads which law enforcement officers can utilize to obtain other types of evidence, but also, although nominally hearsay, they often are themselves admissible at trial against the speakers and their co-conspirators. Since the persons being subjected to eavesdropping generally are organization

enforcement agents and was the subject of testimony by these agents at the trial.

The cases discussing this problem are collected in Annotation, *Admissibility of Sound Recordings as Affected by Means of Obtaining*, 168 A.L.R. 927.

<sup>188</sup> *Olmstead v. United States*, *supra* note 186; *United States v. Goldman*, *supra* note 186. *Cf.* *Silverman v. United States*, *supra* note 183.

<sup>189</sup> Note 183, *supra*.

<sup>190</sup> "We need not here contemplate the Fourth Amendment implications of these and other frightening paraphernalia which the vaunted marvels of an electronic age may visit upon human society. Nor do the circumstances here make necessary a re-examination of the Court's previous decisions in this area. For a fair reading of the record in this case shows that the eavesdropping was accomplished by means of an unauthorized physical penetration into the premises occupied by the petitioners.

"...  
"Eavesdropping accomplished by means of such a physical intrusion is beyond the pale of even those decisions in which a closely divided Court has held that eavesdropping accomplished by other electronic means did not amount to an invasion of Fourth Amendment rights." 365 U.S. at 509-10. (Emphasis supplied.)

members, their statements are competent as admissions against themselves and as statements in furtherance of the conspiracy in proceedings against other organization members.<sup>191</sup>

Because of the nature of organized crime, eavesdropping in its various forms has necessarily assumed a key role. Frank Hogan, District Attorney of New York County, has stated that without the availability of such evidence-gathering techniques the convictions of an imposing list of organization leaders, including Charles "Lucky" Luciano, Johnny "Dio" Dioguardi, Frank Carbo, and Joe "Adonis" Doto would have been impossible.<sup>192</sup>

(2) *Physical Evidence Obtained Without the Consent of the Custodian.* Many of the prime revenue producing enterprises of criminal organizations involve the wholesaling or retailing of certain illegal commodities or illegal services. These businesses ordinarily require the maintenance of considerable stocks of illegal commodities and the storage of equipment utilized in the dispensing of the services. All this physical material and equipment is admissible and cogent evidence against a criminal organization if it can be obtained by the authorities. Moreover, as a criminal organization becomes a larger, richer, more highly organized business complex, and particularly as it enters highly regulated legitimate industries, a detailed system of books and records must be maintained. It is these books and records which allow an organization leadership to achieve a measure of control over widespread enterprises with a minimum of physical presence on the premises where the illegal businesses are conducted. It is these same books and records which often can form an evidentiary link between the organization's illegal activities and the men who direct them. The problem confronting law enforcement is to acquire possession of these various articles of physical evidence under conditions which will allow their admission in evidence against organized crime.

The legal methods of obtaining physical evidence, chiefly by subpoena duces tecum or search and seizure, have been the subject of volumes of legal treatises and periodicals.<sup>193</sup> No attempt will

be made in this article even to summarize the law in this area. Rather, discussion will be confined to certain variations of these techniques which are peculiarly adaptable to gathering evidence against organized crime.

As criminal organizations have become larger and more sophisticated, they have begun extensively to utilize the corporate form of organization, particularly in their "fronts" and pseudo-legitimate subsidiaries. This has certain business advantages as well as simplifying the process of disguising the true ownership of an enterprise. However, it also renders the books, records, and other physical property of an organization more susceptible to inspection by government agents. Although the physical property possessed by a corporation is afforded the same protection *from search and seizure* as records or other property owned by a private person, in most jurisdictions, corporate property is subject to subpoena under circumstances in which an individual could validly invoke the Fifth Amendment and refuse to submit his property to governmental scrutiny.<sup>194</sup> Accordingly, to the extent that a criminal organization has utilized the corporate form in carrying on its operations, law enforcement authorities are enabled to acquire possession of its potentially evidence-rich books and records through the subpoena powers possessed by grand juries or administrative agencies. Similarly, union records are also generally subject to subpoena,<sup>195</sup> and by virtue of a comprehensive regulatory scheme recently enacted by Congress, they can be subjected to close inspection by the federal government.<sup>196</sup> Thus, in one area in which criminal organizations frequently specialize, labor racketeering, relevant books and records are particularly susceptible to inspection by law enforcement authorities.

Another direction in which organized crime is continually expanding is into fields of legitimate

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*guards in the Law of Search and Seizure*, 52 Nw. U.L. Rev. 65 (1957).

<sup>194</sup> "In the first place, the employee or officer cannot refuse to produce on the ground that the disclosure would criminate the corporation.

"Nor can he refuse to produce on the ground that some parts of the corporate records would criminate himself, even if such parts were made by himself . . . ." 8 WIGMORE, EVIDENCE §2259b.

See generally, *Wilson v. United States*, 221 U.S. 361 (1911); *Bleakley v. Schlesinger*, 267 App. Div. 400, 46 N.Y.S. 2d 508 (1944).

<sup>195</sup> *United States v. White*, 322 U.S. 694 (1944); 8 WIGMORE *op. cit. supra* note 148, at §2259b.

<sup>196</sup> 29 U.S.C. §521 *et. seq.* (the administrative provisions of the Landrum-Griffin Act).

<sup>191</sup> See, e.g., *On Lee v. United States*, *supra* note 187; *United States v. Goldman*, *supra* note 186; cases collected at 168 A.L.R. 927.

<sup>192</sup> *Washington Post*, May 12, 1962, p. A5.

<sup>193</sup> See, e.g., VARON, *SEARCHES, SEIZURES AND IMMUNITIES* (1961); 8 WIGMORE, EVIDENCE, §2183 (3d ed. 1940); Peterson, *Restrictions in the Law of Search and Seizure*, 52 Nw. U.L. Rev. 46 (1957); Paulsen, *Safe-*

or pseudo-legitimate commerce which are subject to a high degree of economic and social regulation. To effectively enforce these systems of regulation, many jurisdictions require persons in the industry to maintain certain records and compel the filing of certain reports. Because these records and reports are invested with a significant public interest independent of their evidentiary value, it has been held that they are "public" property rather than the private records of the person keeping them.<sup>197</sup> Therefore, these records and reports cannot be protected from governmental inspection merely because they incriminate the custodian, even though the custodian be an individual rather than a corporation.<sup>198</sup> Accordingly, whenever an activity in which organized crime is engaged can be properly subjected to regulation for some legitimate reason, the organization can be compelled to maintain records freely accessible to governmental inspection and to file reports outlining the details of its operations.<sup>199</sup> The federal government appears to have done this on a limited scale with respect to gambling. By statute and regulation, all persons liable for the federal wagering taxes are required to keep certain records reflecting information concerning bets placed with them and to register with Internal Revenue.<sup>200</sup>

<sup>197</sup> *Shapiro v. United States*, 335 U.S. 1 (1948); *People v. Coombs*, 158 N.Y. 532, 53 N.E. 527 (1899); *City of Philadelphia v. Cline*, 158 Pa. Super. 179, 44 Atl. 2d 610 (1945); 8 WIGMORE, *op. cit. supra* note 148, at §2259c.

<sup>198</sup> "[T]he privilege which exists as to private papers cannot be maintained in relation to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation and the enforcement of restrictions validly established." 335 U.S. at 33.

<sup>199</sup> The constitutional limits of this "required records" doctrine as yet have not been clearly defined. Professor Morgan has articulated the test he believes appropriate to determine whether persons engaging in a given activity can be compelled to maintain records and make them available for governmental scrutiny.

"It is believed that in all these situations the fundamental question is whether the actor could constitutionally be prohibited from doing the things, not *mala in se*, required to be disclosed when he first agreed to make the disclosures. If so, then the condition of disclosure may be imposed upon the specific conduct." MORGAN, *BASIC PROBLEMS OF EVIDENCE* 147-48 (1957).

<sup>200</sup> "Each person liable for tax under this subchapter shall keep a daily record showing the gross amount of all wagers on which he is so liable, in addition to all other records required pursuant to section 6001(a)." 26 U.S.C. §4403.

"Each person required to pay a special tax under this subchapter shall register with the official in charge of the internal revenue district—

- (1) his name and place of residence
- (2) . . . each place of business where the activity . . . is carried on; and

These records are to be available for inspection by the Internal Revenue Service. In this area, the predicate for regulation is the necessity of having reliable information available to insure that the full tax is being paid by those engaged in the taxable activity.<sup>201</sup> Labor unions, the trucking industry, and liquor production and distribution are among those legitimate industries with a special appeal to organized crime which are highly regulated and in which access to relevant records ordinarily is available to government officials.

The implementation of a regulatory program often includes a licensing system. A person or firm cannot engage in the regulated activity without a license, and receipt and retention of the license requires conformance with certain standards and agreement to certain conditions. Some states have conditioned the granting of licenses upon waiver of certain constitutional privileges to secrecy. Minnesota, for instance, requires that liquor establishment licensees hold their premises open for search by state law enforcement officials at all times, irrespective of whether the officers have a search warrant or probable cause.<sup>202</sup> Such a search may yield many types of physical evidence other than those records which the licensee has been required to keep pursuant to the regulatory power. Thus, what would otherwise be unconstitutional searches and seizures can be rendered constitutionally permissible if the conduct of a given activity is a privilege subject to withdrawal or modification at the will of government.<sup>203</sup> Attaching

- (3) if he is engaged in receiving wagers for or on behalf of any [other person] the name and place of residence of each such person."

26 U.S.C. §4412.

<sup>201</sup> The record-keeping requirements of the wagering tax statutes are analogous in purpose and effect to the record-keeping requirements of the income tax provision which were upheld in *Beard v. United States*, 222 F.2d 84 (4th Cir. 1955), *cert. den.*, 350 U.S. 856. The court of appeals there argued:

"Moreover, the instruction related to the duty imposed by the taxing statutes upon the defendant to keep records of his transactions so that the extent of his liability to income tax might be ascertained; and therefore the case falls within the rule laid down in *Shapiro v. United States*, . . ." 222 F.2d at 84. (Emphasis supplied.)

<sup>202</sup> "Every sheriff, deputy sheriff, constable, marshal, policeman, police officer, and peace officer shall observe and inspect the premises where occupations are carried on under license . . ." MINN. STAT. ANN. §325.56.

<sup>203</sup> *People v. Avas*, 300 P.2d 695, 144 Cal. App. 2d 91 (1956), discusses the constitutionality of an informer's efforts.

"One invited to enter is not a trespasser. His entry does not become a trespass because he may be alerted to learn facts or to hear damaging declarations either by his

conditions to the issuance of a license is a potentially useful technique for gathering evidence against a criminal organization, because many of their illegal enterprises ordinarily are conducted on premises which are licensed because of closely associated regulated activities, liquor retailing in particular. Gambling, prostitution, and narcotics are often concentrated in bars, nightclubs, and casinos, each of which can legitimately be subjected to periodic and thorough searches if the license for the premises has been conditioned upon a waiver of the rights of privacy.

Another method of obtaining physical evidence to which organized crime is especially susceptible is one in which the seizure is made by or as a result of investigation by an undercover agent. Since virtually all of a criminal organization's enterprises involve the dispensing of illegal products or services, it must constantly deal with the consuming public. And no constitutional amendment guarantees the loyalty of that public to the criminal organization. If the government can maneuver an agent into a position where he will be accepted as an approved buyer of the organization's product, or if it can subvert a member of the existing consuming public, it can obtain such evidence as is voluntarily sold to the government man.<sup>204</sup> Thus, the narcotics sold to a govern-

natural faculties of hearing and sight or with mechanical and electronic aids of science . . . <sup>300</sup> P.2d at 699.

<sup>204</sup> There are certain inhibitions on the undercover activities of government agents themselves, inhibitions which evidently do not apply to private citizens who are employed specially to act as informers.

In *Fraternal Order of Eagles v. United States*, 57 F.2d 93 (3rd Cir. 1932), a search was held illegal which was predicated on information obtained by prohibition agents who had gained entrance to a lodge by falsely representing themselves as lodge members. The court held: "A search and seizure following an entry into the home or office of a person suspected of crime by means of fraud, stealth, social acquaintance, or under the guise of a business call are unreasonable and violate the Fourth Amendment." 57 F.2d at 94. *Accord*, *United States v. Reckis*, 119 F. Supp. 687 (D. Mass. 1954).

On the other hand, although posing as a member of a special group such as a fraternal order has been held to vitiate any search resulting from such ruse, the courts appear to approve of government agents' undercover work when they merely represent themselves to be members of the general public, not any special "in-group." In *United States v. Bush*, 283 F.2d 51 (6th Cir. 1960), the court upheld a search culminating from an officer's visit to a "moonshine" outlet where he sought to make a purchase of untaxed liquor as a member of the general public.

"As to misrepresentations made to Mrs. Bush, we are of the view that the only misrepresentation was that the agent hid his identity as an officer and posed as a member of the general public. Evidence obtained by law enforcement officers, using the subterfuge of hiding

ment informant may return to haunt the criminal organization which retailed the drug. Moreover, the undercover consumer may use his presence on the premises of the illegal enterprise to observe sufficient activity to furnish probable cause for a subsequent issuance of a search warrant to scour the establishment for further evidence.

The potential usefulness of physical evidence as a form of proof has been enhanced greatly by the rapid development of sophisticated methods of scientific examination and comparison of weapons, accounting records, fingerprints, documents, and other types of physical evidence. This class of evidence can now be subjected to intensive analysis, and the results of this analysis can often be conveyed to the jury with conclusive results. In a recent case against one of the leading racketeers in the Philadelphia area, virtually the sole predicate for conviction was a comparison of records maintained by a large local gambling establishment with identical figures found on various scraps of paper discarded by the racketeer with his trash over a period of several months. The testimony of a documents expert to the effect that the discarded figures had been prepared by the organization leader and that they corresponded with the business summaries of the gambling establishment was sufficient to sustain the conviction.<sup>205</sup>

(3) *Statutory Presumptions Employed To Replace Human Testimony in Establishing a Prima Facie Case.* Many evidentiary gaps which are difficult to fill through voluntary testimony or the other forms of evidence discussed in this article can often be bridged by enacting statutes which alleviate the government's burden of proof with respect to elements of a crime which logically accompany the existence of facts which readily can be proved. In the usual form of these statutes, proof of one fact creates a presumption that certain other facts exist.<sup>206</sup> The effect of the presumption is at least

their identity in order to pose as members of the general public, has consistently been held admissible." 283 F.2d at 51. *Accord*, *Warren v. Territory of Hawaii*, 119 F.2d 936 (9th Cir. 1941). *Cf.* *Purifoy v. United States*, 170 F.2d 144 (5th Cir. 1948); *United States v. Smith*, 43 F.2d 173 (S.D. Tex. 1930).

<sup>205</sup> See *United States v. Minker*, 198 F. Supp. 935 (W.D. Pa. 1961), for a discussion of some of the legal issues involved in this case.

<sup>206</sup> "[T]he facts found might be such as to be, in point of law, inconsistent with any supposition, except that of the existence or non-existence of the fact in controversy, in which case the conclusion is necessary, independently of any belief based upon what is more or less probable, because the law declares the uniform effect of such a

to shift the burden of coming forward with the evidence to the accused, meaning that unless he furnishes some evidence of innocence, the jury is justified in convicting him on the basis of the "presumption" alone.<sup>207</sup> Moreover, some statutory presumptions are phrased in terms which allow the jury to find the accused guilty solely on the basis of a "presumption," even though he produces some evidence of his innocence if they do not consider his explanation satisfactory.<sup>208</sup> The only constitutional limitation on these statutory presumptions is that there be a rational connection between the fact which must be proved and the fact which will be presumed, that is, that in common experience ordinarily when one exists the other will exist also.<sup>209</sup>

The prosecution of many of the crimes committed by organized crime has been eased by enactment of statutory presumptions. From possession of narcotics or gambling equipment it is presumed that the possessor had an intent to use them illegally.<sup>210</sup> The person holding legal title to gambling premises or a house of prostitution has been presumed to be the operator.<sup>211</sup> And, in Florida a

state and condition of circumstances." *Sun Mutual Ins. Co. v. Ocean Ins. Co.*, 107 U.S. 485, 502 (1882).

<sup>207</sup> *New York Life Insurance Co. v. Gamer*, 303 U.S. 161 (1938); *United States v. Marper*, 198 F.2d 186 (3d Cir. 1952), cert. denied, 344 U.S. 876; 9 WIGMORE, EVIDENCE §§2487(d), 2491 (3d ed. 1940).

<sup>208</sup> See, e.g., 21 U.S.C. §171, which reads in pertinent part as follows:

"Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

<sup>209</sup> *Tot v. United States*, 319 U.S. 463 (1943).

<sup>210</sup> See, e.g., N.Y. PENAL CODE §1751, which reads in part:

"Such [illegal] intent is presumptively established by proof that the person knowingly possessed or had in his control . . . one or more preparations, compounds, mixtures or substances, of an aggregate weight of [differing amounts for differing drugs]. This presumption may be rebutted."

See also, FLA. STAT. ANN. §849.05, which reads in part:

"If any of the implements, devices or apparatus commonly used in games of chance in gambling houses . . . are found in any house . . . or other place, it shall be prima facie evidence that said . . . place where the same are found is kept for the purpose of gambling."

<sup>211</sup> *Cf.*, PA. STAT. ANN. (Purdon) §4605, which reads:

"Whoever, being the owner . . . of any premises leases, . . . the same, . . . to be used and occupied . . . [for gambling] is guilty of a misdemeanor."

"The owner of such premises who shall have knowledge that any such [gambling] has been set up in or upon the said premises and shall not forthwith cause complaint to be made against the person who has set

statute has been enacted which makes ownership of a federal gambling stamp presumptive evidence that the stamp holder is violating state gambling laws.<sup>212</sup>

Although this type of statutory presumption is of considerable assistance in obtaining convictions against minor functionaries in a criminal organization, seldom is it of use against the upper echelon. Organization leaders avoid the effect of these statutes by arranging the conduct of their criminal operations in such a manner that they personally never indulge in any activities which might trigger an unfavorable presumption. Thus, these men ordinarily avoid carrying narcotics or gambling paraphernalia on their person, holding legal title to the premises upon which the organization's businesses are conducted, and taking out federal gambling stamps in their own names. Only when the organization is small or the organization leader subject to some of the same personal weaknesses as he himself exploits will a man in control of a criminal organization be entwined in circumstances which will allow a presumption to operate. Accordingly, a more sophisticated breed of statutory presumption must be developed before this will be an effective technique for establishing cases against the leadership of organized crime.

#### B. Convicting Management-Level Organization Members for Violation of Laws Not Directly Related to the Organization's Illegal Activities

Confronted with the difficulties inherent in any attempt to prosecute management-level organization members for the acts committed by the organization, some governments have resorted to proceeding against these men for infractions of other laws. The federal government has been forced to employ this approach for the additional reason that most of the activities of organized

up . . . same, shall be deemed to have knowingly leased . . . the said premises for the said purposes."

<sup>212</sup> "The holding, owning, having in possession of, or paying the tax for a wagering occupational tax stamp issued by the Internal Revenue authorities of the United States shall be held in all the courts of this state as prima facie evidence against the person holding such stamp in any prosecution of such person for violation of the Gambling Laws of this state . . ." FLA. STAT. ANN. §849.05 (1954). The Florida Supreme Court has held this statute unconstitutional in its attempt to render the ownership of a gambling stamp prima facie evidence of a gambling violation without any independent evidence of the corpus delicti. *Jefferson v. Sweat*, 76 So.2d 494 (Fla. 1954).



crime are not illegal under federal law.<sup>213</sup> Gambling, prostitution, most forms of racketeering, shylocking, and the illegal operation of most legitimate businesses are enterprises which may be conducted without breaking any federal laws. Even arson, assault, murder, and the other violent subsidiary crimes of the criminal organization usually are not federal crimes.<sup>214</sup> Consequently, such jurisdiction as the federal government does enjoy in the area of organized crime is exercised primarily through prosecuting the men of organized crime for violations of federal criminal laws not directly related to the organization's activities.

Tax fraud has been the charge most generally employed by the federal government in seeking to send management-level organization members to federal prisons. This technique affords the federal prosecutor a broad-spectrum weapon against organization leaders. As federal taxpayers, the latter are prosecutable for a wide range of acts and omissions involving the federal tax laws. They are liable if they fail to make required returns or maintain required records.<sup>215</sup> If they do file but submit a false return or make a false statement in documents relevant to their taxes, they violate tax fraud provisions.<sup>216</sup> A false statement, oral or

written, to government agents investigating the taxpayer's liability can also be a predicate for prosecution.<sup>217</sup> If evidence can be obtained indicating that they have taken positive steps to attempt to evade a tax which is due and owing, they may be prosecuted under a felony section.<sup>218</sup> Likewise, willful failure to pay a federal tax<sup>219</sup> and concealments of assets with intent to defraud are felonies under existing law.<sup>220</sup> Moreover, the

"Any person who—

"(1) . . . Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution." 26 U.S.C. §7206 (1). Taxpayers have also been prosecuted under the general perjury (18 U.S.C. §1621) and false statement (18 U.S.C. §1001) provisions of the criminal code.

<sup>217</sup> These prosecutions have been successfully concluded under both the perjury (18 U.S.C. 1621) and false statement (18 U.S.C. 1001) statutes. *Perjury*: *Lasalle v. United States*, 155 F.2d 452 (10th Cir. 1946). *False Statement*: *Cohen v. United States*, 201 F.2d 386 (9th Cir. 1953); *Knisely v. United States*, 200 F.2d 559 (6th Cir. 1952), *cert. denied*, 345 U.S. 923; *Cf., United States v. Silver*, 235 F.2d 375 (2d Cir. 1956).

<sup>218</sup> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution." 26 U.S.C. §7201.

The primary elements of this crime are: (1) a tax deficiency, that is, income upon which a tax has not been paid and which ordinarily has not been reported, see, *United States v. Rosen*, 314 U.S. 513 (1941); *Rose v. United States*, 128 F.2d 622 (10th Cir. 1942), *cert. denied*, 317 U.S. 651; (2) a "willful and positive" attempt to evade payment of this tax deficiency, see *Spies v. United States*, 317 U.S. 492 (1942).

<sup>219</sup> "Any person required under this title to collect, account for, and pay over any tax imposed by this title who willfully fails to collect or truthfully account for and pay over such tax shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution." 26 U.S.C. §7202.

The primary elements of this crime are: (1) a tax due and owing; (usually this section would not be employed unless the taxpayer had fully reported his taxable income); (2) a willful failure to pay this tax. See, *United States v. Palermo*, 152 F. Supp. 825 (E.D. Pa. 1957), in which the requisite willfulness was established by the taxpayer's extravagant expenditures during the period he owed back taxes.

<sup>220</sup> "Any person who—

"(4) . . . Removes, deposits, or conceals, or is concerned in removing, depositing, or concealing, any goods or commodities for or in respect whereof any tax is or shall be imposed, . . . with intent to evade or defeat the assessment or collection of any tax imposed

<sup>213</sup> "While there are some important exceptions, these activities are for the most part carried on in violation of state rather than federal law." ABA REPORT ON ORGANIZED CRIME AND LAW ENFORCEMENT 275 (1952).

<sup>214</sup> Recent legislation enacted as a part of the Attorney General's program against organized crime renders many of these heretofore strictly local infractions federal crimes if an interstate nexus is present. This legislation will be discussed in the third installment of this article.

<sup>215</sup> "Any person required by this title or by regulations made under authority thereof to make a return, keep any records, or supply any information, who willfully fails to . . . make such return, keep such records, or supply such information, at the time or times required by law or regulations, shall, in addition to other penalties provided by law, be guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than \$10,000, or imprisoned not more than 1 year, or both, together with the costs of prosecution." 26 U.S.C. §7203. An organization leader would be susceptible to prosecution under this section for failure to file a return even though much of the income to be reported was derived from illegal activities. *Cf., Rutkin v. United States*, 343 U.S. 130 (1952). The claim of self-incrimination is not available to excuse a failure to file. *United States v. Sullivan*, 274 U.S. 259 (1927).

<sup>216</sup> "Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than \$1000, or imprisoned not more than 1 year, or both." 26 U.S.C. §7207. If the statement is made under oath or otherwise under the penalties of perjury, the organization leader may be amenable to felony sanctions.

government can prosecute an organization leader for assisting another to evade the tax.<sup>221</sup> Acts which do not comprise a violation or attempt to violate any of these substantive sections may be punishable as part of a conspiracy "to impair, defeat and obstruct the functions of the Commissioner of Internal Revenue" by concealing matters relevant to collection of federal taxes.<sup>222</sup>

These various offenses are not confined to acts and omissions in relation to income taxes. An organization leader can be prosecuted as well for evasion of excise taxes, social security taxes, or

by this title . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution." 26 U.S.C. §7206(4).

<sup>221</sup> The general accessory statute (18 U.S.C. §2) would apply to all of these tax violations. This statute reads as follows:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal. (b) Whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

In addition, there is a special section of the revenue laws punishing certain forms of assistance:

"Any person who—

"(2) . . . Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity or fraud is with the knowledge or consent of the persons authorized or required to present such return, affidavit, claim or document; . . . shall be guilty of a felony and, upon conviction thereof, shall be fined not more than \$5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution." 26 U.S.C. §7206(2).

<sup>222</sup> *United States v. Klein*, 247 F.2d 908 (2d Cir. 1957), *cert. denied*, 355 U.S. 924; *Kobey v. United States*, 208 F.2d 583 (9th Cir. 1953). These prosecutions were brought under the following language of the general conspiracy statute, 18 U.S.C. §371:

"If two or more persons conspire . . . to defraud the United States, or any agency thereof in any manner or for any purpose, . . . each shall be fined not more than \$10,000 or imprisoned not more than five years, or both."

It has been held that the government is not required to show the existence of a tax deficiency to sustain a conviction under this charge. The essence of the theory is not the loss of federal revenues but the impairment of the Treasury Department's function of collecting federal taxes. If the acts which are the intended objective of the conspiracy would render the collection of such taxes more difficult, participants in the conspiracy are prosecutable under 18 U.S.C. §371. In *Kobey v. United States*, *supra*, for instance, members of a gambling organization were convicted for concealing the gambling operation and destroying certain records which would have been useful in determining the amount of taxes owed.

withholding taxes.<sup>223</sup> That a business enterprise is illegal does not exempt the owners from responsibility for collecting and paying over social security and withholding taxes owed by their employees.<sup>224</sup> Thus, an organization leader can be prosecuted for failing to collect and pay over these taxes for his croupiers, dealers, and other employees in one of an organization's gambling operations.<sup>225</sup>

One factor which has hindered successful prosecution of organization leaders for federal tax fraud in recent years is the sophistication acquired by these individuals in the techniques of successful tax evasion. They have learned to deal strictly in cash, to maintain a minimum of records, if any, to conceal their financial interest in various businesses through the employment of "front men," and to arrange for "stand-up men" who will explain any unreported funds traced to an organization leader as money they "loaned" him.

The usual method of establishing a tax evasion case against organization leaders, despite their skimpy records, their convenient lapses of memory, and their multitude of fronts, is the so-called "net-worth" theory. In presenting such a case, the government establishes a taxpayer's net worth at the commencement of the taxing period,<sup>226</sup> deducts

<sup>223</sup> A separate section punishes the willful failure to furnish a statement or the furnishing of a false statement to employees setting forth the taxes withheld from their earnings.

"In lieu of any other penalty provided by law . . . any person required under the provisions of section 6051 [requiring statements of income and F.I.C.A. taxes withheld] to furnish a statement who willfully furnishes a false or fraudulent statement or who willfully fails to furnish a statement in the manner, at the time, and showing the information required under section 6051 [i.e., names of the employer and employee, amount of wages, amount of taxes withheld], or regulations prescribed thereunder, shall for each such offense, upon conviction thereof, be fined not more than \$1,000, or imprisoned not more than 1 year, or both." 26 U.S.C. §7204.

<sup>224</sup> *Kobey v. United States*, 208 F.2d 583 (9th Cir. 1953).

<sup>225</sup> "As part of their argument . . . , the appellants . . . assert that 'Illegal businesses are not within the purview of the Social Security Act.'"

"There is no suggestion [in the relevant provision of the Internal Revenue Code] that the employment must be lawful. As we have seen, to be taxable, wages need not be derived from legitimate employment."

"It is asserted also that under California law, contracts of bookmakers with their employees are 'illegal, void and unenforceable.' It is unquestionable that the *validity* of California contracts should be tested under California law; but the *Federal taxability* of the proceeds from such contracts is a matter of Federal law." 208 F.2d at 596-97.

<sup>226</sup> This beginning net worth position must be established with substantial accuracy. *United States v.*

that from his net worth at the end of the period, and proves that the net gain in net worth exceeds the income reported by the taxpayer. The judge or jury is then entitled to draw the inference that the defendant has not reported his entire income.<sup>227</sup> It has been held that the government does not have to show a probable source of the excess unreported gain in net worth, if it can negate the probability that the gain was derived from non-taxable sources.<sup>228</sup>

The tax fraud weapon has yielded some spectacular successes, the most notable of which undoubtedly was the final victory over Al Capone. The very success of the approach has in recent years, however, greatly reduced its effectiveness. Impressed by the resourcefulness and relative incorruptibility of federal law enforcement officials, management-level organization members have begun scrupulously to report all income, or at least all that they spend.<sup>229</sup> The gross evasions of the Capone era are a thing of the past, and these cases have become more difficult to prosecute successfully.<sup>230</sup> The federal government is now often required to

Achilli, 234 F.2d 797 (7th Cir. 1956). The proof of this vital element usually is the most difficult aspect of a "net worth" case. It can be established, *inter alia*, through admissions made by the taxpayer, *Smith v. United States*, 348 U.S. 147 (1954), *affirming*, 210 F.2d 496 (1st Cir.), a prior bankruptcy judgment, *United States v. Vassallo*, 181 F.2d 1006 (3rd Cir. 1950), financial statements submitted to lending institutions by the taxpayer, *Friedberg v. United States*, 348 U.S. 142 (1954), and the work sheets of the taxpayer's accountant, *Falsone v. United States* 205 F.2d 734 (5th Cir. 1953).

<sup>227</sup> This theory of proof has been universally upheld. *Holland v. United States*, 348 U.S. 121 (1954); *United States v. Johnson*, 319 U.S. 503 (1942).

<sup>228</sup> *United States v. Ford*, 237 F.2d 57 (2d Cir. 1956); *United States v. Adonis*, 221 F.2d 717 (3d Cir. 1955). *Contra*, *Massei v. United States*, 241 F.2d 895 (1st Cir. 1957).

Conversely, proof of a probable taxable source of the excess increase in net worth creates a presumption that the net increase did not derive from non-taxable sources. *Holland v. United States*, 348 U.S. 121 (1954); *Jelaza v. United States*, 179 F.2d 202 (4th Cir. 1950).

<sup>229</sup> "The mafiosi had also learned four principles from the Capone era . . . 1. Always have a good lawyer. 2. Never plot or carry out violence against a federal officer. 3. *Pay federal income taxes*. 4. Never trust anyone except a Sicilian mafioso." SONDERN, *BROTHERHOOD OF EVIL: THE MAFIA* 69 (1959). (Emphasis supplied.)

<sup>230</sup> A set of laws designed to tighten the tax enforcement provisions and thereby improve tax evasion as a weapon against organized crime was recommended by the Kefauver Committee upon completion of its much publicized investigation into organized crime in America. There were S. 1529, S. 1531, S. 1532, and S. 1660, all in the 82nd Congress. These bills are summarized and evaluated in ABA REPORT ON ORGANIZED CRIME AND LAW ENFORCEMENT 48-53 (1952).

prosecute management-level organization members for minor infractions of the tax laws for which ordinary taxpayers would never be haled into court.<sup>231</sup>

In addition to tax fraud prosecutions, another technique utilized by the federal government which implements this same general approach is to seek deportation of management-level organization members of foreign birth. In the usual situation, use of the deportation device means a federal sanction—expulsion from the country—is applied for past violations of state laws, although, of course, deportation can be based upon conviction of a federal crime as well.<sup>232</sup> Inasmuch as an organization member generally does not achieve immunity from local prosecution even in the most corrupt cities until he has reached a certain level in the organization, the early careers of many current organization leaders are marked by arrests and convictions of state crimes. The federal government, by a close perusal of the prior histories of foreign-born organization leaders, has been able to reach back into their more vulnerable days as apprentice hoodlums and to convert these past convictions into present-day deportation from the country.

Deportation as a legal weapon is not available against all organization leaders, of course. Absent unusual circumstances, a person who was born an American citizen cannot be deported no matter how heinous the crimes he commits.<sup>233</sup> Moreover, a person of foreign birth who attains American citizenship through naturalization cannot be deported unless and until stripped of that citizenship in a denaturalization proceeding. Thus, the expulsion of a foreign-born organization leader who has become a citizen must be accomplished in two steps, denaturalization, then deportation.<sup>234</sup>

Of the two processes, denaturalization is the more difficult. Crimes or other disreputable conduct occurring subsequent to the attainment of citizenship cannot justify denaturalization. The

<sup>231</sup> See, e.g., *United States v. Accardo*, 298 F.2d 133 (7th Cir. 1962).

<sup>232</sup> *Buffalino v. Irvine*, 103 F.2d 830 (9th Cir. 1939); *Ponzi v. Ward*, 7 F.Supp. 736 (D. Mass. 1934).

<sup>233</sup> Title 8 U.S.C. §1101 (a) (3) defines the class of persons who are amenable to deportation as "Any person not a citizen or national of the United States . . ." See *Bilokumsky v. Tod*, 263 U.S. 149 (1923).

<sup>234</sup> *Eichenlaub v. Shaughnessy*, 338 U.S. 521 (1950). However, deportations can be sought on the basis of acts committed while a citizen as long as at the time of the deportation hearing the defendant has been denaturalized. *Rabaud v. Boyd*, 353 U.S. 427 (1957).

sole ground for denaturalization is fraud in the procurement of the certificate of naturalization. To succeed the government must prove concealment or willful misrepresentation of a material fact in obtaining citizenship.<sup>235</sup> A wide range of matters have been held material to the procurement of United States citizenship, concealment of which will justify loss of citizenship in a denaturalization action. Among these are: (1) prior arrests of the applicant;<sup>236</sup> (2) his prior convictions;<sup>237</sup> (3) the applicant's name;<sup>238</sup> (4) his marital status at the time of naturalization;<sup>239</sup> (5) his employment at the time of naturalization;<sup>240</sup> (6) whether the nature of his original entry into the country was legal or illegal;<sup>241</sup> (7) any conduct which might reflect upon his moral character,<sup>242</sup> such as acts of

adultery,<sup>243</sup> association with prostitutes,<sup>244</sup> and even divorce.<sup>245</sup> The federal government has been able to uncover lies or concealment in regard to such material facts by a substantial number of naturalized organization leaders and thereby strip them of the immunity from deportation which is enjoyed by all American citizens.

After an organization leader has been reduced to the status of an alien through a denaturalization proceeding or in case investigation reveals that he never became an American citizen, the next step in the government's strategem is to initiate a deportation action against him.<sup>246</sup> To accomplish this objective the government generally must show that the organization leader committed certain criminal acts either before entering this country or subsequent to taking residence here.<sup>247</sup> If the proof is of criminal conduct prior to entry, it is sufficient to show either a single offense "involving moral turpitude"<sup>248</sup> or two convictions not necessarily involving moral turpitude but which carry an aggregate penalty of five years imprisonment.<sup>249</sup> If the government is relying on conduct occurring subsequent to entering the country, it must establish that the organization leader was convicted of

<sup>235</sup> "It shall be the duty of the United States attorneys for the respective districts, upon affidavit showing good cause therefore to institute proceedings . . . for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground that such order and certificate of naturalization were procured by concealment of a material fact or by willful misrepresentation . . ." 8 U.S.C. §1451(a). See also, 8 U.S.C. §1451(g), which provides for automatic revocation of citizenship by the trial court upon conviction for violation of 18 U.S.C. §1425 (procurement of naturalization in violation of law). The government has the burden of proof and must establish the grounds for revocation by clear, unequivocal and convincing evidence which does not leave the issue in doubt." *Nowak v. United States*, 356 U.S. 660 (1958).

<sup>236</sup> *Chaut v. United States*, 270 F.2d 179 (9th Cir. 1959), *reversed*, 364 U.S. 350 (1960) (arrests not of type to support denaturalization).

<sup>237</sup> *United States v. Bridges*, 90 F. Supp. 973 (N.D. Cal. 1950). Failing to disclose a conviction is grounds for denaturalization even if the crime involved would not warrant deportation. *United States v. De Francis*, 50 F.2d 497 (D.C. Cir. 1931).

<sup>238</sup> *United States v. DeLucia*, 163 F. Supp. 36 (N.D. Ill. 1957), *aff'd*, 256 F.2d 487 (7th Cir. 1958), *cert. denied*, 358 U.S. 836 (1958).

<sup>239</sup> *Lumantes v. United States*, 232 F.2d 216 (9th Cir. 1956).

<sup>240</sup> *United States v. Costello*, 171 F. Supp. 10 (S.D.N.Y. 1959), *aff'd*, 275 F.2d 355 (2d Cir. 1960), *cert. denied*, 362 U.S. 973. In this case, Frank Costello, reputed leader of the New York criminal organization, was denaturalized on the grounds that he failed to reveal the fact that his occupation was "bootlegger" when he made application for citizenship.

<sup>241</sup> *United States v. Shapiro*, 43 F. Supp. 927 (S.D. Cal. 1942); *United States v. Anastasio*, 120 F.Supp. 435 (D. N. J. 1954), *rev. on other grounds*, 226 F.2d 912 (3d Cir. 1955), *cert. den.* 351 U.S. 931.

<sup>242</sup> Conduct consistent with good moral character during the five year period of residence required prior to citizenship is material because it is one of the statutory prerequisites to granting citizenship to an alien. 8 U.S.C. §1427(a) (3).

<sup>243</sup> *United States v. Cloutier*, 87 F.Supp. 848 (E.D. Mich. 1949).

<sup>244</sup> *United States v. Raverat*, 222 Fed. 1018 (D. Mont. 1915);

<sup>245</sup> *United States v. Forrest*, 69 F. Supp. 389 (D.R.I. 1946).

<sup>246</sup> For an excellent delineation of the constitutional perimeter within which the federal government's power to deport must be exercised, see Note, *Constitutional Status of the Lawfully Admitted Permanent Resident Alien: The Inherent Limits of the Power to Expel*, 69 YALE L.J. 262 (1959).

<sup>247</sup> 8 U.S.C. §1251(a) (1) renders persons deportable who were excludable at the time of their entry. Also deportable are aliens guilty of communist activities, 8 U.S.C. 1251(a)(b)(c)(d)(e)(f)(g)(h), any alien who has used fraud in procuring a visa or other document in entering the United States, 8 U.S.C. §1182 (a)919, and any alien who fails to comply with the alien registration provisions, 8 U.S.C. §1251(a)(5).

<sup>248</sup> 8 U.S.C. §1182(a)(9), makes persons committing the prescribed offense or offenses excludable. Under this section, it is not necessary that the government produce a record of a conviction for the crime alleged. It is sufficient if the government produces evidence that the defendant committed acts which fulfill the elements of a "crime involving moral turpitude." See Note, *Deportation Based on Criminality Before Entry*, 1 CLEV. MAR. L. REV. 22 (1952).

<sup>249</sup> 8 U.S.C. §1182(a)(10). This section requires proof that the defendant was convicted of two or more offenses "regardless of whether the conviction was in a single trial or whether the offenses arose from a single scheme of misconduct and regardless of whether the offenses involved moral turpitude, for which the aggregate sentences to confinement actually imposed were five years or more."

a single crime "involving moral turpitude" within five years of entry or else at any time after entry was convicted of two such crimes.<sup>250</sup>

Thus, deportation is a technique which requires a thorough investigation of the organization leader's personal history both before and after his entry into this country. In most cases, this investigation must yield evidence of a crime "involving moral turpitude" if deportation is to be effected.<sup>251</sup> In the context of the deportation provisions, this category has been held to embrace a broad range of criminal activity including murder,<sup>252</sup> extortion,<sup>253</sup> arson,<sup>254</sup> bribery,<sup>255</sup> perjury,<sup>256</sup> and tax evasion.<sup>257</sup> In addition, participation in certain fields of criminal activity has been made grounds for deportation in special statutes thus obviating the requirement of a judicial finding that the activity "involves moral turpitude." Among these are several in which an organization leader might become embroiled such as prostitution,<sup>258</sup> the narcotics traffic,<sup>259</sup> and the possession

of sub-machine guns and sawed-off shotguns.<sup>260</sup> On the other hand, several types of criminal activity which are typical of organization operations have been held insufficient as a predicate for deportation. These include professional gambling,<sup>261</sup> bootlegging,<sup>262</sup> and loan sharking.<sup>263</sup>

That the deportation of management-level organization members does not always curtail their influence in or usefulness to organized crime is attested to by the career of Charles "Lucky" Luciano, who until his recent death purportedly directed the world-wide narcotics traffic, most of it destined for the United States, from Italy where he was deported after World War II.<sup>264</sup> Deportation is also subject to the limitation that it is available only against foreign-born organization members, an element which is naturally becoming less numerous in criminal organizations as it is in the nation as a whole.<sup>265</sup>

Possibly because they have other grounds for

<sup>250</sup> 8 U.S.C. §1251(a)(4). According to this section, an alien is deportable if he "is convicted of a crime involving moral turpitude committed within five years after entry and either sentenced to confinement or confined therefor in a prison or corrective institution, for a year or more, or who at any time after entry is convicted of two crimes involving moral turpitude, not arising out of a single scheme of criminal misconduct, regardless of whether confined therefor and regardless of whether the convictions were in a single trial."

<sup>251</sup> Virtually the only exception is if the alien committed two or more crimes of any description prior to entry which resulted in the imposition of an aggregate sentence exceeding five years. In such a case it is not necessary the crimes be ones "involving moral turpitude." See note 249, *supra*, and accompanying text.

<sup>252</sup> *Allessio v. Day*, 42 F.2d 217 (2d Cir. 1930). Voluntary manslaughter has also been held to be a "crime involving moral turpitude." *Pillisz v. Smith*, 46 F.2d 769 (7th Cir. 1931). However, involuntary manslaughter does not carry this undesirable connotation and will not justify deportation. *Tutrone v. Shaughnessy*, 160 F. Supp. 433 (S.D.N.Y. 1958); *Matter of R*, 5 I. & N. Dec. 463 (1953).

<sup>253</sup> *Matter of GT*, 4 I. & N. Dec. 446 (1951); *Matter of F*, 3 I. & N. Dec. 361 (1949).

<sup>254</sup> *Johnson v. Pepe*, 28 F.2d 810 (2d Cir. 1928).

<sup>255</sup> *Matter of V*, 4 I. & N. Dec. 100 (1950).

<sup>256</sup> *Alvares y Flores v. Savoretti*, 205 F.2d 544 (5th Cir. 1953); *United States ex rel. Karpay v. Uhl*, 70 F.2d 792 (2d Cir. 1934), *cert. denied*, 293 U.S. 573.

<sup>257</sup> *Khan v. Barber*, 253 F.2d 547 (9th Cir. 1958), *cert. denied*, 357 U.S. 920; *Chu v. Cornell*, 247 F.2d 929 (9th Cir. 1957), *cert. denied*, 355 U.S. 892. See, Note, *Federal Income Tax Evasion Defined as Crime Involving Moral Turpitude*, 25 GEO. WASH. L. REV. 711 (1957).

<sup>258</sup> Involvement in prostitution as a grounds for deportation is the subject of a special statutory section, 8 U.S.C. §1251(a)(12). It requires only proof of commission of the proscribed acts, not conviction of a crime, and applies not only to the prostitutes themselves, but to other functionaries in that type of enter-

prise, such as procurers, *Spadaro v. Nabon*, 229 F.2d 190 (5th Cir. 1956), managers, *Ranieri v. Smith*, 49 F.2d 537 (7th Cir. 1931), *cert. denied*, 284 U.S. 657, and persons supported by, or receiving the proceeds of prostitution, *Matter of G*, 5 I. & N. Dec. 559 (1954). The latter category is the one into which an organization leader often might fall.

<sup>259</sup> A special section makes any alien deportable who "is . . . a narcotic drug addict, or who . . . has been convicted of a violation of, or a conspiracy to violate, any law or regulation relating to the illicit possession of or traffic in narcotic drugs . . ." This section was held to apply to violations which occurred prior to the enactment of this statute in *Marcello v. Bondi*, 349 U.S. 302 (1955), the case which resulted in an as yet unexecuted deportation order against Carlos Marcello, the reputed king-pin of organized crime in New Orleans. For a general discussion of this section see Note, *Deportability of Alien Narcotics Offender*, 39 MINN. L. REV. 229 (1955).

<sup>260</sup> Congress also has seen fit to enact specific legislation in regard to deportation for the possession of machine guns or sawed-off shotguns. See 8 U.S.C. §1251(a)(14).

<sup>261</sup> *United States v. Carrollo*, 30 F. Supp. 3 (W.D. Mo. 1939); *Matter of G*, 1 I. & N. Dec. 59 (1941).

<sup>262</sup> *Iorio v. Day*, 34 F.2d 920 (2d Cir. 1929).

<sup>263</sup> *Matter of B*, 6 I. & N. Dec. 98 (1954).

<sup>264</sup> For an account of Mr. Luciano's speckled career, see SONDERN, *op. cit. supra* note 229, at 85-104.

<sup>265</sup> The Kefauver Committee recommended two amendments to the immigration laws which were aimed at making immigration enforcement a more effective weapon against organized crime. S. 1662, 82nd Congress, would allow the Attorney General to cancel suspension of deportation on the basis of after-discovered evidence as to the criminality or other relevant consideration rendering the prior suspension of deportation unwarranted. S. 1661, 82nd Congress, would punish persons who harbor or conceal illegally entered aliens. This proposed legislation is summarized and evaluated in ABA REPORT, *op. cit. supra* note 213, at 56-57.

exercising jurisdiction over organized crime, state governments generally have not made extensive use of this indirect approach to convicting management level organization members. There would probably be no lack of opportunity for a state prosecuting authority so disposed. The statute books of most states and the ordinances of most cities are replete with archaic laws at least one of which most citizens violate at some time or other each day; and obviously members of criminal organizations are no more virtuous than most other citizens. If such men were kept under constant surveillance it probably would be possible to bring a series of charges against them that would keep them in court most days that they were not in jail serving sentences for their violation of these laws.<sup>266</sup>

As an example of potential uses of this technique, among these oft-broken laws are the fornication statutes which are still in the criminal codes of most states.<sup>267</sup> Most persons claiming any knowledge of the private lives and habits of management-level organization members state that these men almost invariably insure the happiness of their home life by maintaining and making use of a mistress. This means not merely casual fornication, but frequent, reliable and presumably easily detected fornication. Rigorous enforcement of the fornication statutes against management-level members of the criminal organization would probably yield two foreseeable results. First, these men would become monogamous after a few of their cohorts had been sent to prison for not being. Second, the fornication

statutes might very well be repealed when the public was made fully aware of their existence and meaning. Thus, as a technique for ridding ourselves of some archaic criminal laws, as well as for imprisoning important members of organized crime, this approach has much to recommend it.

Also often overlooked by many local authorities in their efforts to convict organization leaders are their own state criminal tax fraud laws. Some states in which organized crime is most powerful derive a part of their revenues from state income taxes. Further, compliance with these laws is often enforced through criminal sanctions.<sup>268</sup> Any failure to report and pay all taxes due on his total income will render an organization leader amenable to criminal prosecution. Accordingly, in these states local law enforcement has available the same weapon which the federal government has found most effective in obtaining convictions against the leadership of organized crime.

#### C. *Evaluation of the Approach of Convicting Management-Level Organization Members*

It is a common error to believe that the imprisonment of management-level members of the criminal organization is the ultimate solution to the problem of organized crime. It is not. A criminal organization is a viable and resilient social organism. Capone was sent to prison, but the Chicago organization he once headed was for a long time thereafter much more prosperous than it was in his heyday. Nitti committed suicide, and yet it prospered. Accardo could go to prison, but the organization he formerly headed would scarcely miss him. The plain truth is that management-level organization members, like their underlings, and for that matter, like corporation executives, are replaceable. For every "president" of a criminal organization sent to prison, there are several "vice-presidents" able and eager to take over. Even in the improbable event that law enforcement agencies were able simultaneously to convict the entire "management" of a criminal organization, the organization probably would not die. As long as there was money in the treasury, some of the organization's facilities still intact, and some of its enterprises yet in operation, lower echelon organization members probably would move up to take the reins of control of the neglected empire. Admittedly, however, such a simultaneous con-

<sup>266</sup> In late 1961, Chicago law enforcement officials initiated a crackdown on the personal traffic offenses committed by organization leaders.

"The lineup in Traffic Court Wednesday looked like 'Hood's Who.'"

"Two bigtime hoodlums, plus some associates were up on minor traffic charges."

"They were hauled into court as part of a renewed police effort to make them uneasy in Chicago."

"Some of the tickets dated back to 1952." Chicago Daily News, Dec. 27, 1961, p. 6.

Although not calculated to inflict any lasting injury on organized crime, this effort does illustrate the potential of the approach of prosecuting top racketeers for their own personal infractions of the law rather than through the crimes of the organization.

<sup>267</sup> As evidence of the seeming imperishability of such statutes despite widespread disobedience and general neglect of enforcement, consider the most recent draft of a new and progressive criminal code in America—the one recently enacted by the Illinois legislature. Section 11-8 defines and punishes the crime of fornication. See ILL. REV. CRIM. CODE of 1961, 11-8. Puritanism evidently will never be purged from our nation's criminal laws.

<sup>268</sup> See, e.g., the tax evasion provisions of the New York Penal Code:

viction of all or substantially all of the organization's management personnel would be the most crippling single blow that could be administered to a criminal organization. Given a proper follow-up by law enforcement officials, it might even eventuate in the death of the organization. A proper follow-up would entail the closing down of all the enterprises of the organization, and prompt action against any would-be successors to the imprisoned management team.

Admitting the great impact which a simultaneous imprisonment of the entire management of a criminal organization would have, the likelihood of such an event taking place is very slim. It is more important therefore to appraise the effects which isolated convictions of one or two management-level members of a given criminal organization can be expected to produce.

One possible consequence, which is unfortunate when it does result, is a general relaxation of tension in a previously aroused public which may accompany the successful prosecution of a leading figure in organized crime. The public too easily identifies the threat of organized crime with its leading members. When a Capone, a Costello, or an Accardo gets his "comeuppance," the citizenry may believe that the threat to their community which they so vividly recognized before has gone to prison along with the chief villain, and their interest in the subject can subside. If this were a necessary concomitant of the process of convicting management-level organization members, it probably would be better not to prosecute them unless a mass conviction of the entire management were indeed feasible. It is to be hoped that the public is now sufficiently sophisticated concerning the nature of organized crime to know that the conviction of one or two men, no matter how infamous, does not bring an end to a criminal organization.

On the other side of the ledger, there are collateral advantages to be gained by imprisoning management-level organization members, aside from any momentary dislocations it might create

in the power structure of the organization. For one thing, it reaffirms the basic tenet of every democratic society that no one is above the law. The denial of this tenet is, as discussed in the first installment of this article,<sup>269</sup> one of the real evils of organized crime. To the degree that government is able ultimately to mete out appropriate punishment to the scions of organized crime, it reassures the law-abiding and warns the potential law breaker. To the extent that government fails in this mission, it breaks faith with its citizens, undermines moral standards and courts eventual disaster.

Another beneficial result which would follow any consistent success in convicting management-level organization members is the long-run deterrent effect it would probably have on other members of the organization. If the risk of imprisonment were very great for management-level members, there might be great reluctance on the part of many to rise to such positions within the organization. The nature of organized crime is such that it is very difficult to remain anonymous, especially as a member rises to positions of importance in the organization. In addition, it is not the type of criminal activity in which the criminal can make a few secretive hit-and-run sorties and hope to retire. It is essentially a continuous, fairly open life of criminal activity. If punishment were indeed being meted out to substantial numbers of management-level organization members, it would be difficult for a member to be convinced that he would be able to elude prosecution. Unfortunately, the combined efforts of state and federal authorities have left too large a percentage of these men unsouped to cause serious concern to the membership of most criminal organizations. The size of the rewards still outweighs the slim risks.

## II. INFLECTING ECONOMIC LOSSES ON THE ILLEGAL ENTERPRISES OF ORGANIZED CRIME

Important as conviction of organization leaders may be in any drive against organized crime, it is not the exclusive nor the ultimate approach to the containment of a criminal organization. Organized crime is engaged in many businesses. Some of these businesses are illegal in themselves. Others are legal businesses which the organization operates in an illegal manner. The latter category includes vending machine leasing, laundry services, labor

"A person, who, in making any statement, oral or written, which is required or authorized by law to be made as the basis of imposing any tax or assessment, or of any application to reduce any tax or assessment, willfully makes, as to any material matter any statement which he knows to be false, is guilty of a misdemeanor." N.Y. PENAL CODE §2321.

"A person who willfully obstructs or hinders a public officer from collecting any . . . taxes . . . and which such officer is by law empowered to collect, is guilty of a misdemeanor." N.Y. PENAL CODE §1870.

<sup>269</sup> See part I of this series, 53 J. CRIM. L., C. & P.S. 399, at 414-15 (1962).

unions, and the selling of various commodities. Since these are legitimate businesses, it is impossible for law enforcement agencies to attempt to suppress the businesses themselves. However, gambling, prostitution, shylocking, and narcotics peddling are all illegal businesses. Consequently, action which will make these businesses less profitable or more difficult to conduct is permissible. It is not surprising to find that one of the legal approaches most frequently employed against organized crime is to seek to render its illegal businesses unprofitable. Like ordinary legitimate concerns, organized crime is in business to make money. And as they would to a legitimate concern, sustained financial losses can spell ruin to organized crime.

In general, three methods have received fairly wide use in attempting to cause financial loss to the illegal enterprises of organized crime. First, and potentially the most effective of these methods, is confiscation. This includes the confiscation of illegal consumer goods, physical objects which are used to conduct illegal businesses, and money involved in illegal transactions. The second method is to close the premises on which illegal businesses are conducted through public nuisance actions or the revocation of essential licenses. A third method would be to impose and collect heavy taxes from illegal businesses.

#### A. Confiscation

The technique of confiscation is as broad or narrow, as useful or useless, as the legislature by statute wishes to make it.<sup>270</sup> Given a broad enough statute and conscientious law enforcement officers, certain organization businesses would be impossible to operate at a profit, and a serious crimp would be put in the conduct of others. Although the untouchable Eliot Ness did very few of the things attributed to him in a weekly television drama,<sup>271</sup> he did administer the first setback suffered by the Capone syndicate through leading a series of spectacular raids in which millions of gallons of illegal

liquor and much valuable equipment were confiscated and destroyed.<sup>272</sup>

Confiscation involves the seizure and retention by the government of physical objects and money which in one way or another are employed by the criminal organization in the conduct of its illegal businesses.<sup>273</sup> The objects subject to confiscation can include illegal consumer products, such as narcotics;<sup>274</sup> the machinery utilized to produce the illegal goods, such as stills<sup>275</sup>; devices used in dispensing illegal services, such as slot machines;<sup>276</sup> the vehicles employed in transporting other illegal objects, such as automobiles used for smuggling narcotics;<sup>277</sup> and the fixtures found on premises used for the conduct of illegal businesses, such as the plush fittings of a gambling casino.<sup>278</sup> Confiscation of money has been authorized by some states when it is found inside slot machines,<sup>279</sup> on poker tables,<sup>280</sup> or within premises employed for illegal purposes.<sup>281</sup> This weapon probably could be sharpened considerably by broadening the statute to permit confiscation of any funds traceable to an illegal business.

A forfeiture proceeding is a civil action. Accordingly, the government must establish the

<sup>272</sup> "The operation most immediately successful, which dug the pit for Capone's eventual destruction, was the drying up of his sources of supply. Elliot Ness, a brilliant Justice Department agent with a small but relentless squad . . . crashed into more than 30 big plants and warehouses, destroyed millions of dollars worth of irreplaceable equipment and impounded no less than 50 big trucks—a large part of the syndicate life line." SONDERN, *op. cit. supra* note 229, at 65-66.

<sup>273</sup> For a summary of the statutes and cases in this area, see Annotation, 3 A.L.R. 2d 738.

<sup>274</sup> See 21 U.S.C. §184 (1958).

<sup>275</sup> See 26 U.S.C.A. §5671 (1963 Supp.); 26 U.S.C. §7302 (1958).

<sup>276</sup> See, e.g., ILL. REV. STAT. §342 (1959); PA. STAT. ANN. (Purdon's) §14444; FLA. STAT. ANN. §849.232 et. seq.

<sup>277</sup> See 49 U.S.C.A. §782 (1951).

<sup>278</sup> See MODEL ANTI-GAMBLING ACT §4(3), ABA REPORT, *op. cit. supra* note 213, at 78.

<sup>279</sup> Moore v. Brett, 193 Okla. 627, 137 P.2d 539 (1943); State v. McNichols, 63 Idaho 100, 117 P.2d 468 (1941); Germania Club v. City of Chicago, 332 Ill. App. 112, 74 N.E.2d 29 (1947).

<sup>280</sup> Krug v. Board of Chosen Freeholders, 3 N.J. Super. 22, 65 A.2d 542 (App. Div. 1949); Fairmount Engines Co. v. Montgomery County, 135 Pa. Super. 367, 5 A.2d 419 (1939).

<sup>281</sup> Commonwealth v. Deavenport, 45 A.2d 405, 158 Pa. Super. 359 (1946); Connelly v. Weber, 182 Pa. Super. 187, 126 A.2d 474 (1956). For discussion of the power of the state to confiscate money found in slot machines or otherwise in and around gambling establishments, see notes in 40 CALIF. L. REV. 147 (1952); 3 HASTINGS L. REV. 157 (1952); 6 MIAMI L. Q. 133 (1951); 31 NEB. L. REV. 115 (1951); 4 STANFORD L. REV. 145 (1951).

<sup>270</sup> At the common law, certain articles are subject to confiscation as contraband. The theory is that possession of these articles is illegal, leading to the conclusion that the court cannot properly direct return of such articles, since to do so would make the recipient a criminal. State v. Ditmar, 132 Wash. 501, 232 Pac. 321 (1925); State v. Keeler, 105 Wis. 175, 236 N.W. 561 (1931); 37 C.J.S. Forfeitures §3 (1939).

<sup>271</sup> "The Untouchables," ABC-TV.



illegal use of the property only by evidence meeting the civil standard of a preponderance of the evidence, rather than the criminal standard of beyond a reasonable doubt.<sup>282</sup> In most states<sup>283</sup> and in the federal jurisdiction<sup>284</sup> property is subject to confiscation and forfeiture even though it was discovered and brought under governmental control during an illegal search and seizure. Although the property thus seized will be suppressed from use as evidence in a criminal prosecution, the court will refrain from ordering its return to the former owners, inasmuch as the illegal use of the property has rendered the property forfeit to the state. A dual rationale has been offered in support of this prevalent policy—first, the property no longer belongs to the persons who used it in the commission of a crime, but rather belongs to the state, and second, property which has been used in violation of the law should not be returned to those who have thus used it so that it can again be utilized against society. In contrast, however, in most jurisdictions, physical objects obtained during an illegal search and seizure are inadmissible as evidence in forfeiture proceedings.<sup>285</sup> Accordingly, in order to procure a forfeiture of illegally used contraband, it is necessary that the government have sufficient independent evidence to establish that the seized property was being used in the commission of a crime.

The financial loss which would be suffered by a given criminal organization during a sustained series of gambling raids, each culminating in the confiscation of all gambling devices, all fixtures,

<sup>282</sup> The *Palmyra*, 12 Wheat (25 U.S.) 1 (1827). In many jurisdictions because of the different standards of proof applicable in the two proceedings, an acquittal in a criminal proceeding will *not* bar forfeiture of seized property in a subsequent forfeiture proceeding. *United States v. Western Oleomargarine Co.*, 240 Fed. 235 (D. Colo. 1916); *Micks v. Mason*, 145 Mich. 212, 108 N.W. 707 (1906); *Commonwealth v. Certain Confiscated Liquors*, 91 Pa. Super. 165, *appeal dismissed*, 291 Pa. 357, 140 Atl. 128 (1928).

<sup>283</sup> "It is a general rule that contraband, or property the possession of which is illegal, cannot be returned to accused from whom it was unlawfully taken, since that would make him a criminal when he became repossessed of it." 79 C.J.S., *Searches and Seizures* §92.

<sup>284</sup> "Property seized through an illegal search and seizure is subject to forfeiture." *United States v. Macri*, 185 F. Supp. 144, 150 (D. Conn. 1960). *Accord*, *Trupiano v. United States*, 334 U.S. 699 (1948); *United States v. Carey*, 272 F.2d 492 (5th Cir. 1959); *Welsh v. United States*, 220 F.2d 200 (D.C. Cir. 1955); *United States v. Eight Boxes*, 105 F.2d 896 (2d Cir. 1939).

<sup>285</sup> See, e.g., *United States v. 673 Cases of Distilled Spirits and Wines*, 74 F. Supp. 622 (D. Minn. 1947).

and all money on the premises could reach proportions disastrous to its gambling operations. Of all the illegal businesses in which organized crime engages, gambling is probably the one most susceptible to this technique. And since gambling is the major single source of organization income, a concerted use of this technique against an organization's gambling enterprises could place the entire organization in difficult economic straits.

#### B. Closing Premises on Which Illegal Enterprises are Conducted

A second technique for causing economic injury to organized crime is to close the premises upon which its illegal businesses are conducted. Since an organization normally will be able to obtain new premises for the continuation of the illegal enterprise formerly conducted at the closed premises, only a temporary loss of facilities is usually involved in such a closing. But the organization will sustain certain permanent losses of revenue and incur additional costs. The organization will lose permanently whatever income would have been earned at the old premises from the time of its closing until new premises are located and opened. It may also lose rent monies or other payments already made on a lease or similar arrangement, or any premium paid if the organization purchased the premises outright.

The two methods available for closing premises devoted to the operation of illegal businesses are *public nuisance actions*<sup>286</sup> and *license revocations*.<sup>287</sup> At the common law, and in some states under special statutes, gambling houses and houses of prostitution, for example, may be enjoined as public nuisances.<sup>288</sup> The usual injunction merely prohibits future similar illegal conduct on the

<sup>286</sup> For discussion of this technique, see Baker, *An Equitable Remedy to Combat Gambling in Illinois*, 28 CHI-KENT L. REV. 287 (1950); Note, *Equitable Devices for Controlling Organized Vice*, 48 J. CRIM. L., C. & P.S. 623 (1958).

<sup>287</sup> For a discussion of this technique, see Gaynor, *Indirect Control of Organized Crime Through Liquor License Procedure*, 49 J. CRIM. L., C. & P.S. 65 (1958).

<sup>288</sup> Premises used for purposes of gambling or prostitution are nuisances *per se* at the common law. *United States v. Dixon*, 25 Fed. Cas. 872, No. 14, 970 (C.C.D.C. 1830); *Vandeworker v. State*, 13 Ark. 700 (1850). States having statutes authorizing injunctions against premises upon which certain illegal acts are committed include the following: CAL. PEN. CODE §11225 (1960) (houses of prostitution); ME. REV. STAT. ch. 141, §1 (1959) (gambling, prostitution and illegal sale of liquor); TEX. REV. CIV. STAT. ANN. art. 4665, 4667 (1960) (gambling and prostitution).

enjoined premises.<sup>289</sup> The statutes of some states permit a broader decree—one closing the guilty premises for all purposes for one year and enjoining the persons involved in the illegal business from engaging in similar conduct anywhere within the court's jurisdiction.<sup>290</sup> Rigorous enforcement of such a statute would have the secondary effect of making landlords wary of renting to the organization or of permitting illegal businesses to continue operating on their property.

The revocation of essential licenses, normally liquor licenses, held by premises on which some illegal organization business is being operated likewise has the usual result of a financial loss to the organization. If the organization has a share in the licensed business, as it often will have, it suffers the loss of revenue attendant on the closing of that business. In addition, there is the cost of acquiring new licensed premises or space in another's licensed premises. Again, rigorous enforcement of such a law would make other owners of licensed premises very reluctant to allow an organization's illegal operations to take place upon their premises. In many states revocation of liquor licenses can be accomplished summarily by an executive officer without judicial proceedings.<sup>291</sup> An appeal of the revocation order to the executive or an administrative body is typically provided.<sup>292</sup> The rationale of statutes permitting summary revocation is that a liquor license is a privilege rather than a property right and can be revoked or denied without complying with the requirements of due process.<sup>293</sup>

<sup>289</sup> *State v. Denny's Place*, 98 Ohio App. 351, 129 N.E.2d 532 (1954); *Brindle v. Copeland*, 89 S.E. 332 (Ga. 1916); *Balch v. State ex rel. Grigsby*, 65 Okla. 146, 164 Pac. 776 (1917). In the absence of a liberalizing statute, such injunctions are subject to the further limitation that they may not encompass suppliers of essential services to the enjoined premises. *People v. Fritz*, 316 Ill. App. 217, 45 N.E.2d 48 (1942); *State v. Dick and Bros. Quincy Brewing Co.*, 270 Mo. 100, 192 S.W. 1022 (1917).

<sup>290</sup> *E.g.*, ILL. ANN. STAT., ch. 100½, §§2, 3 (1960).

<sup>291</sup> KAN. GEN. STAT. §41-311 (g) (1958); N.Y. ALCOHOLIC BEVERAGE CONTROL LAW §106; WIS. STAT. ANN. 175, 90 (1) (1959).

<sup>292</sup> See, *e.g.*, ILL. ANN. STAT. ch. 43, §149, which authorizes the local liquor control commissioner to revoke a retail license, and ILL. ANN. STAT. ch. 43, §153, which authorizes an appeal from such an order to the state liquor control commission.

<sup>293</sup> *Darling Apartment Co. v. Springer*, 22 A.2d 397 (Del. 1941); *Fitzpatrick v. Liquor Control Commission*, 316 Mich. 83, 25 N.W.2d 118 (1946); *Blum v. Ford*, 104 Ark. 393, 107 S.W.2d 340 (1937); *People v. McBride*, 234 Ill. 146, 84 N.E. 865 (1908).

### C. *Spécial Taxes on Revenue From Illegal Businesses*

"The power to tax is the power to destroy." This, one of the most trite phrases heard in present day political discussions, is usually the cry of alarmists who fear that we may *unintentionally* destroy the object of our taxation through overtaxing. But what of the use of taxes to *intentionally* destroy undesirable economic entities? This is a technique for fighting organized crime which remains largely unexplored.<sup>294</sup> The federal government did pass a special gambling tax in 1952.<sup>295</sup> However, the rates were far from the confiscatory levels essential to the destruction of organized gambling through tax alone. Although it seems an extreme measure, it would probably not be beyond the pale of constitutionality for a state government to impose a special tax of 90% on all revenues derived from the illegal businesses usually engaged in by organized crime.<sup>296</sup> Moreover, the imposition of such a tax by a state government would not necessitate repeal of criminal statutes attaching criminal penalties to the conduct of such businesses.<sup>297</sup> The difficulty, however, with any such taxation measure is one of enforcement. In order to establish criminal liability for failure

<sup>294</sup> One writer, Russell Baker, carried on a one man campaign to gain recognition for this technique as a means of destroying organized crime. See Baker, *The Federal Power and Organized Crime*, 1953 WASH. U. L. Q. 121; Baker, *Taxation: Potential Destroyer of Crime*, 29 CHI-KENT L. REV. 197 (1951).

<sup>295</sup> Under the federal law, two types of taxes are imposed upon persons engaged in professional bookmaking and numbers operations. First, a 10% excise tax is collected on the gross amount of wagers placed with the operation. The persons liable for this tax are the principals, i.e., those with a proprietary interest in the enterprise and who therefore ultimately "accept" the wager from the bettor. See, 26 U.S.C. §4401-04. A second "special occupational tax" of \$50 per year as imposed upon all persons liable for the excise tax and all those who "receive wagers for and in behalf" of such persons. See 26 U.S.C. §4411-13. It has been held that this latter category embraces only those who physically accept wagers from the betting public, not the various "runners," bookkeepers, strong-arm men, etc., who act as intermediaries between the betting public and the principal operator and otherwise assist in the conduct of the gambling enterprise. *United States v. Calamaro*, 354 U.S. 351 (1957).

<sup>296</sup> The major constitutional question embedded in such a statute would be whether it violated the equal protection clause of the Fourteenth Amendment. A number of considerations supporting the reasonableness of such a classification could probably be introduced. Among them would be the difficulty of collecting taxes from the criminal element, and more important the negative contribution which this class makes to society. See *United States v. Constantine*, 296 U.S. 287, 297 (1935) (dissent).

<sup>297</sup> *United States v. Stasoff*, 260 U.S. 477 (1922).

to pay the tax, the state would have to prove that the money was derived from the operation of an illegal business. And if such proof can be made, the taxpayer can be imprisoned for violating the criminal statutes prohibiting engaging in such business. But as an interesting adjunct to other techniques, one which in special situations might prove useful, even decisive, in fighting organized crime, confiscatory taxation aimed at destroying organization profits merits serious consideration.

#### D. *Evaluation of the Economic Sanction Approach*

Because of the drama and illusion of final victory which accompanies the successful prosecution of a top figure in a criminal organization, this approach has occupied the center stage of the effort against organized crime. Some of the reasons the conviction of an organization leader seldom means the end of an organization or even a diminution of its power were explored earlier.<sup>298</sup> Often the more feared and more effective, though admittedly less dramatic, weapon is the approach which strikes at the primary source of organization power—its immense wealth.

The three techniques discussed in this section—closing of premises, confiscation of money and property, and taxation of organization resources—all have a similar purpose and effect, the infliction of economic injury on the organization. The advantage of each of these techniques is that the organization itself, or rather, those persons who own, control, and profit from its operations, must suffer the effects. Unlike the arrest and fining or imprisonment of lesser functionaries in an organization—a sanction scarcely felt by organization leaders—, these techniques deprive the organization of assets and profits thereby imposing a sanction on the beneficial owners of the criminal organization.

In order for this approach to be effective, the pressure against organization operations must be maintained continuously over a long period of time. The flow of profits must be dammed up for an appreciable period before a criminal organization will begin to experience a loss of power. Through a sustained program of confiscation, additional tax burdens, and closing of organization facilities, it should be possible to reduce significantly the economic resources of an organization. Like any other business organization suffering a long series of economic setbacks, a

criminal organization will become a less important force in the community. If the losses can be continued over a sufficient period of time, a criminal organization, like any other business, will be forced to cease operations. Profits are both the source and the purpose of organization power. Without them an organization cannot afford to carry on its illegitimate activities. Moreover, with its assets depleted an organization no longer will be able to afford to pay public officials large bribes or to support political organizations favorable to their activities. And without the protective cloak of corruption, an organization is likely to feel the full brunt of local law enforcement. Therefore, the demise of an organization may be accelerated in its later stages, once the economic sanctions begin taking effect.

The effectiveness of this approach will vary with the characteristics of the illegal enterprise under assault. If, like most forms of gambling, the enterprise must operate upon fixed premises, employ relatively expensive equipment and paraphernalia, and normally requires large quantities of money to be retained on the premises, it is particularly susceptible to permanent injury from this approach. Shylocking, on the other hand, which can be carried on with a notepad and a strong arm, both highly portable, can seldom be dealt a damaging blow with these techniques. There simply are no premises to close or valuable property to confiscate. Ranged somewhere between these two categories of illegal activity in their amenability to this approach are the other primary sources of organization income: narcotics, untaxed liquor, and prostitution. The results which can be expected from the utilization of this approach against a given criminal organization thus often may depend upon what are its major enterprises. In practice, there will be many organizations against which this cannot be an ultimate weapon even if perfectly and persistently implemented. On the other hand, because of the importance of gambling in the profit structure of most criminal organizations and the susceptibility of this activity to this approach, there will be few which cannot be severely wounded. Consequently, it is always a useful, sometimes extremely potent weapon against organized crime which appears to deserve to occupy a significant place in any law enforcement drive against a criminal organization.

However, one of the chief weaknesses of this approach is political. Waging a lengthy campaign

<sup>298</sup> See pages 21-22, *supra*.

aimed at inflicting economic losses upon a criminal organization will not yield the drama nor the headlines nor create the political goodwill that equal resources devoted to the "head-hunting" of organization leaders can.

### III. DENIAL OF SERVICES AND FACILITIES ESSENTIAL TO THE OPERATION OF ILLEGAL BUSINESSES

The third basic approach available to combat organized crime is to sever the lines which supply it with services and facilities essential to the proper functioning of its illegal operations. Most of the illegal businesses in which organized crime participates depend upon the availability of certain services and physical facilities. Most of these services and facilities are readily replaceable should the current source be cut off. However, there is at least one notable exception: services rendered by a monopoly and which cannot be duplicated by the organization itself. Both of these conditions are fulfilled in the field of rapid wire communications.

#### A. Denial of Wire Services Necessary to Certain Forms of Organized Gambling

Off-track betting, more than any other form of illegal enterprise in which organized crime is involved, requires rapid communication to function successfully.<sup>299</sup> For the transmission of the vital race results from the racetrack to the distant horse-room, the criminal organization depends on wire communications. Wire communications, in turn, are in the hands of a few highly regulated monopolies. Through a series of criminal statutes<sup>300</sup> and administrative procedures, a number of states have sought to shut off this supply of vital information by denying use of these public facilities to criminal organizations. To the extent that these states have been successful in shutting off this

necessary flow of information, they have closed down or seriously curtailed off-track betting.

Most state criminal statutes dealing with the dissemination of race results proscribe the transmission of such information with intent that it be used in a gambling operation.<sup>301</sup> This imposes a difficult problem of proof upon the prosecutive agency, because of the necessity of establishing that the sender knew of the recipient's intended use of the information received. Florida has solved this evidentiary problem by banning all dissemination of racing information for a period of thirty minutes subsequent to each race.<sup>302</sup> A useful adjunct to criminal sanctions is the provision which a few states have made for the severing of communications services to persons or establishments which are shown to be utilizing such service in furtherance of commercial gambling activities. Some of these statutes authorize public utilities to curtail service to any establishment identified by a law enforcement agency as a facility used for gambling purposes.<sup>303</sup>

This state legislation has not been wholly effective, however, because much of the communications involved are interstate and not susceptible to state jurisdiction. There are even instances of clever criminal organizations converting what would ordinarily be an intrastate network into interstate communications by having the information relayed from one state to another and then back to the original state, thus nullifying any attempts by the state government to prevent the transmissions. The obvious solution to this problem is federal legislation prohibiting the transmission of such information in interstate commerce. Such legislation was first proposed in 1953 by the

<sup>299</sup> For discussion of the results of these campaigns as well as the various legal devices adopted to close off the illegal customers from their essential communication network, see notes in 39 CALIF. L. REV. 145 (1951); 40 J. CRIM. L., C. & P. S. 176 (1952); 17 MO. L. REV. 16 (1952); 40 GEO. L. J. 68 (1951); 35 MINN. L. REV. 262 (1951).

<sup>302</sup> FLA. STAT. ANN. §396.09.

<sup>303</sup> See, e.g., PA. STAT. ANN. (Purdon) tit. 66, §1702-10. Without a specific statute the California Public Utilities Commission in 1948 interpreted its duties as encompassing the power to order the cessation of wire services to subscribers identified by law enforcement officers as gambling enterprises. Decision No. 41415, 47 P.U.C. 853 (1948). See also *McBride v. Western Union Telegraph Co.*, 171 F.2d 1 (9th Cir. 1949), in which it was held that a gambler was not entitled to resumption of service discontinued by the Western Union Telegraph Company at the instance of the Attorney General.

<sup>299</sup> "Communications dominate the activity of the modern bookmaker. The national race wire service . . . is essential to any large-scale bookmaking operation. Similarly, the telephone is the bookmaker's chief medium in accepting bets, laying off bets, etc." ABA REPORT, *op. cit. supra* note 213, at 84.

<sup>300</sup> See MICH. STAT. ANN. §28.537, which makes it illegal for any person to distribute information concerning wagering odds, etc., to the public. Pennsylvania, PA. STATS. ANN. (Purdon) tit. 66, §1702-10, and Florida, FLA. STATS. ANN., §365.01-365.14, have statutes aimed at the public utility furnishing the communications service. These statutes prohibit such utilities from knowingly furnishing private wires for dissemination of racing information.

Kefauver Committee.<sup>304</sup> In 1961, a statute finally was enacted which renders the interstate transmission of wagering information a federal crime.<sup>305</sup> This statute also provides that upon notification by federal authorities that a communication subscriber is sending gambling information, a public utility is to disconnect the subscriber's service.<sup>306</sup>

Although rapid communications are obviously indispensable to off-track betting, they are also of crucial importance to other operations of the criminal organization.<sup>307</sup> As with any large far-flung business concern, organized crime relies to a large extent upon the availability of a fast, reliable means of transmitting messages, whether the message relates to future plans, the current level of business, the arrival of new customers, or warning of an impending police raid. Legislation cutting off all organization enterprises and members from all forms of public communications could probably be profitably considered by all governments, federal, state and local.

#### B. Denial of Physical Facilities Necessary to Certain Organization Enterprises

The closing down of gambling houses and houses of prostitution was discussed as one of the means of inflicting economic loss on organization enterprises.<sup>308</sup> In that context, the costs which the

<sup>304</sup> S. 1624, 82d Congress. See summary and critique of this proposed bill in ABA REPORT, *op. cit. supra* note 213, at 47.

<sup>305</sup> 18 U.S.C. §1084.

<sup>306</sup> "When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, state, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, state or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a state or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored." 18 U.S.C. §1084(d).

<sup>307</sup> An example of another type of enterprise dependent upon the availability of rapid communications is provided by the call girl racket. Recently, the Chicago Police Department has endeavored to secure the cessation of phone service to Chicago's largest escort service, contending that the "escort" service was actually a front for a call girl service.

<sup>308</sup> See pages 24-25, *supra*.

closing of such facilities entail were emphasized. But such action by the state has another effect in addition to financial loss. It deprives the organization of necessary facilities, at least temporarily. If the state government were vigorously to employ the tactics of liquor license revocation and public nuisance injunctions against premises upon which illegal organization businesses were conducted, the supply of such facilities available to the criminal organization would rapidly shrink and possibly virtually disappear. The organization would be hesitant to purchase such premises out-right, realizing that they might be closed shortly and rendered virtually worthless, especially for organization purposes. And landlords would be equally leery of renting their buildings to persons they suspect of illegal designs, and also quick to evict upon learning that their premises were being used for an illegal enterprise.

#### C. Evaluation of Denial of Services and Facilities

As was true of the approach of causing economic loss to organized crime, this approach has application only to those enterprises of the organization which are illegal in themselves. Facilities cannot be denied a legitimate business merely because it is using illegal methods of competition. Two conditions must be met before the denial of essential facilities can be a truly conclusive weapon. First, the illegal business must depend upon one or more services or other facilities in order to function properly. Second, the government must be able to sever all sources of supply of that service or facility. Both of these conditions can be substantially fulfilled in the case of off-track betting and its essential service—racing information. Most other types of illegal businesses operated by organized crime do not appear to yield so readily to this technique. But the approach is not devoid of other useful applications.<sup>309</sup> It certainly is worth retaining in the arsenal as a secondary weapon.

#### IV. SUMMARY

In this installment the author has attempted to survey the primary weapons available to an honest,

<sup>309</sup> Other facilities, services, or products which are essential to various illegal businesses and the curtailment of which would at least impede organized crime, include slot machines and other complex, not easily constructed, gambling devices; automatic weapons; phone service to any gambling premises or call girl headquarters; electricity, gas, running water, and other utilities to premises, such as elaborate gambling casinos or bootleg breweries, which depend upon these utilities in the conduct of ordinary operations.

dedicated prosecutor and his associates in the struggle to contain organized crime, the police, other investigative bodies, and the legislature. None of the three basic approaches discussed is an ultimate weapon. However, a coordinated attack on all three fronts over a sustained period could bring the end of a criminal organization as an important force in the community and eventually lead to its dissolution. Any criminal organization would be hard pressed to survive the imprisonment of significant numbers of its managerial personnel; the financial losses associated with confiscation of its property, closing of its premises, and onerous taxation; and the denial of those critical services and facilities which are indispensable to its operations. However, seldom if ever has such a campaign been mounted against organized crime in any section of the nation. In some states, this is because

the legislature has not provided local prosecutors with the full panoply of legal weapons and financial resources necessary to such a campaign. In other states and at other times it is because the prosecutor has chosen to allow his weapons to rust and to channel the resources into other less critical tasks. At this stage corruption in the legislature, the prosecutor's office, the police force, and the judiciary assumes importance. Corruption prevents the enactment of necessary legislation and the effective utilization of such legislation against organized crime; while it is allowed to paralyze the law enforcement effort against organized crime, the weapons and techniques discussed in this installment will be of no avail. Accordingly, the third and final installment of this article will consider the legal antidotes to corruption.