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Organized Crime: Challenge to the American Legal System

Earl Jr. Johnson

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ORGANIZED CRIME: CHALLENGE TO THE AMERICAN LEGAL SYSTEM

Part III—Legal Antidotes for the Political Corruption Induced by Organized Crime

EARL JOHNSON, JR.

Mr. Johnson is a Special Attorney in the Organized Crime and Racketeering Section of the United States Department of Justice.* After receiving his J.D. degree from the University of Chicago Law School in 1960, Mr. Johnson became a Ford Foundation Fellow in Criminal Law at the Northwestern University School of Law, where he received his LL.M. degree in 1961.

This article is the last of three installments. The first appeared in Volume 53, Number 4 of the *Journal*, at page 399, and the second in Volume 54, Number 1, at page 1. 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 summarized 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 presents a survey of the legal countermeasures available to minimize the effects of political corruption upon the prosecutive effort against organized crime. This survey encompasses 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.

Political corruption is not primarily a legal problem. It is, quite logically, a political problem. The cure for corruption, if such exists, is essentially a political cure. Usually, a reform party, or a reform element within an existing party, must seize control of the government through the expensive, exhausting process of nominating and electing uncorrupted and uncorruptible men to substantially all the important offices. These men, in turn, must fire the corrupted and not hire the corruptible. This is a large order, and it is not the purpose of this section to attempt to outline the legal techniques, if any there are, for facilitating this type of political movement. Instead, corruption will be assumed, and we will be concerned with the legal ways and means of minimizing the deliterious effects of corruption on the law enforcement effort against organized crime.

This installment will not consider methods of removing the shield of corruption, but rather techniques for penetrating or circumventing it. Four approaches will be discussed, all of which rest upon one large but relatively safe assumption—that organized crime is never able simultaneously to obtain influence over all men at all levels of government which have law enforcement powers that can be employed against organized crime. The four approaches are the employment of: (1) techniques for initiating legal action against organized crime despite corruption in the official or officials exercising primary discretionary control over the decision to prosecute; (2) techniques for discouraging officials from behaving improperly; (3) techniques for minimizing the effects of improper official behavior when it does occur; and (4) techniques for maximizing the results an honest

* 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.

element within the government can achieve despite the presence of corrupt officials.

I. Techniques for Initiating Legal Action Against Organized Crime Despite Corruption in Officials Primarily Responsible

In most states the local prosecutor, whether titled District Attorney, County Attorney, or State's Attorney, is the man responsible for the decision to prosecute or not to prosecute criminal activity occurring within the jurisdiction. The grant of discretion is broad.[310] The local prosecutor's decision ordinarily is not reviewable judicially.[311] Nor is it subject to formal administrative correction. If the local prosecutor refuses to prosecute a criminal organization or its enterprises, it and they are virtually impregnable. Moreover, the influence of the prosecutor's office generally extends into the investigative agencies as well, determining what character of cases is to be accorded close scrutiny and what is to be passed over lightly or ignored. Nevertheless, certain techniques are available for bringing about action against a criminal organization even though the organization has been able to induce a voluntary paralysis in the local prosecutor's office. Four techniques to be discussed in this installment, all calling for the substitution of some other person or persons to carry out the prosecutor's function of preparing and trying cases, are as follows: (a) substitution of a court-appointed special prosecutor; (b) substitution of the state attorney general; (c) substitution of private persons; (d) substitution of the federal government.

A. *Substitution of Court Appointed Special Prosecutor*

When the local prosecutor, through allegiance to a criminal organization or otherwise, refuses to initiate prosecutive action, a limited number of states authorize the court to appoint a special prosecutor to carry on this function. It is almost universal that some provision is made for the appointment of a special prosecutor where the regular prosecutor is *unable* to perform his duties because of illness, absence, or interest;[312] it is relatively uncommon where the cause of the prosecutor's inaction is *unwillingness* rather than *inability* to prosecute.[313] Typical of the inability statues is the New York law:

> "Whenever the district attorney of any county and his assistant, if he has one, shall not be in attendance at a term of any court of record, which he is by law required to attend, or is disqualified from acting in a particular case to discharge his duties at any such term, the court may, by an order entered in its minutes, appoint some attorney at law residing in the county, to act as special district attorney during the absence, inability or disqualification of the district attorney and his assistant; but such appointment shall not be made for a period beyond the adjournment of the term at which made. The special district attorney so appointed shall possess the powers and discharge the duties of the district attorney during the period for which he shall be appointed. . . ."[314]

Although the enumerated grounds for replacing the regular prosecutor in this and similar statutes do not embrace his refusal to prosecute, courts in a few states have articulated a theory which allows a judge to appoint a replacement prosecutor in this situation.[315] In Florida, for instance, trial courts are considered to possess an inherent right, independent of statute, to appoint a substitute prosecutor where a State Attorney present and able to prosecute refuses to perform this duty.[316]

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[310] See Baker, *The Prosecutor—Initiation of Prosecution*, 23 J. Crim. L. & C. 770 (1933).

[311] See, *e.g.*, United States v. Brokow, 60 F. Supp. 100 (S.D. Ill. 1945); State *ex. rel.* Spencer v. Criminal Court, 214 Ind. 551, 15 N.E.2d 1020 (1938). *Contra*, *Ex parte* Hyter, 16 Cal. App. 211, 116 Pac. 370 (1911).

[312] See, *e.g.*, Conn. Gen. Stat. §7612 (1949); Fla. Stat. Ann. §27.16; Ill. Rev. Stat., ch. 14, §6 (1960); McKinney's Consol. Laws, N. Y. County Law §701; Va. Code Ann. §19-4 (1959).

[313] In many states attempts to utilize this type of statute to replace a reluctant prosecutor have been rebuffed by the courts. See, *e.g.*, Mahaffey v. Territory, 11 Okla. 213, 66 Pac. 342 (1901); State v. Heaton, 21 Wash. 59, 56 Pac. 843 (1899). *Contra*, Spaulding v. State, 81 Neb. 89, 85 N.W. 80 (1901).

[314] McKinney's Consol. Laws, N. Y. County Laws, §701.

[315] Territory v. Harding, 6 Mont. 323, 12 Pac. 750 (1887); Tesh v. Commonwealth, 34 Ky. (4 Dana) 522 (1836). Other cases recognizing such an inherent right of courts include Taylor v. State, 49 Fla. 69, 38 So. 380 (1905); Wilson v. County of Marshall, 257 Ill. App. 220 (1930); Dukes v. State, 11 Ind. 556 (1858); State v. Jones, 305 Mo. 437, 268 S.W. 83 (1924); State *ex. rel.* Thomas v. Henderson, 123 Ohio St. 474, 175 N.E. 865 (1931); Nance v. State, 41 Okla. Crim. 379, 273 Pac. 369 (1929); State v. Gauthier, 113 Ore. 297, 231 Pac. 141 (1924).

[316] Taylor v. State, 49 Fla. 69, 38 So. 380 (1905). The relevant Florida statute, Fla. Stat. Ann. §27.16, allows for the substitution of a court-appointed special prosecutor only for the inability of the regular prosecutor to perform his duties. However, in *Taylor*, it was held that the inherent power of the court extends beyond the grounds enumerated in the statute to en-

In addition to the jurisdictions in which courts have an inherent power to appoint a special prosecutor to act in place of a reluctant regular prosecuting official, a few others have enacted broad statutes which delegate specific authority to their judges to call in replacements for prosecutors who fail to act.[317] However, of these relatively few states which allow the court to appoint a special prosecutor for refusal to prosecute, only a small proportion permits citizens to petition the court to make such an appointment,[318] and none allows appeal of a judge's refusal to appoint a special prosecutor.[319]

As a technique for circumventing a corrupt local prosecutor, substitution of a special prosecutor has much to recommend it. If there is one honest, fearless judge in the jurisdiction who is aware, or is made aware, of a consistent failure to prosecute organized crime for its criminal activities, there is a good chance that a special prosecutor can be obtained and legal action initiated. To be truly effective, this special prosecutor should have the power to go before a grand jury to procure an indictment as well as to proceed under an existing indictment. Assistants and investigators should be made available if necessary. Furthermore, provision should be made for appointment of a special prosecutor at the instance of a judge acting *sua sponte* or upon petition of a private citizen, and a decision denying such a petition should be reviewable by higher courts.

One of the major problems forseeable in having a special prosecutor appointed by the court is the tendency this procedure has of transforming the court from an impartial judge to active participant.[320] This difficulty, however, should be of minimal concern in a multi-judge judicial system, where the prosecutor can be appointed by one judge and the case tried before another.

B. *Substitution of State Attorney General*

Just as the substitution of a court-appointed special prosecutor can be a valuable device where honesty and fearlessness prevail in at least a part of the local judiciary, similarly, the substitution of the state attorney general is useful when he possesses those traits. Three different theories on which intervention by the state attorney general can be premised are found embodied in the statutes of various states. Some states have *supervision*[321] statutes which usually are construed to permit a state attorney general to conduct local prosecutions in the name of supervising the performance of the local prosecutor.[322] *Supersession* statutes, the second type, specifically provide for substitution by the attorney general.[323] However, these statutes vary as to who may request such intervention. Some provide for action only at the instance of the governor or legislature;[324] others permit intervention by the attorney general at his own discretion.[325] The third category of statutes grants the attorney general *concurrent jurisdiction* in criminal proceedings.[326] This jurisdiction can normally be exercised either independently or jointly with the local prosecutor.[327]

The laws of three states, Illinois, Florida, and

compass any failure of the regular prosecutor to carry out his primary responsibilities.

[317] Among those statutes authorizing substitution of a special prosecutor on the express grounds that the regular prosecutor has refused to act are ALA. CODE, tit. 13, §235 (1956); N.M. STAT. ANN. §§5-3-4, 5-3-30 (1953); N.D. REV. CODE §11-1606 (1957); OHIO REV. CODE 309.05 (1958); PA. STAT. ANN., tit. 16, §7710 (1960); TENN. CONST., art. 6, §5; UTAH CONST., art. 8, §10.

[318] People v. Northrup, 184 Ill. App. 638 (1914); Lake County Property Owner's Ass'n v. Holovachka, 233 Ind. 509, 120 N.E.2d 263, 121 N.E.2d 721 (1954).

[319] Lake County Property Owner's Ass'n v. Holovachka, *supra* note 318.

[320] "Another problem involved in obtaining the appointment of a special prosecutor is the tendency of the court to construe their replacement power, whether statutory or inherent, very narrowly. Perhaps one reason for this limitation is the attitude of certain judges that active participation in suppressing organized crime would destroy their usefulness as impartial judges." Note, *Legal Methods for the Suppression of Organized Crime: Circumventing the Corrupt Prosecutor*, 48 J. CRIM. L., C. & P.S. 531, 540 (1958).

[321] See, *e.g.*, ARIZ. REV. STAT. §41-193(4) (West 1956); MICH. STAT. ANN. §183 (1952); WASH. REV. CODE §43.10.090 (1951).

[322] Mundy v. McDonald, 216 Mich. 444, 185 N.W. 877 (1921); State *ex rel.* Nolan v. District Court, 22 Mont. 25, 55 Pac. 961 (1899); State *ex rel.* Miller v. District Court, 19 N.D. 819 (1910). *Contra*, CONN. GEN. STAT. §212 (1949).

[323] See, *e.g.*, MICH. STAT. ANN. §3.181 (1952), MCKINNEY'S CONSOL. LAWS, N.Y. EXECUTIVE LAW §63(2); OHIO REV. CODE §109.02 (1953).

[324] See, *e.g.*, NEB. REV. STAT. 84-205(9) (1943); WASH. REV. CODE 43.10.090 (1951).

[325] See, *e.g.*, IOWA CODE ANN. §13.2(2) (1949); NEV. COMP. LAWS §7316(c) (1929); N.M. STAT. ANN. §5-3-3 (1953).

[326] See, *e.g.*, ME. REV. STAT. ch. 20, §89 (1954); ORE. REV. STAT. §180.240 (1955); VT. REV. STAT. §463 (1947). It should be noted that some states, *e.g.*, Nebraska, have provisions at one place or another in their statutes authorizing all forms of replacement of the local prosecutor, supervision, supercession, and concurrent jurisdiction.

[327] "He [the attorney general] can initiate an action independently of the local prosecutor or appear jointly in the same proceeding with the local prosecutor." Note, *supra* note 320, at 535.

New York, where prime bastians of organized crime are located, illustrate the variety of procedures and powers which have been made available to supersede local prosecutors who refuse to carry out their sworn duties or who are inadequate to the task. Illinois possesses the least adequate law, providing only that when in the judgment of the attorney general "the interest of the people of the state requires it, he shall attend the trial of any party accused of crime, and assist in the prosecution."[328] It has been implied, however, that even under this diluted authority the Attorney General could institute and conduct proceedings if it could be proved that a local prosecutor had refused after being requested to act in a specific situation.[329] The relevant Florida statute embodies a slightly different approach. Instead of substituting the state attorney general for a reluctant local prosecutor, the Governor is authorized to assign a local prosecutor from another area of the state to conduct the prosecution of any case in which the "ends of justice" would be served thereby.[330] In New York, two procedures are available. For any cause sufficient to himself, the Governor can direct the Attorney General's office to handle a trial or grand jury proceeding.[331] In the conduct of such proceedings the Attorney General or his assistants enjoy the same powers and responsibilities as the District Attorney would in a like matter. Pursuant to a separate provision, the Attorney General, with the approval or at the direction of the Governor, can initiate an independent investigation into "matters concerning the public peace, public safety and public justice."[332] For purposes of conducting this investigation he is extended broad-ranging powers including the authority to employ necessary temporary assistance, investigators, and clerical personnel. It has been specifically held that the relationship between organized crime and politics constitutes a matter "concerning the public peace, public safety and public justice."[333]

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[328] ILL. REV. STAT. ch. 14, §4.

[329] In People v. Flynn, 375 Ill. 366, 31 N.E.2d 591 (1941), the Illinois Supreme Court held that the Attorney General did not have authority under Illinois law to conduct an independent grand jury probe into the activities of a corrupt mayor who was permitting gambling, prostitution, and other organization rackets to operate unhindered. However, the court did emphasize that this power was unavailable to the state Attorney General only because the local prosecutor had not refused to conduct such a probe himself.

[330] "If any state attorney shall be disqualified to represent the state in any case pending in the circuit court of his circuit, or if for any reason the governor of the state thinks that the ends of justice would be best subserved by any exchange of state attorneys, the governor may require an exchange of circuits or of courts, in any of the counties of this state between such state attorney and any other state attorney of the state, or may assign any state attorney of the state to the discharge of the duties of state attorney in any circuit of the state, at any regular or special term of the circuit court." FLA. STAT. ANN. §27.14.

[331] "The attorney-general shall:

. . . .

2. Whenever required by the governor, attend in person, or by one of his deputies, any term of the supreme court or appear before the grand jury thereof for the purpose of managing and conducting in such court or before such jury criminal actions or proceedings as shall be specified in such requirement; in which case the attorney-general or his deputy so attending shall exercise all the powers and perform all the duties in respect of such actions or proceedings, which the district attorney would otherwise be authorized or required to exercise or perform; and in any of such actions or proceedings the district attorney shall only exercise such powers and perform such duties as are required of him by the attorney-general or the deputy attorney-general so attending. In all such cases all expenses incurred by the attorney-general including the salary or other compensation of all deputies employed, shall be a county charge." MCKINNEY'S CONSOL. LAWS, N.Y. EXECUTIVE LAW §63.

[332] "Whenever in his judgment the public interest requires it, the attorney-general may, with the approval of the governor, and when directed by the governor, shall inquire into matters concerning the public peace, public safety and public justice. For such purpose he may, in his discretion, and without civil service examination, appoint and employ, and at pleasure remove, such deputies, officers and other persons as he deems necessary, determine their duties and, with the approval of the governor, fix their compensation.

"The attorney-general, his deputy, or other officer, designated by him, is empowered to subpoena witnesses, compel their attendance, examine them under oath before himself or a magistrate and require the production of any books or papers which he deems relevant or material to the inquiry. If a person subpoenaed to attend upon such inquiry fails to obey the command of a subpoena without reasonable cause, or if a person in attendance upon such inquiry shall, without reasonable cause, refuse to be sworn or to be examined or to answer a question or to produce a book or paper, when ordered so to do by the officer conducting such inquiry, he shall be guilty of a misdemeanor. It shall be the duty of all public officers, their deputies, assistants and subordinates, clerks and employees, and all other persons, to render and furnish to the attorney-general, his deputy or other designated officer, when requested, all information and assistance in their possession and within their power. . . ." MCKINNEY'S CONSOL. LAWS., N. Y. EXECUTIVE LAW, §63(8).

[333] *In re* DiBrizzi, 303 N.Y. 206, 101 N.E.2d 464 (1951). This case arose out of the appointment of a State Crime Commission to delve into organized crime in New York. This Commission was appointed pursuant to subsection 8 (set forth in the preceding footnote) as an aid to the Attorney General in conducting a probe of that subject. This means of implementing the subsection 8 powers of the Attorney General was approved in *DiBrizzi*. The holding of public hearings in connection with this probe likewise was upheld in Application of Bowers, 203 Misc. 653, 121 N.Y.S.2d 629, *aff'd*, 281 App. Div. 861, 119 N.Y.S.2d 920 (1952).

The effectiveness of any of these forms of substitution of the state attorney general for the local prosecutor depends not only upon the character of the attorney general and his staff, but also upon certain political considerations. A state attorney general of the same political party as a local prosecutor is apt to be extremely hesitant to embarrass a fellow standard-bearer by entering his domain to initiate a prosecution, thereby declaring to the electorate the inefficiency or corruptness of their elected servant. On the other hand, a state attorney general of the opposite party may be inclined to intervene unnecessarily, merely to generate rumors of corruption in the opposing party.

C. *Substitution of Private Persons*

In the United States, the prosecution of criminal cases historically and with minor exceptions[334] has been performed solely by public officials. In contrast, in England many criminal prosecutions are initiated and conducted by private persons.[335] The causes for the prevalence of private prosecution in England are not related to organized crime or a public prosecutor's refusal to prosecute. But it is instructive to note that widespread use of this method of prosecution does not necessarily bring about a total breakdown of criminal justice.[336]

A private person has no inherent right to prosecute for criminal offenses, even though the criminal act has caused him direct physical or financial injury. Private prosecution must be specifically authorized by statute if it is to become available as a technique for circumventing a corrupt local public prosecutor. It would not be necessary for the containment of organized crime to authorize the private prosecution of all criminal offenses, but merely those offenses most likely to be committed by criminal organizations.

Although no statute has been enacted authorizing private *criminal* prosecution of violations of gambling, prostitution, or similar laws, some states allow private persons to conduct suits invoking important *non-criminal* sanctions against some of these offenses. It is quite common to find statutes providing that a private person or group of persons may seek a public nuisance injunction against premises on which gambling, prostitution, or similar offenses take place. In New York, "any citizen of the county, or any society, association, or body incorporated under the laws of this state, may maintain an action in equity . . . to perpetually enjoin" a house of prostitution.[337] Illinois has analogous provisions applicable to premises utilized as houses of prostitution[338] or in the distribution and use of narcotics.[339] Similarly, private

[334] These exceptions generally fit into one of the following categories: (1) privately employed attorneys conducting or assisting in prosecution with the consent of the public prosecutor; (2) *qui tam* actions in which private persons receive a share of the fine for successfully prosecuting certain offenses; (3) multiple damage actions, which are civil suits with punitive aspects. Comment, *Private Prosecution: A Remedy for District Attorney's Unwarranted Inaction*, 65 YALE L. J. 209, 218–23 (1955).

[335] "This is considered the basic system for enforcing the criminal law in England, particularly in regard to the lesser offenses." JACKSON, THE MACHINERY OF CRIMINAL JUSTICE IN ENGLAND 108–10 (1953). Other nations having private prosecution to some extent are Scotland, France, Spain, Pakistan, and Germany. Comment, *supra* note 334, at 224.

[336] "Although reform movement and extensive code revision has occurred in some of these countries, private prosecution laws have emerged intact and have indeed, not drawn significant criticism." *Id.* at 224.

[337] "Whoever shall erect, establish, continue, maintain, use, own or lease any building, erection, or place used for the purpose of lewdness, assignation, or prostitution is guilty of maintaining a nuisance. . . ." MCKINNEY'S CONSOL. LAWS, N.Y. PUBLIC HEALTH LAW §2320.

"1. When a nuisance is kept, maintained, or exists, as defined in this article, the district attorney, *or any citizen of the county, or any society, association, or body incorporated under the laws of this state,* may maintain an action in equity in the name of the state of New York, upon the relation of such district attorney, citizen, or corporation to perpetually enjoin said nuisance, the person or persons conducting or maintaining the same from further conducting or maintaining the same, and the owner, or agent of the building or ground upon which said nuisance exists, from further permitting such building or ground or both to be so used.

"2. Such action shall be brought in the supreme court of the county in which the property is situated. . . ." *Id.* §2321. (Emphasis supplied.)

"1. If the complaint in an action instituted pursuant to the provisions of this article, is filed by any person or association, it shall not be dismissed except upon a sworn statement made by the complainant and his attorney, setting forth the reasons why the action should be dismissed, and the dismissal is approved by the district attorney in writing or in open court. . . .

"If an action instituted pursuant to the provisions of this article is brought by any person or association and the court finds there were not reasonable grounds or cause for said action the costs may be taxed against such person or association." *Id.* §2325.

[338] ILL. REV. STAT. ch. 100½, §§1–12.

[339] "All places and fixtures and movable contents thereof, used for the purpose of unlawfully selling, serving, storing, keeping, giving away or using narcotic drugs are hereby declared to be nuisances and may be abated as hereinafter provided and the owners, agents, and occupants of any such place may be enjoined as hereinafter provided." ILL. REV. STAT ch. 100½, §15.

"The Division or the State's Attorney or *any citizen of the county in which a nuisance exists* may maintain a complaint in the name of the People of the State of Illinois, to enjoin all persons from maintaining or per-

persons are often permitted to petition for the revocation of liquor licenses. The Illinois statute is typical:

> "*Any five residents* of the city, village, or county shall have the right to file a complaint with the local commission stating that any retail licensee, subject to the jurisdiction of the local commission, has been or is violating the provisions of this Act or the rules or regulations issued pursuant hereto."[340]

Through procedures such as these private persons can cripple criminal organizations even though denied the power to institute criminal action against them.

Private prosecution of organized crime as a technique for circumventing the corrupted prosecutor depends, of course, upon the existence of a body of interested, honest, and courageous citizens. The ordinary activities in which criminal organizations engage seldom cause serious physical injury to its victims. Private prosecutors might come forward in event of a rape, assault, or murder,[341] but will not be motivated to enforce gambling laws or similar legislation. A more altruistically motivated, public-spirited body of citizenry must be looked to for the institution of private prosecutions against organization activities. Where can such be found? Many cities have ready-made groups in their voluntary crime commissions —private citizens who have banded together in organizations whose primary functions, thus far, have been to investigate crime, particularly organized crime, and inform the public of its nature and extent. Authorization of private prosecutions would provide these organizations with a new weapon, a new purpose, a new challenge.[342] If honesty or courage is lacking in the local public prosecutor, and in the local judiciary, and in the state attorney general, then perhaps these qualities can be found among the private citizens of the community.

D. *Substitution of the Federal Government*

All the techniques heretofore discussed for remedying the situation created by a corrupt or ineffective local prosecutor have called for replacing the prosecutor with some other person in the conduct of *state* criminal prosecutions. In aid of, or in place of, these techniques, it is becoming more and more common for the federal government to act, enforcing its own laws affecting organized crime. Expansion of federal activity in the area of organized crime has received impetus not only because of corruption in local law enforcement, but also because organized crime has become interstate in scope, large and complex in nature, and immensely rich in plunder.[343]

In order to move against organized crime, it has been necessary to enact legislation extending federal jurisdiction over the types of criminal activity in which criminal organizations specialize. The federal government, of course, is confined within its own constitutional perimeter; accordingly, legislation has been predicated upon the federal government's power over matters such as interstate commerce,[344] the status of aliens,[345]

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mitting such nuisance, to abate the same and to enjoin the use of any such place for the period of one year. . . ." *Id.* §16.

"If the existence of the nuisance is established, the court shall enter a decree perpetually restraining all persons from maintaining or permitting such nuisance, and from using the place in which the same is maintained for any purpose for a period of one year thereafter, . . . and perpetually restraining the defendant from maintaining any such nuisance within the jurisdiction of the court." *Id.* §19.

[340] ILL. REV. STAT. ch. 24, §151.

[341] "The injured individual was most severely harmed by the criminal act; he will be equally affected by the failure of society to prosecute." Comment, *supra* note 334, at 228.

[342] An outline of a proposed private prosecution statute is laid out in the Comment cited *supra* note 334, at 229–33. In this formulation the court, in its discretion, may appoint a private prosecutor upon petition by a private citizen and a showing that the public prosecutor had failed or refused to act. The public prosecutor may seek to have the private prosecution dismissed. However, the continuation of the action remains in the hands of the court. The usefulness of this formulation as a means of dealing with organized crime depends upon the validity of one assumption—that the integrity of the court has not yielded to the same temptation of corrupt dollars or votes which caused the prosecutor to fail to perform his duty to prosecute in the first place. This defect could be obviated by rendering the trial court's decision concerning a private person's petition to act as a prosecutor a reviewable decision with a *de novo* hearing in the appellate court.

[343] Although it seems to be the general consensus among political leaders, prosecutors, judges, lawyers, and the common citizen that organized crime is properly a concern of the federal government, the opposite view has not been without eminent support. See Adlai Stevenson, *Organized Crime and Law Enforcement: A Problem for the People*, 38 ABAJ 26 (1952).

[344] "The Congress shall have Power . . . To regulate Commerce with foreign Nations, and among the several States, . . ." U.S. CONST. art. I, §8, cl. 3.

[345] "The Congress shall have Power . . . To establish an uniform Rule of Naturalization, . . ." U.S. CONST. art. I, §8, cl. 4.

certain geographical areas,[346] taxes,[347] and the mails.[348] Various phases of organized crime's enterprises have been made federal crimes through legislation based upon one and sometimes more of these constitutional provisions. Of the six chief sources of organization profits, four are susceptible to federal jurisdiction, at least under some circumstances.[349] Thus, the narcotics traffic in virtually all its phases has been subjected to federal jurisdiction through legislation grounded on the taxing power and the power to regulate foreign and interstate commerce. As the result of this combination of legislation, the illegitimate purchase, sale, or possession of narcotics,[350] the importation of these drugs,[351] the interstate transportation of narcotics,[352] and the use of a communication facility in the commission of a narcotics offense[353] are all federal crimes.[354] In addition, a narcotics violator

[346] "The Congress shall have Power . . . To define and punish . . . Felonies committed on the high seas, . . . To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may, . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased . . . for the Erection of Forts, magazines, arsenals, dock-yards, and other needful Buildings . . . ." U.S. CONST. art. I, §8, cls. 10–17.

[347] "The Congress shall have Power to lay and collect Taxes, Duties, Imposts and Excises, . . . but all Duties, Imposts and Excises shall be uniform throughout the United States." U. S. CONST. art. I, §8, cl. 1.

[348] "The Congress shall have Power . . . To establish Post Offices and post Roads; . . ." U. S. CONST. art. I, §8, cl. 7.

[349] Organization profits appear to be derived primarily from the following: gambling, "shylocking," racketeering, narcotics, prostitution, and legitimate businesses. These activities were discussed in the first installment of this article. See 53 J. CRIM. L., C., & P.S. 399, 402–06 (1962). Of these six areas of interest only shylocking and legitimate business remain virtually untouchable by federal power.

[350] These transactions violate provisions based on both the power to tax and the power to regulate foreign commerce.

"It shall be unlawful for any person . . . to manufacture, produce, compound, sell, deal in, dispense, distribute, administer, or give away narcotic drugs without having registered and paid the special tax imposed . . . ." 26 U.S.C. §4704.

"(c) It shall be unlawful for any person who has not registered and paid the special tax . . . to have in his possession . . . narcotic drugs"; 26 U.S.C. §4724. These sections apply to opium, isonipecaine, coca leaves, opiate, their derivatives and chemical equivalents. Parallel provisions render these same transactions unlawful with regard to marihuana. See 26 U.S.C. §4744 (possession) and 26 U.S.C. §4755(a) (trafficking).

"Whoever . . . receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts, . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense . . . the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000." 21 U.S.C. §174.

The penalties exacted for engaging in unlawful acts proscribed under 26 U.S.C. §4704 are set forth in 26 U.S.C. §7237. This section provides for graduated penalties of two to five years, five to ten years, and ten to twenty years, for first, second, and third offenders, respectively. The federal government has imposed particularly stiff penalties upon anyone providing heroin to teenagers.

"Notwithstanding any other provision of law, whoever, having attained the age of eighteen years, knowingly sells, gives away, furnishes, or dispenses . . . any heroin unlawfully imported . . . to any person who has not attained the age of eighteen years, may be fined not more than $20,000, and shall be imprisoned for life, or for not less than ten years, except that the offender shall suffer death if the jury in its discretion shall so direct . . . ." 21 U.S.C. §176b.

[351] "It is unlawful to import or bring any narcotic drug into the United States . . . except that such amounts of crude opium and coca leaves as the Commissioner of Narcotics finds to be necessary to provide for medical and legitimate uses only may be imported . . . under such regulations as the Commissioner of Narcotics shall prescribe . . . ." 21 U.S.C. §173.

"Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, . . . shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense . . . the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000." 21 U.S.C. §174. A similar provision imposes criminal penalties for smuggling marihuana. See 21 U.S.C. §176a.

[352] "Except as otherwise provided in this subsection, it shall be unlawful for any person to send, ship, carry, or deliver narcotic drugs from any State or Territory or the District of Columbia, or any insular possession of the United States, into any other State or Territory or the District of Columbia, or any insular possession of the United States . . . ." 26 U.S.C. §4724(b). This applies to opium, isonipecaine, coca leaves, and opiate, their derivatives and chemical equivalents. A parallel provision, 26 U.S.C. §4755(b), also makes the interstate transportation of marihuana illegal. Penalties for violation of these sections are set out in 26 U.S.C. §7237 (see note 350 *supra*).

[353] "(a) Whoever uses any communication facility in committing or in causing or facilitating the commission of, or in attempting to commit, any act or acts constituting [a narcotics offense] or a conspiracy to commit [a narcotics offense] . . . .

"(b) For purposes of this section, the term 'communication facility' means any and all public and private instrumentalities used or useful in the transmission of writings, signs, signals, pictures, and sounds of all kinds by mail, telephone, wire, radio, or other means of communication." 18 U.S.C. §1403.

[354] The narcotics traffic has long been a primary concern of the federal government. This concern has been reflected in the enactment of legislation affording special procedural advantages to the federal government in the prosecution of narcotics cases, procedural advantages not available in the usual federal criminal case. Thus, the government is authorized to appeal

must register upon entering or leaving the country.[355]

Prostitution has been reached primarily through the commerce power. The Mann Act prohibits the interstate transportation of prostitutes,[356] and recent legislation enacted as a part of the Justice Department drive on organized crime punishes the use of any facility of interstate commerce or the mails in furtherance of a prostitution enterprise.[357]

Similarly, most forms of racketeering violate federal law if they result in an obstruction of interstate commerce.[358] In effect, racketeering obstructs commerce when directed against a business concern having some connection with interstate commerce.[359] Moreover, use of any facility of interstate commerce to further a racketeering attempt is a federal crime, whether or not the racketeers are aiming at a business connected with interstate commerce.[360]

Gambling, the source of half of the income of organized crime, has been the focal point of the Justice Department's renewed offensive against organized crime and is the subject of most of the legislation recently enacted to combat organized crime. Prior to the new legislation, gambling was outlawed in certain geographical areas subject to federal jurisdiction,[361] use of the mails was un-

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orders suppressing evidence, 18 U.S.C. §1404, to execute search warrants at any time of the day or night, 18 U.S.C. §1405, and to extend immunity from prosecution to encourage witnesses to testify against their associates in crime, 18 U.S.C. §1406.

[355] "[N]o citizen of the United States who is addicted to or uses narcotic drugs, . . . or who has been convicted of a violation of any of the narcotic or marihuana laws of the United States, or of any State thereof, the penalty for which is imprisonment for more than one year, shall depart from or enter into or attempt to depart from or enter into the United States, unless such person registers . . . at a point of entry or a border customs station . . . .

"Whoever violates any of the provisions of this section shall be punished for each such violation by a fine of not more than $1,000 or imprisonment for not less than one nor more than three years, or both." 18 U.S.C. §1407.

[356] "Whoever knowingly transports in interstate or foreign commerce . . . any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose . . . shall be fined not more than $5,000 or imprisoned not more than five years, or both." 18 U.S.C. §2421.

In addition to transportation of prostitutes, the Mann Act punishes any person who "persuades, induces, entices, or coerces" any woman to move in interstate commerce for purposes of prostitution, 18 U.S.C. §2422, and the failure to file a true report concerning any recently arrived alien kept as a prostitute, 18 U.S.C. §2424. A double penalty ($10,000 and ten years) is exacted for the crime of inducing a female under 18 to travel in interstate commerce for the purpose of engaging in prostitution. 18 U.S.C. §2423.

[357] 18 U.S.C. §1952. See note 369 *infra* for text of this statute.

[358] "(a) [W]hoever in any way or degree obstructs, delays or affects commerce or the movement of any article or commodity in commerce, by robbery or extortion or attempts or conspires so to do, or commits or threatens physical violence to any person or property in furtherance of a plan or purpose to do anything in violation of this section shall be fined not more than $10,000 or imprisoned not more than twenty years, or both.

"(b) As used in this section—

"(1) The term 'robbery' means the unlawful taking or obtaining of personal property from the person or in the presence of another, against his will, by means of actual or threatened force, or violence, or fear of injury, immediate or future, to his person or property, or property in his custody or possession, or the person or property of a relative or member of his family or of anyone in his company at the time of the taking or obtaining.

"(2) The term 'extortion' means the obtaining of property from another, with his consent, induced by wrongful use of actual or threatened force, violence or fear, or under color of official right . . . ." 18 U.S.C. §1951.

It should be noted that this section applies to only two techniques employed by racketeers in attempting to secure customers and discourage competitors—robbery and extortion. Moreover, extortion has been limited to the employment of threats to induce the victim to surrender a payoff in money or other property.

[359] "The term 'commerce' means commerce within the District of Columbia, or any Territory or Possession of the United States; all commerce between any point in a State, Territory, Possession, or the District of Columbia and any point outside thereof; all commerce between points within the same State through any place outside such State; *and all other commerce over which the United States has jurisdiction.*" 18 U.S.C. §1951(b)(3). (Emphasis supplied.)

This jurisdictional section has received a broad interpretation in the federal courts.

"It seems apparent from the language of the statute that it was the intent of Congress to protect interstate commerce against extortion which in any way or in any degree reasonably could be regarded as affecting such commerce. The exaction of tribute from contractors engaged in local construction work who are dependent upon interstate commerce for materials, equipment, and supplies, or who are engaged in constructing facilities to serve such commerce is, in our opinion, proscribed by the statute in suit." Hulahan v. United States, 214 F.2d 441, 445 (8th Cir. 1954), *cert. denied*, 348 U.S. 856, which applied this section to an extortion attempt against a local contractor using materials imported from other states. *Accord*, Nick v. United States, 122 F.2d 660 (8th Cir. 1941), *cert. denied*, 314 U.S. 687 (threats to interfere with exhibition of films received in interstate commerce); United States v. Stirone, 262 F.2d 571 (3rd Cir. 1958), *aff'd*, 361 U.S. 212 (contractor using sand from out of state and furnishing concrete manufactured therefrom for construction of steel mill which would produce steel for shipment in interstate commerce).

[360] 18 U.S.C. §1952. See note 369 *infra* for text of this statute.

[361] "(a) It shall be unlawful . . .

(1) to set up, operate, or own or hold any interest in

lawful in connection with certain types of gambling schemes,[362] and the interstate transportation of slot machines was prohibited.[363] Moreover, a 10% excise tax [364] and a $50 annual occupational tax[365] were levied on those engaged in bookmaking, lotteries, and certain other forms of gambling.[366] The new legislation, relying upon the federal power to regulate interstate commerce, prohibits the interstate transmission of wagering information[367] and the interstate transportation of wagering paraphernalia,[368] thus denying to organized illegal gambling the wire services it requires and complicating the procurement and handling of gambling devices, betting slips, and related paraphernalia.

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any gambling ship or any gambling establishment on any gambling ship; . . .

"(b) Whoever violates the provisions of subsection (a) of this section shall be fined not more than $10,000 or imprisoned not more than two years, or both.

"(c) Whoever being . . . (2) the owner of any vessel under or within the jurisdiction of the United States . . . shall use, or knowingly permit the use of, such vessel in violation of any provision of this section shall . . . forfeit such vessel, together with her tackle, apparel, and furniture, to the United States." 18 U.S.C. §1082. A companion section, 18 U.S.C. §1083, prohibits the use of any vessel for the transportation of persons between a gambling ship and land.

[362] "Whoever . . . carries in interstate or foreign commerce any paper, certificate, or instrument purporting to be or to represent a ticket, chance, share, or interest in or dependent upon the event of a lottery, gift enterprise, or similar scheme . . . or knowingly takes or receives any such paper, certificate, instrument, advertisement, or list so . . . transported, shall be fined not more than $1,000 or imprisoned not more than two years, or both." 18 U.S.C. §1301. Companion statutes proscribe the sending of lottery materials through the mails, 18 U.S.C. §1302, the broadcasting of lottery information by a radio station, 18 U.S.C. §1303, and prohibit postal employees from acting as agents for lotteries, 18 U.S.C. §1304.

[363] "It shall be unlawful knowingly to transport any gambling device to any place in a State, . . . from any place outside of such State, . . ." 15 U.S.C. §1172.

[364] "(a) There shall be imposed on wagers, as defined in section 4421, an excise tax equal to 10 percent of the amount thereof . . . .

"(c) Each person who is engaged in the business of accepting wagers shall be liable for and shall pay the tax under this subchapter on all wagers placed with him. Each person who conducts any wagering pool or lottery shall be liable for and shall pay the tax under this subchapter on all wagers placed in such pool or lottery . . . ." 26 U.S.C. §4401. The constitutionality of the wagering tax provisions was upheld against contentions that they constituted a penalty in the guise of a tax, that they infringed on the police power reserved to the states, and that they violated the privilege against self-incrimination, in United States v. Kahriger, 345 U.S. 22 (1953), and Lewis v. United States, 348 U.S. 419 (1955).

[365] "There shall be imposed a special tax of $50 per year to be paid by each person who is liable for tax under section 4401 or who is engaged in receiving wagers for or on behalf of any person so liable." 26 U.S.C. §4411. All persons liable for this tax must register with the District Director of Internal Revenue their names and addresses and pertinent information. See 26 U.S.C. §4412. In United States v. Calamaro, 354 U.S. 351 (1957), the Supreme Court held that the only members of a gambling operation who are liable for this occupational tax are those who have a "proprietary" interest in the operation, the so-called "bankers," and those who accept the wagers directly from the betters, the so-called "writers." "Pick-up men," "headquarters personnel," guards, and others performing services vital to the organization are not encompassed within the taxing or registration provisions.

[366] "(1) . . . The term 'wager' means—

(A) any wager with respect to a sports event or a contest placed with a person engaged in the business of accepting such wagers,

(B) any wager placed in a wagering pool with respect to a sports event or a contest, if such pool is conducted for profit, and

(C) any wager placed in a lottery conducted for profit.

(2) . . . The term 'lottery' includes the numbers game, policy, and similar types of wagering. The term does not include—

(A) any game of a type in which usually

(i) the wagers are placed,

(ii) the winners are determined, and

(iii) the distribution of prizes or other property is made, in the presence of all persons placing wagers in such game . . . ." 26 U.S.C. §4421.

The effect of subsection (2)(A) is to exempt from the wagering tax poker, blackjack, roulette, and other casino-type gambling games in which all participants in the game are present during all phases of the game. Lotteries conducted by tax exempt organizations are also excluded from these taxes under subsection (2)(B).

[367] "Whoever being in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers or for information assisting in the placing of bets or wagers is guilty of a felony." 18 U.S.C. §1084. For an analysis of the legislative history of this statute, see Pollner, *Attorney General Robert F. Kennedy's Legislative Program To Curb Organized Crime and Racketeering*, 28 BROOKLYN L. REV. 37 (1961).

[368] "(a) Whoever, . . . knowingly carries or sends in interstate or foreign commerce any record, paraphernalia, ticket, certificate, bills, slip, token, paper, writing, or other device used, or to be used, or adapted, devised, or designed for use in (a) bookmaking; or (b) wagering pools with respect to a sporting event; or (c) in a number, policy, bolita, or similar game shall be fined not more than $10,000 or imprisoned for not more than five years or both." 18 U.S.C. §1953. Subsection (b) of this statute exempts certain paraphernalia:

"(1) parimutuel equipment where parimutuel betting is legal,

(2) betting materials transported into a state where betting on sports events is legal,

(3) betting information contained in newspapers and other similar publications." For an analysis of the legislative history of this statute, see Pollner, *supra* note 367.

However, the most comprehensive weapon forged by the 87th Congress was the so-called "travel bill," which renders criminal any travel in interstate commerce or any use of a facility in interstate commerce or any use of the mails in furtherance of a gambling enterprise.[369] The same section prohibits these interstate acts when committed in connection with prostitution and racketeering.[370] If this statute is accorded the same liberal interpretation with regard to the required connection between the illegal enterprise and interstate commerce that has been prevalent in the construction of most other federal criminal laws premised upon the commerce power, this section should extend federal jurisdiction over broad areas of organized criminal activity. Very slight and incidental uses of the mails or contacts with interstate commerce have been held sufficient to invoke federal power under mail fraud,[371] interstate transportation of stolen goods,[372] and similar laws.

Federal jurisdiction is not limited to the major profit-making enterprises of organized crime, gambling, narcotics, racketeering, and prostitution; it also encompasses certain of the subsidiary crimes committed by an organization in order to acquire or maintain its power in the community. The threats and violence used to consolidate its position violate federal law if the channels of interstate commerce are utilized[373] or if these acts interfere with interstate commerce.[374] Moreover, the transfer or possession of the most effective instruments of violence, submachine guns and sawed-off shotguns, violates federal law unless a special federal tax is paid and the owner is registered with federal authorities.[375] Bribery of local officials, the primary

[369] "(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to
(1) distribute the proceeds of any unlawful activity; or
(2) commit any crime of violence to further any unlawful activity; or
(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,
and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.
"(b) As used in this section 'unlawful activity' means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States . . . " 18 U.S.C. §1952.
There appear to be four major elements which must be established in a prosecution under this statute: first, that the accused traveled or used a facility (this might include telegraph, telephone, radio, railroad, bus, or other form of transmission or transportation) in interstate commerce; second, that the accused in traveling or using such facility intended to distribute the proceeds, commit a crime of violence, or perform other acts which facilitate the conduct of a business enterprise; third, that the business enterprise facilitated by such acts involved a form of gambling (or other enumerated activity) illegal in the state where committed or under federal law; fourth, that the accused, after traveling or using a facility in interstate commerce, committed or attempted to commit one of the proscribed acts in furtherance of such business.
This statute extends federal jurisdiction over a number of factual situations typical of the conduct of organized crime. Among these are the importation of out-of-state gunmen to maim or murder, the collection of gambling debts from out-of-state betters, and the distribution of profits to an organization leader in another state. For an analysis of the legislative history of this statute, see Pollner, *supra* note 367.

[370] "(b) As used in this section 'unlawful activity' means (1) any business enterprise involving . . . narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States." 18 U.S.C. §1952. See note 369 *supra* for text of this statute.

[371] See, *e.g.*, Henderson v. United States, 202 F.2d 400 (6th Cir. 1953), in which it was held that a fraudulent scheme violates the federal mail fraud statute, 18 U.S.C. §1341, even though it was not intended that the mails be used in the execution of the scheme and even if the mailing which actually occurred was only incidental to the scheme. Illustrative are cases holding that deposit of checks drawn on out-of-state banks (Marvin v. United States, 279 F.2d 451 (10th Cir. 1960)) and mailing of lulling communications to pacify the victims after a scheme has been completed (Blue v. United States, 138 F.2d 351 (6th Cir. 1943), *cert. denied*, 322 U.S. 736) constitute uses of the mail proscribed by the act.

[372] "The transporting charge does not require proof that any specific means of transporting were used. . . . When Pereira delivered the check, drawn on an out-of-state bank, to the El Paso bank for collection, he 'caused' it to be transported in interstate commerce." Pereira v. United States, 347 U.S. 1, 9 (1954). *Accord*, United States v. Doran, 299 F.2d 511 (7th Cir. 1962), *cert. denied*, 370 U.S. 925.

[373] "(a) Whoever travels . . . or uses any facility in interstate or foreign commerce . . . with intent to—
(2) commit any crime of violence to further any unlawful activity;
(b) As used in this section 'unlawful activity' means . . . (2) extortion . . . in violation of the laws of the State in which committed or of the United States." 18 U.S.C. §1952. See note 369 *supra* for text of this statute.

[374] 18 U.S.C. §1951. See notes 358 and 359 *supra* and accompanying text.

[375] "It shall be unlawful for any person to receive or possess any firearm which has at any time been transferred in violation of [provisions requiring payment of manufacturers' tax, retailers' tax or transfer tax, and registration]. Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of such firearm, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains such possession to the satisfaction of the jury." 26 U.S.C. §5851.

means by which criminal organizations remain secure from criminal prosecution, likewise violates federal law if any facility of interstate commerce is employed in connection with the bribery.[376]

Before enactment of the recent legislation directed against organized crime, the most potent federal weapons were tax fraud prosecutions[377] and deportation proceedings.[378] These techniques were discussed in detail, in a previous installment of this series, as examples of one approach to the problem of organized crime—the prosecution of organization leaders for crimes unrelated to the organization's primary activities.[379] The necessity for resorting to this indirect approach to the prosecution of organization leaders should diminish with the advent of statutes which afford the federal government other bases of jurisdiction over the activities of organized crime. However, it is doubtful that the indirect method will fall into complete disuse. It still remains virtually the only feasible approach where an interstate nexus does not exist or cannot be proved.

In the grant of at least some federal jurisdiction over organized crime, a firm initial step has been taken toward affording the local prosecutor a valued ally if he is honest and an effective substitute if he is corrupt. However, the primary focus in the federal area thus far has been upon supplying federal authorities with jurisdiction over organized crime, to the neglect of equipping federal law enforcement with the legal weapons essential to a successful campaign against that foe. Many states have legislation better designed to cope with organized crime than the federal government possesses. Such elementary techniques as immunity, wiretapping, and closing of premises used for illegal enterprises are either non-existent or available only with regard to a narrowly limited class of offenses. Because of the reputation for honesty which the federal government enjoys, many people have high expectations for its success against criminal organizations, expecting it to play a leading role in the struggle against organized crime. But until Congress elects to furnish the federal law enforcement arm with the basic weaponry for a contest against organized crime, the federal government is forced to play its role with a short lance and a dull sword.

II. Techniques for Discouraging Officials From Behaving Improperly

Every potentially corrupt or actually corrupted officer, from patrolman to judge, is in constant tension. He must make two basic decisions—first, whether to accept "favors" from a criminal organization and, second, once a "debt" is owed the organization, whether to perform in a given situation in accord with the wishes of that organization. These decisions will be influenced at least somewhat by what the tempted individual considers the legal consequences are likely to be if his improper action is discovered. If the sanctions are severe and the probability of their imposition great, many tempted officials may be deterred from becoming corrupt, and corrupted individuals may be influenced not to behave improperly in a given case. Two categories of sanctions are available against public officials who act improperly—civil and criminal.

A. *Civil Sanctions Against Corrupt Officials*

The civil remedies have the purpose of ousting the offending official from his government position. Ouster has the dual effect of purging law enforcement of a traitor and of serving as a warning to others who might be tempted to follow a similar path.

At least three different types of civil remedies are available in various states: personal removal actions, both executive and judicial,[380] proceedings to remove the prosecutor's name from the rolls of court,[381] and administrative removal proceedings.[382]

New York law exemplifies removal by the executive. Any officer appointed by the Governor alone can be removed by the Governor after a proper hearing on the charges made against him.[383]

[376] "(b) As used in this section 'unlawful activity' means . . . (2) . . . bribery in violation of the laws of the State in which committed or of the United States." 18 U.S.C. §1952. See note 369 *supra* for remainder of text of this statute.

[377] 26 U.S.C. §7201 *et seq.*, discussed in the second installment of this article. See, 54 J. Crim. L., C. & P.S. 1, 16–18 (1963).

[378] These statutory sections were discussed in the second installment of this article. See, 54 J. Crim. L., C. & P.S. 1, 18–20 (1963).

[379] This approach was discussed and evaluated in the second installment of this article at 54 J. Crim. L., C. & P.S. 1, 15–21 (1963).

[380] See, *e.g.*, State v. Allen, 126 Fla. 878, 172 So. 222 (1937); In re Byrne, 193 La. 566, 191 So. 729 (1939).

[381] See, *e.g.*, Wilbur v. Howard, 70 F. Supp. 930 (E.D. Ky. 1947).

[382] This category includes the common Civil Service Hearing. See, *e.g.*, Ill. Rev. Stat. ch. 24, §§51, 51.1.

[383] "An officer appointed by the governor . . . whose appointment is not required by law to be made by and with the advice and consent of the senate, any county

If the officer involved has been appointed by the Governor with the advice and consent of the state legislature, then he may be removed by the legislature upon recommendation from the Governor.[384] In California, removal by judicial action, rather than by the executive, obtains. Such action is instituted by a grand jury accusation, and trial of the charge is before a jury.[385] Although technical rules of evidence are not binding in such a proceeding,[386] it is conducted essentially as a regular criminal trial.[387]

Many critical law enforcement positions, particularly within the police arm, are part of the state civil service system. When individuals holding such positions are corrupted, their removal can be attained only through administrative procedures established under the civil service system. In Illinois, a member of the police force cannot be removed or suspended for longer than 30 days for accepting a bribe or failing to enforce laws unless he has received a hearing by the so-called Police Board.[388] If the charges are established by a preponderance of the evidence,[389] the Board by majority vote can cause the dismissal of the offending police officer.[390]

All of these civil methods of discouraging corrupt action are subject to an inherent weakness. The financial rewards held out by organized crime may so overshadow the economic value of the officer's government position that the prospect of risking his job will not dissuade him from becoming a vassal to organized crime. In weighing the possible loss of government salary against the riches to be gleaned from being in league with a criminal organization, the officer may find the balance tipped toward the latter course.

Despite this obvious deficiency, the civil sanctions possess certain advantages over the more severe penalties of the criminal sanctions against corrupt action. Ordinarily they are available against lesser forms of misconduct than would justify a criminal proceeding.[391] For example, close personal association with members of criminal organizations or conflict-of-interest business ar-

treasurer, any county superintendent of the poor, any register of a county may be removed by the governor . . . after giving to such officer a copy of the charges against him and an opportunity to be heard in his defense." McKINNEY'S CONSOL. LAWS, N.Y. PUBLIC OFFICERS LAW §33.

[384] "The governor before making a recommendation to the senate for the removal of any officer may in his discretion take proofs, for the purpose of determining whether such recommendation shall be made. . . . An officer appointed by the governor by and with the advice and consent of the senate, except an officer who is or any or either of the officers who are the head of a department, and except as otherwise provided by special provision of law may be removed by the senate upon the recommendation of the governor . . . ." McKINNEY'S CONSOL. LAWS, N.Y. PUBLIC OFFICERS LAW §32.

[385] "An accusation in writing against any officer of a district, county, or city, including any member of the governing board of a school district, for wilful or corrupt misconduct in office, may be presented by the grand jury of the county for or in which the officer accused is elected or appointed. An accusation may not be presented without the concurrence of at least 12 grand jurors . . . ." DEERING'S CALIF. CODES ANN. (Government) §3060.

"Upon a conviction and at the time appointed by the court it shall pronounce judgment that the defendant be removed from office. To warrant a removal, the judgment shall be entered upon the minutes, and the causes of removal shall be assigned therein." *Id.* §3072. "Corrupt misconduct" comprises any wilful malfeasance, misfeasance, or nonfeasance. People v. Tice, 144 C.A.2d 750, 301 P.2d 588 (1956).

[386] People v. Harby, 51 C.A.2d 759, 125 P.2d 874 (1942).

[387] "The trial shall be by a jury, and conducted in all respects in the same manner as the trial of an indictment." DEERING'S CALIF. CODES ANN. (Government) §3070.

[388] "In any city of more than 500,000 population in which this Act is in operation, no officer or employee of the police department in the classified civil service of the city whose appointment has become complete shall be removed or discharged, or suspended for more than 30 days except for cause upon written charges and after an opportunity to be heard in his own defense by the Police Board . . . .

"The Police Board shall establish rules of procedure not inconsistent with the provisions of this section respecting notice of charges and the conduct of the hearings before the Police Board. The Police Board shall not be bound by formal or technical rules of evidence, however, hearsay evidence shall be inadmissible. The person against whom charges have been filed shall have the right to appear before the Police Board with counsel of his own choice and defend himself; shall have the right to be confronted by his accusers; shall have the right to cross-examine any witness giving evidence against him; and shall have the right by counsel to present witnesses and evidence in his own behalf . . . ." ILL. REV. STAT. ch. 24, §51.1.

[389] In Oratowski v. Civil Service Com'n of City of Chicago, 3 Ill. App. 2d 551, 123 N.E.2d 146 (1954), it was decided that the civil standard of a preponderance of the evidence obtained in civil service proceedings rather than the more onerous criminal standard of proof beyond a reasonable doubt.

[390] "The concurrence of a majority of the members of the Police Board shall be necessary for any disciplinary recommendation or action entered." ILL. REV. STAT. ch. 24, §51.1.

[391] "Civil remedies . . . are more flexible than criminal prosecutions in that they need not be based upon the commission of a crime." Note, *Legal Methods for the Suppression of Organized Crime: Legal Remedies Against Corrupt Law Enforcement Officers*, 48 J. CRIM. L., C. & P.S. 414, 420 (1958).

rangements with them sometimes can be the predicate for dismissal of a government official.[392] Moreover, in civil proceedings a lesser standard of proof and less rigorous procedures usually prevail than those obtaining in criminal actions.[393]

B. *Criminal Sanctions Against Corrupt Officials*

The three applicable common law criminal actions are malfeasance, misfeasance, and nonfeasance. They may be differentiated as follows: malfeasance involves doing an act wrongful in itself,[394] such as accepting a bribe;[395] misfeasance constitutes doing a lawful act in an improper manner;[396] nonfeasance entails a failure to perform an act which the official has a duty to perform.[397] In misfeasance and nonfeasance suits, a "corrupt motive" generally must be established if the act omitted or improperly performed was a discretionary act.[398] Only "wilfulness" need be shown if the act was ministerial.[399]

Although the common law labels, malfeasance, misfeasance and nonfeasance, have been dropped in many states, the statutes still reflect these traditional concepts of official misbehavior. In the recently enacted Illinois Criminal Code of 1961 all three crimes are unified in the offense "Official Misconduct," which is defined as follows:

> "A public officer or employee commits misconduct when, in his official capacity, he commits any of the following acts:
>
> (a) Intentionally or recklessly fails to perform any mandatory duty as required by law; or
>
> (b) Knowingly performs an act which he knows he is forbidden by law to perform; or
>
> (c) With intent to obtain a personal advantage for himself or another, he performs an act in excess of his lawful authority; or
>
> (d) Solicits or knowingly accepts for the performance of any act a fee or reward which he knows is not authorized by law."[400]

In addition to those sanctions aimed generally at misbehavior by public officials, some states have recognized the special temptations offered by criminal organizations and have enacted statutes specially designed to cope with the misconduct peculiar to the organized crime field. In New York [401] and California[402] an affirmative duty is placed upon all law enforcement officers and prosecutors diligently to investigate and prosecute gambling offences. Any omission to perform these duties is rendered criminal. Under these statutes it is unnecessary to prove a corrupt or evil motive to sustain a conviction, inasmuch as acts which

[392] People v. Becker, 112 C.A.2d 324, 246 P.2d 103 (1952).

[393] "In criminal proceedings against public officials, the prosecutor is governed by general rules governing the weight and sufficiency of evidence in criminal prosecution. Furthermore, the rules as to admissibility of evidence in criminal prosecution usually apply in criminal action against officials. Thus, if the law enforcement official has neglected his duties, or performed them improperly, but there is insufficient evidence to support a criminal charge of nonfeasance, a civil action may at least permit his removal from office." Note, *supra* note 391, at 422. However, some cases have held that the state must discharge the same burden of proof in a civil removal action as would pertain in a criminal prosecution for the same alleged misconduct in office. Phillips v. State, 75 Okla. 46 (1919); *cf.*, Sheen v. Paine, 32 Utah 295, 90 Pac. 440 (1907).

[394] Speer v. State, 130 Ark. 457, 198 S.W. 113 (1917); *Ex parte* Amos, 112 So. 289 (Fla. 1927).

[395] State v. Jefferson, 88 N.J.L. 447, 97 Atl. 162 (1916).

[396] Holmes v. Osborn, 57 Ariz. 522, 115 P.2d 775 (1941); ordinarily self gain is not an ingredient of the crime of misfeasance.

[397] Hardie v. Coleman, 155 Fla. 119, 155 So. 129 (1934).

[398] State v. Wheatlery, 192 Md. 44, 63 A.2d 644 (1949). "Most acts performed by a prosecutor, for instance, are discretionary. This requirement of 'corrupt intent' is designed to protect the discretionary official from indictment for mere error of judgment or for mistake of law." Note, *supra* note 391, at 424.

[399] State v. Sweeten, 83 N.J.L. 364, 85 Atl. 309 (1912); Commonwealth v. Hubbs, 133 Pa. Super. 244, 8 A.2d 618 (1939). Most acts performed by policemen, for instance, fit in this category of "ministerial" acts, i.e., acts which they are under a duty to perform as specified in a statute or official regulation.

[400] ILL. CRIM. CODE art. 33-3 (1961).

[401] "It is the duty of all sheriffs, constables and police officers to inform against all persons whom they have reason to believe are offenders against the provision of this article [anti-gambling]; and it shall be the duty of prosecuting or district attorneys to prosecute such persons. Any omission by the officers herein mentioned of their respective duties shall be punishable by a fine not exceeding five hundred dollars." MCKINNEY'S CONSOL. LAWS, N.Y. PENAL CODE §997.

[402] "Every district attorney, sheriff, constable, or police officer must inform against and diligently prosecute persons whom they have reasonable cause to believe are offenders against the provisions of this chapter [chapter on gaming], and every such officer refusing or neglecting so to do, is guilty of a misdemeanor." DEERING'S CALIF. CODES ANN. (Penal) §335. Prosecutions under this statute have included the conviction of a police officer for failing to inform against and diligently prosecute gambling offenses. Coffey v. Superior Court, 147 Cal. 525, 82 Pac. 75 (1905).

were previously discretionary have been rendered obligatory.

Criminal prosecutions for official misconduct have undeniable advantages over the more often employed civil remedies. The severe penalties and widespread publicity associated with a criminal proceeding probably have a greater deterrent effect upon public officials contemplating improper actions than do the consequences of a civil removal proceeding.[403] The publicity attending such a trial also has subsidiary effects which may prove damaging to the criminal organization. The public is aroused at least temporarily and may demand stricter law enforcement. Also, patronage of the organization's enterprises may well fall off. These latter effects will give even a criminal organization reason to pause.

III. Techniques for Minimizing the Effects of Improper Official Behavior When It Does Occur

No matter how effective the criminal and civil sanctions against official misbehavior may be, some officials will be corrupted, and some corrupt officials will perform their duties in accordance with the wishes of organized crime. Thus, the focus of the problem of corruption shifts from whether improper action will be taken to the magnitude of such action and the permanency of its effects.

The system for prosecuting persons suspected of crime which has evolved in our country contains a whole procession of built-in safeguards to insure that an innocent man will not be punished mistakenly. At almost every stage of the prosecutive process, there are provisions for review of any determination that the accused should be held to account for the crime. The decision of the police officer or Justice of the Peace that there was ample cause for arrest of the accused is reviewable in a hearing on a motion to suppress evidence seized incidental to the arrest. The decision to hold an accused for grand jury action is reviewed in a preliminary hearing. The sufficiency of the indictment and compliance with procedural requirements during the indictment process are reviewable through a motion to dismiss. After the trial, not only the trial itself but the entire proceeding against the defendant from arrest onward is subject to close scrutiny by one or more levels of appellate courts. And finally, in addition to appeal, various post conviction remedies are usually provided to gain the freedom of a man who was erroneously convicted.

By contrast, in our system there are no procedures to insure that a guilty man will not be freed erroneously. If at any step during the prosecution of an individual a decision is reached, no matter how grievously in error or how corruptly motivated, that the accused is innocent or some procedural requirement ignored, he goes free. Ordinarily no review of any such decision to suppress prosecution of the accused is available.[404]

Thus, our criminal procedure resembles a series of contests, all of which must be won by the government to convict, but only one of which must be won by the defendant, whether by fair means or foul, to conclude the entire series in his favor. Each prosecution victory may have to sustain appellate scrutiny, while in most jurisdictions a victory by the defendant is unimpeachable.[405] This system is an open invitation to corruption. When organized crime is a defendant it must merely obtain corrupt action at one of the many stages in the prosecutive process to protect itself. It does not have to fear reversal of the corrupt decision, which is final and unappealable.

A means of withdrawing this invitation to corruption is to provide closer supervision of corruptible elements of the law enforcement body by relatively incorruptible elements. A pair of examples may illustrate the technique.

A corrupt prosecutor often furthers the ends of the criminal organization by "nollei prosing" a prosecution in which the organization has an interest. Now, with an honest judge, if the state required, as some do, judicial approval of the prosecutor's decision to "nollei pross" a case,[406]

[403] "A successful criminal prosecution can serve as an object lesson to other officials who might be, or might contemplate being in the pay of organized crime .... The nature of a criminal prosecution is such that newspapers and other mass media seize upon it as good selling material, with the result that such a prosecution of a public official may be clothed with publicity, often sensationalized." Note, *supra* note 391, at 421.

[404] The states vary widely in the scope of the state's right to appeal in criminal cases. Connecticut, Vermont, and California are typical of the liberal jurisdictions. Vermont actually stipulates that the state's right of appeal shall be coextensive with the defendant's right of appeal. Vt. Stat. Ann. tit. 13, §7403 (1957). However, most states do not allow appeal by the states from the trial-in-chief, limiting appeal to certain pre-trial motions. Kronenberg, *Right of a State To Appeal Criminal Cases*, 49 J. Crim. L., C. & P.S. 473, 477 (1959).

[405] See note 404 *supra*.

[406] "The entry of a nolle prosequi is abolished, and neither the attorney-general nor the district attorney can discontinue or abandon a prosecution for a public

the improper decision which the organization had induced the prosecutor to make might avail them nothing. The honest judge, in discharging his duty of supervising the prosecutor, would probably deny the prosecuter his request to "nollei pross" the case, and the organization purpose would be thwarted.

A corrupt judge often serves the criminal organization by destroying the prosecution's case through grant of a motion to suppress physical evidence even though the search was lawful. This ill-gotten decision would reap no dividends to the organization if it were appealable to a presumably honest appellate court system.[407] The appellate court would merely reverse the trial court, and the case would go to trial complete with the originally suppressed physical evidence. New York recently enacted a statute extending to the state the right to appeal a lower court decision in this vital area.[408] However, the effect of corruption will be materially reduced only when every decision rendered by prosecutor, judge, or jury is amenable to supervision and possible correction through appeal by the state.[409]

Another means of circumscribing the power of a corrupt official to serve a criminal organization is the reduction of the number and scope of discretionary decisions he may make relative to the activities of organized crime. For example, the value of a bribed judge to a criminal organization is significantly reduced if his absolute discretion in the sentencing process is withdrawn and he is required by law to impose a certain minimum term of imprisonment. Federal law sets such mandatory sentences for narotic offenses,[410] and several states prescribe minimum sentences for gambling offenses and certain other crimes.[411] The same principle applies when an affirmative duty is imposed upon prosecutors to investigate and fully prosecute all gambling offenses brought to their attention. The possibility of corrupt action remains, but the potential scope of such action is sharply limited.

IV. Techniques for Maximizing the Results an Honest Element Within the Government Can Achieve Despite the Presence of Corrupt Officials

Any successful drive against organized crime requires a degree of teamwork among the various levels of law enforcement and among individuals at each level. When some members of the team are in reality working for the opposition, the problems are multiplied many times. If some of the police are corrupt, they fail to "see" organization activities going on under their noses, or they fail to investigate properly. If some of the prosecutor's staff are corrupt, they bungle cases assigned to them which may injure the organization. A corrupt judge or court clerk may leak the information that a search warrant has been issued against an organization establishment. Accepting the probability that corruption exists among at least some persons at all these levels, how do we minimize their influence over law enforcement? Or, conversely, how can the power of non-corrupted law enforcement officials be maximized?

The ideal sought by most proponents of sound administrative practice is a single unified law

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offense, except as provided in the last section." Deering's Calif. Codes Ann. (Penal) §1386. "The court may, either of its own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons of the dismissal must be set forth in an order entered upon the minutes. No dismissal shall be made for any cause which would be ground of demurrer to the accusatory pleading." Deering's Calif. Codes Ann. (Penal) §1385. See also, McKinney's Consol. Laws, N.Y. Code of Crim. Proc. §672.

[407] Recent federal legislation in the area of narcotics control authorizes appeal from motions to suppress in this narrow but important class of federal criminal cases. See 18 U.S.C. §1404 (1960).

[408] On April 29, 1962, the following provision and several companion sections became effective:

"In taking an appeal from an order granting a motion for the return of property or suppression of evidence pursuant to subdivision six of section five hundred eighteen, the people must file, in addition to a notice of appeal as required by section five hundred twenty-two, a statement asserting that the deprivation of the use as evidence of the property ordered to be returned or suppressed, has rendered the sum of the proof available to the people with respect to a criminal charge which has been filed in a court, or which the people propose to file or to cause to be filed in a court, either (1) insufficient as a matter of law, or (2) so weak in its entirety that any reasonable possibility of prosecuting such charge or prospective charge to a conviction has been effectively destroyed.

"The taking of such an appeal and the filing of such a statement shall constitute a bar to the filing of any criminal charge and to the prosecution of any existing criminal charge against the moving party involving the property in question, unless and until the order of return or suppression is reversed on appeal and vacated." McKinney's Consol. Laws, Code of Crim. Proc. §518-a.

[409] Concerning the constitutionality of extending to the state a full spectrum right of appeal, see Annotations, 113 A.L.R. 636, 157 A.L.R. 1065.

[410] See, 18 U.S.C. §1407, 21 U.S.C. §174, 26 U.S.C. §7237.

[411] See, *e.g.*, Minn. Stats. Ann. §623.20.

enforcement body, each arm of which confines its actions to the special sphere which is assigned as its responsibility and each arm dependent upon specialists within other sections for services essential to the completion of any investigation or prosecution. Thus, a prosecutor prosecutes and depends upon detectives for investigation, a crime laboratory for scientific appraisal of evidence, and policemen for execution of search and arrest warrants. In theory, this leads to a smooth functioning machine with each element of the whole performing those tasks for which it is best prepared by training, talent, and experience. Unfortunately, that system of organization and practice which is best suited to the administration of the criminal law where the latter is carried on in a vacuum may be the one most susceptible to the monkey wrench of political corruption. The closely meshed gears of an efficient law enforcement machine may be thrown awry by a few well-placed bribes.

Laws which reduce the dependence of one law enforcement official upon fellow officers in bringing a case to a successful conclusion, laws which allow him to circumvent at will individual officials or whole departments, laws which repose ultimate power and ultimate responsibility in several rather than one law enforcement official, all these render a law enforcement body potentially a more effective instrument for the contest against organized crime and political corruption. Admittedly, such laws would run counter to deeply ingrained principles of efficient management. The centralization of power and responsibility and the distribution of functions among discrete subordinate departments so coveted by administrators is profaned by such a proposal. And yet, the fact of political corruption is so pervasive and so perverting that efficiency and success actually may be promoted by overlapping responsibilities, overlapping powers and overlapping purpose.

Illustrative of the principle involved are two specific tools which could have the effect of multiplying the power which a handful of honest, dedicated men can wield against organization activity. One of these provides a method of avoiding information leaks when search and arrest warrants are secured. It would authorize law enforcement officers of one county to procure these warrants in adjoining counties and then return to their own county to conduct the search or make the arrest.[412] The second tool cuts to the bone the amount of evidence which must be adduced to establish violations of certain gambling provisions. For instance, some states have made ownership of a federal gambling stamp prima facie evidence of a violation of the state gambling laws.[413] This means that a diligent prosecutor could virtually single-handedly gather and process all the evidence necessary to a gambling conviction. He would not have to rely upon the honesty of the police force to detect and properly investigate the gambling activity. The prosecutor would not have to trust a judge and his staff to keep silent about arrest and search warrants. He would merely visit the local internal revenue office, obtain properly identified copies of the pertinent documents, and commence the prosecution. Of course, the federal gambling stamp is not conclusive evidence, and a judge or jury could find the defendant not guilty despite his ownership of such a stamp. However, according to the terms of the statutes to which reference is made, such evidence is *sufficient*, in and of itself, to convict. Although the prosecutor probably would deem it advisable to obtain corroborating evidence, these statutes place him many steps ahead on the path to securing a conviction. His reliance on other individuals and other elements

[412] Such a system was proposed by the ABA committee on organized crime. See, ABA REPORT ON ORGANIZED CRIME AND LAW ENFORCEMENT (1952).

Under most existing statutes, search warrants must be obtained from a judicial officer who presides within the geographic area where the search is to take place. See, *e.g.*, DEERING'S CALIF. CODES ANN. (Penal) §1528; MCKINNEY'S CONSOL. LAWS, CODE OF CRIM. PROC. §796; ILL. REV. STAT. ch. 38, §§691, 692, 693; FLA. STAT. ANN. §933.01.

In Robinson v. State, 124 So. 2d 714 (Fla. App. 1961), *modified on other grnds*, 132 So. 2d 156, *cert. denied*, 132 So. 2d 159, an ambiguity in the Florida statute was resolved with a holding that a Justice of the Peace of one district within a county could *not* issue a warrant for a search to be conducted of a home in another district in the same county.

[413] Certain states have attempted to create by statute a presumption of violation of state law from conformance with the Federal Gambling Tax Acts. See FLA. STAT. ANN. §849.015 (1955). The Florida statute was held unconstitutional, Boynton v. State, 75 So. 2d 211 (Fla. 1954), but a virtually identical Alabama statute was upheld, Griggs v. State, 73 So. 2d 382 (Ct. App., Ala.; 1954); *cf.*, Long v. State, 105 So. 2d 136 (Ct. App. Ala. 1958). In any case, federal records of conformance with the federal gambling tax are admissible in state prosecutions. Irvine v. People, 347 U.S. 128 (1954). *Cf.*, Lewis v. United States, 348 U.S. 419 (1955); United States v. Kahriger, 345 U.S. 22 (1953). One municipality even passed an ordinance imposing a criminal penalty on anyone possessing a federal gambling stamp within the city limits. Ord. N. 4030, City of Chattanooga, Tenn. This ordinance was held constitutional and otherwise proper in Deitch v. City of Chattanooga, 258 S.W.2d 776 (Tenn. 1953).

of the law enforcement system, who might be corrupt, is reduced proportionately.

Any legislation which allows a dedicated law enforcement officer, at his option, to circumvent certain individuals within the law enforcement structure serves to enhance the power which that official can bring to bear against a criminal organization. Similarly, any law which lessens the dependence of an individual law enforcement officer upon other individuals or levels of law enforcement, in prosecuting activities in which organized crime is engaged, probably drastically reduces the market value of corruption.

V. Implementation of an Effective Program Against Organized Crime

The main purpose of this article has been to survey some of the more important legal countermeasures useable in the containment of organized crime. This survey is now complete. As has been stressed repeatedly, none of these countermeasures is a pancea. However, it is believed that the entire set can form the nucleus of an effective program. Remaining to be discussed are certain considerations which underlie any attempt to implement such a program.

The first and most frequently argued of these considerations is in reality a false issue. It arises because of the position urged by many that instead of developing and invoking effective sanctions against gambling and similar specialties of organized crime, criminal organizations can better be destroyed through the legalization of these activities. Gambling, prostitution, and like ventures of criminal organizations serve deep and abiding needs of substantial sectors of the population, runs the argument, yet the satisfaction of these needs is rendered illegal in most states. However, the illegality of these activities is no longer supported by the moral code to which most Americans subscribe. The argument concludes with the assertion that organized crime exists because the satisfaction of these needs is illegal, and it would evaporate if only we would be more "realistic" and legalize gambling and similar products and services.

Whether and to what extent gambling or any other activity should be legal is a concern for social scientists, voters, and legislatures of the respective states. In most states gambling, for instance, is legal in certain circumstances; it may be that it could be granted a broader stamp of legality without transgressing against present day morality or infringing seriously upon other values. But as a method of coping with organized crime the broader legalization of activities such as gambling is merely an illusion. This is because organized crime is not engaged in gambling as such, or prostitution as such; rather it specializes in illegal activity regardless of type. When prohibition was abandoned, organized crime merely shifted its primary emphasis from bootleg whiskey to gambling. If gambling were legalized, criminal organizations would concentrate their efforts in new fields of endeavor, whether those be areas already invaded, such as shylocking, racketeering, and narcotics, or relatively new areas, like robbery, fencing, or securities fraud. Any species of criminal enterprise which can be more successfully conducted on an organized, long-term basis than by individuals or ad hoc groups is a field ripe for organized crime. Today it derives a major proportion of its income from gambling because gambling is eminently suited to large-scale systematic operation and poses minimal risks to a well-run criminal machine. But a well-heeled and well-run criminal organization could shift on a season's notice to the cultivation of other weaknesses and the reaping of added riches from those weaknesses. The factors which have made organized crime pre-eminent in illegal gambling will serve to insure its dominance in other fields of concentration. The insulation which protects the organization leadership, the patchwork pattern of law enforcement jurisdiction which fragments its opposition, the terror it instills in potential witnesses, all these remain. Police, prosecutors, or judges who have been paid to overlook gambling infractions can be trained as well to ignore the new offenses which make up the chosen successor to gambling as the prime source of organization revenue. With the sources of its strength intact, organized crime would stand unmoved by the sudden legalization of gambling, or narcotics, or any other activity which comprises a substantial source of current revenue. Accordingly, whatever else might be accomplished by such legalization, the weakening or demise of organized crime is not a forseeable result.

The most significant threat implicit in legal prohibition of an activity which, like gambling, is commercially profitable is not the widespread infractions of the law it may generate, but rather the powerful criminal organizations it will spawn and feed. Consequently, the creation of special sanctions focused on this specific prime danger

appears to be in order. Penalties and legal weapons which would be considered grossly excessive by most persons if employed against a casual violator or a small-time operator may well constitute bare minimums in checking the growth of a major criminal organization. Thus, what would be a misdemeanor and punishable by fine or short imprisonment if the convicted defendant were a better or part-time "bookie," should properly be a felony punishable by several years in prison if the defendant is a member of a large-scale criminal organization. Further, techniques such as compulsory reports to the police, immunity, and wiretapping are not helpful or desirable in enforcing the policy against gambling with regard to the casual better or non-syndicate gambler. Yet those same techniques may be indispensible to effective treatment of the criminal organizations taking part in the same activities. These considerations suggest that, in the preparation of a program for the containment of organized crime such as has been discussed in this article, it may be wise to discriminate between criminal organizations and others committing violations of the same laws. Such discrimination would be advisable both because it might make such a program more palatable to legislators and because it would tend to encourage a broader base of public support during the actual implementation of the program.

Separation of organized criminals from others engaged in similar conduct is a considerable task. It implies the creation of refined statutes which will dissociate small-time practitioners from the vast criminal cartels. Although difficult, this does not appear impossible. Organized crime has at least two critical dimensions which tend to distinguish it from other criminal entities and which would prove useful in formulating a workable statutory distinction. The first is the size of the criminal organization itself. It might be feasible to define a criminal organization as any group engaged in criminal activity which is larger than a certain stated minimum membership. Thus, if law enforcement officials had reason to believe that a given operation were being conducted by a group larger than the stated minimum, the special procedural and evidence-gathering techniques would be available. And, if the prosecution could establish at trial that this in fact was the case, the heavier penalties would apply. Of course, the minimum membership required to trigger the special treatment to be accorded organized crime necessarily would be set at different levels for different sized communities. A number which would comprise a substantial criminal organization in a medium-sized city such as Kansas City or Cincinnati might not qualify as more than an insignificant group in New York City or Chicago. Therefore, considerable study would be required before establishing the applicable cut-off in any particular state or locality. Furthermore, the legislature should be constantly sensitive to changing conditions which might require an adjustment in the figure.

Unfortunately, this criterion for discriminating between organized crime and average criminals has at least one serious drawback. That is the tremendous burden it would foist upon the government as a condition for invoking the special techniques and sanctions. Although the total membership of a criminal organization is large, each of its outlets and operations ordinarily will employ a relatively slight proportion of the total membership. Accordingly, in order to establish a worthwhile case, law enforcement personnel would be forced to establish the connection between persons engaged in similar activity at a whole series of outwardly separate and distinct establishments.

Organized crime has another dimension, however, which might offer a more suitable basis for drawing the line between it and other criminal groups. That dimension is the scale of its operations. The individual criminal or small group ordinarily can conduct operations which gross only a limited amount. Either through founding large separate establishments or a long circuit of small establishments, criminal organizations derive vastly larger sums from the same lines of endeavor. Capitalizing upon this salient factor, a legislature could enact legislation which would render susceptible to special treatment any operation or series of operations which according to an appropriate standard of measurement exceeds a certain size. New York State recently passed a statute embodying this basic principle. By the terms of this legislation, gambling offenses are only misdemeanors unless the state can establish that the accused accepted more than a certain minimum number of bets per day. In the latter instance, the accused stands convicted of a felony.[414] Expanding this concept to embrace not

[414] "Any person engaged in bookmaking to the extent that he receives or accepts in any one day more than five bets or wagers . . . which bets or wagers shall be of such size that the total of the amounts of money

only gambling but all the nefarious enterprises of organized crime, and allowing the size of the operation to influence not only the ultimate sanctions imposed but the procedural and investigative techniques available, would mark a significant step forward in making the law enforcement response to organized crime as potent and as sophisticated as the threat itself.

As it is hoped this article has revealed, the vital consideration in the containment of organized crime is not *what* activities are rendered legal or illegal, but that with regard to those which are illegal, a system of sanctions be provided sufficient to preclude criminal organizations from waxing rich and powerful through exploitation of the prohibited fields. If the prohibited activity is capable of extensive commercial development through careful preparation and sound organization, it is ripe for organized crime, and a thorough program of effective sanctions is imperative. Gambling is the prime current example of such an activity. If certain forms of gambling are to be illegal, then society should provide law enforcement bodies with a set of weapons, at least as complete as that discussed in this article, which will enable them to deny organized crime the means of founding vast empires on the profits from gambling enterprises.

Unfortunately, the ambivalence which people feel toward the morality of gambling too often is reflected in laws which render gambling illegal but impose "slap-on-the-hand" penalties for infractions of those laws. This dubious compromise creates an unhealthy vacuum: legitimate businessmen will not provide the illegal service out of respect for the law proscribing the activity. But the sanctions established are insufficient to discourage criminal organizations from filling the void and prospering thereby. With that prosperity comes economic and political power. The concentration of such power in the hands of any small group poses a potential danger to a democratic society. But when it is held by a group with no respect for society, a group which makes a profession of breaking law and bending order, the danger is immediate, it is real, and it is perpetual. It is time this nation and its citizens broke the moral deadlock which unleashes powerful criminal organizations in our midst, while binding law enforcement to a nineteenth century pillar of ineffectual laws and antiquated procedures.

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paid or promised to be paid to such bookmaker on account thereof shall exceed five thousand dollars, shall be guilty of a felony punishable by imprisonment for a term not exceeding five years." McKINNEY'S CONSOL. LAWS, N.Y. PENAL CODE §986-c. See also, McKINNEY'S CONSOL. LAWS, N.Y. PENAL CODE §974-a, which applies the same principle to large scale lottery operators.