Notre Dame Law Review

Volume 38 | Issue 6 Article 7

9-1-1963

Civil Liberties and the Proposals to Curb Organized Crime

Monrad G. Paulsen

Conclusion

The mass conspiracy case presents serious procedural due process problems, and requires careful control by the trial court with the cooperation of prosecution and defense counsel.

The prosecution must recognize that its use of the mass trial as an enforcement weapon carries with it many obligations.

Defendants must recognize the practical benefits of working together and of giving up technical rights to protect their common interests.

Both sides must recognize the necessity of alerting the trial court to anticipated problems, and of bringing the court more and more into the adversary byplay of the trial, so that rulings can be made which will protect the interests of all.

Of course, the basic problem of the mass trial is the inability of the defendant to control his own defense, with the threat of confusion of evidence always present. For this reason few defendants will ever consider the mass trial as satisfactory as the individual trial. However, the interests of defendants can be better protected without real harm to the public, by the adoption of safeguards to insure procedural due process.

III. CIVIL LIBERTIES AND THE PROPOSALS TO CURB ORGANIZED CRIME

*Monrad G. Paulsen**

The Attorney General's program aimed at curbing organized crime raises more important questions of draftsmanship and legislative policy than it does the issues of civil liberties.[1] The legislation does not mount a heavy attack upon the protections of those accused of a crime.

It is interesting to contrast the proposals of Attorney General Kennedy with the kind of criminal procedure reforms that were sometimes advanced during the late 1920's and the beginning of the 1930's — another period in our history when there was great concern over the ability of government to suppress those who systematically make profit from criminal activity. There is no proposal today to facilitate criminal convictions by providing for majority vote jury verdicts. There is no proposal to permit the prosecution to comment on the defendant's failure to testify, to sanction the admission of prior convictions into evidence as a part of the prosecution's case, to forbid bail to "known criminals," to abolish the exclusionary evidence rule, to remove the right of a prisoner to remain mute or to place "criminal hangouts" beyond the protection of the fourth amendment.[2] It may be that the Attorney General was reluctant to embark upon the certainly futile task of amending the Constitution, or it may be that he felt the merits of the proposals offered were such as to achieve his

* Professor of Law, Columbia University. A.B., J.D., Univ. of Chicago.

1 The program is described in Pollner, *Attorney Robert F. Kennedy's Legislative Program to Curb Organized Crime and Racketeering*, 28 Brooklyn L. Rev. 37 (1961).

2 See the *Recommendations of the International Association of Chiefs of Police*, 24. J. of Am. Inst. of Crim. L. and Criminology 975 (1934).

objectives without more. Whatever the reason, a dispassionate judgment must admit that questions of civil liberties are not the most important questions which this legislation proposes.

It is instructive to consider the statements made by representatives of the American Civil Liberties Union to the House and Senate Committees concerned with the program designed to curb organized crime.[3] The objections were largely reiterations of positions previously taken, and which, as a matter of existing constitutional law, are lost. The Union was disturbed about the proposed extension of immunity legislation and about the problem of double jeopardy which arises when both the federal and state governments can punish what is essentially the same course of conduct. In addition, the organization noted its concern that sports reporting would be discouraged because of the bill banning the use of wire facilities for the transmission of betting information; that the travel bill would restrict the freedom to travel and that conspiracy charges would be the source of abuse. The statements also express distress that some of the statutes are imprecise and hence raise the due process issue of void for vagueness. They opposed the extension of federal power to repress acts which have historically been left to state action. Yet, one is impressed by the relative mildness of the organization's objections. The Union did not sound the alarm that new dangers to freedom were inherent in the proposed legislation.

However, to say that the program to curb organized crime does not primarily raise civil liberties issues or that it does not place before us massive new issues is not to say that civil liberties issues are lacking.

I. Immunity Legislation Proposed

Two of the points raised by the American Civil Liberties Union seem especially important: first, that immunity legislation, designed to induce the testimony of those involved in some aspects of a crime under investigation, should not be extended; and second, that successive prosecutions for essentially the same acts should not be possible under state and federal laws.

The proposed extension of immunity legislation reminds us again of the undesirable aspects of such statutes. An immunity statute does not give a witness protection equivalent to that given by the right of silence. Men who stand exposed as criminals by their own statements are sure to suffer the loss of community respect. They may lose their jobs or the love and comfort of a family. They are protected against a criminal conviction; they are not protected against a criminal reputation. The statutes prevent a conviction, not a prosecution. Indeed, what a witness is compelled to say may, as a practical matter, provide the basis for a subsequent investigation and conviction in respect to matters other than those under investigation. Immunity legislation ought to insulate the witness against both state and federal criminal prosecutions.

If fifth amendment protection has an important position in the fabric of

3 Hearing before the Senate Committee on the Judiciary, 87th Cong., 1st Sess. on the Attorney General's Program to Curb Organized Crime and Racketeering pages 46-57 (1957); Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. 16, 380-386 (1961).

civil liberties, immunity legislation should be adopted cautiously — only in instances where the need for information is clearly imperative.

II. Two Prosecutions for a Single Act

The double jeopardy problem presented by the crime-curb program is a very real one. Suppose a person who travels from New Jersey to Pennsylvania is apprehended by the Pennsylvania police in a gambling establishment. Suppose further, that this person is found not guilty in a state prosecution for carrying on the gambling enterprise because of insufficient proof connecting the accused with the business. Federal officers charged with racket control may be as sharply disappointed at the outcome as the responsible police in the state. Thereafter officers might search for more evidence. The prosecuting officials could rethink the strategy and technique of the prosecution. They may hope for better luck with a federal jury. If our defendant-traveler is brought to trial in the federal courts, he may be charged, under the Attorney General's program, with traveling in interstate commerce to facilitate the carrying on of an unlawful business enterprise. The fact of his acquittal by the state will not operate as a bar.

The leading modern cases on the question whether state and federal prosecutions for the same acts violate the Constitution of the United States are *Bartkus v. Illinois*[4] and *Abbate v. U.S.*[5] In *Bartkus,* the defendant was first tried in a federal court for violation of a federal statute punishing the robbery of banks insured by FDIC. Bartkus was acquitted in this prosecution. Shortly thereafter he was brought to trial by the state under an Illinois statute on a charge of robbing the same bank involved in the federal case. In a 5-4 decision, the United States Supreme Court upheld the Illinois conviction.

Prior cases justified the Court's opinion. In *U.S. v. Lanza,*[6] the Court had held that a federal prosecution might take place on the same facts which had been the basis of a state conviction on the ground that each sovereign must have the power to punish for the violation of its laws.

The Court's opinion in *Bartkus* reflected some practical as well as historical considerations. Mr. Justice Frankfurter, writing the opinion, expressed fear that, "Were the federal prosecution of a comparatively minor offense to prevent state prosecution of so grave an infraction of a state law the result would be a shocking and untoward deprivation . . ." of the historic duties of a state to maintain peace and order.[7] Conversely, it would undercut federal power if the states could immunize against federal prosecutions by a prior state conviction. The extent to which a state or the federal government should yield this duty in order to protect accused persons against double prosecution was said to be a matter for each government to resolve for itself by appropriate legislation.

The facts of *Bartkus,* as set forth in Mr. Justice Brennan's dissenting opinion,[8] illustrate in its sharpest form a danger that can arise when one course

4 359 U.S. 21 (1959).
5 359 U.S. 186 (1959).
6 260 U.S. 377 (1922).
7 359 U.S. at 137.
8 *Id.* at 164.

of conduct can give rise to successive prosecutions. He pointed out that the federal officers were greatly disturbed by the federal acquittal. The trial judge was openly critical of the jury when its verdict was announced. Federal officers solicited the state indictment and secured additional evidence against the defendant and placed it at the disposal of the Illinois State's Attorney. In his view, "the federal officers engineered the second prosecution and on this second try obtained the desired conviction."[9]

Mr. Justice Black's dissent is rooted in the assertion that the fear of bringing persons to trial twice for the same conduct is "one of the oldest ideas found in western civilization. . . . [D]ouble prosecutions for the same offense are . . . contrary to the spirit of our country."[10] He was unpersuaded by Mr. Justice Frankfurter's argument. If the state were to subvert federal policy by imposing inadequate penalties in criminal cases, Congress could preempt the field of federal concern by giving the federal establishment a monopoly of prosecutorial power or by establishing minimal penalties applicable in both court systems.

In *Abbate,* the defendant had been found guilty in Illinois of conspiring to destroy the property of another. After a plea of guilty and a three months' sentence in the state proceeding, the defendants were found guilty a second time, now in a federal court for a conspiracy to destroy a part of a communications system operated or controlled by the United States. Once more, the *Lanza* principle was accepted without serious question by the majority. Mr. Justice Black, the Chief Justice, and Mr. Justice Douglas dissented, saying in part, "It is just as much an affront to human dignity and just as dangerous to human freedom for man to be punished twice for the same offense, once by a State and once by the United States, as it would be for one of these two Governments to throw him in prison twice for the same offense."[11]

The mere fact that there are two sovereigns does not lessen the impact upon a defendant of two prosecutions, two convictions or a conviction after an acquittal.

The Attorney General's program does not embrace legislation forbidding second prosecutions under state law for the same course of conduct which has formed the basis of a federal prosecution. Nor is it forbidden to institute a federal prosecution after a state case has been concluded respecting the same matter. Abuses arising from harassment due to successive trials are remitted to prosecutorial discretion for their solution.

The situation is covered by a policy statement from the Department of Justice respecting successive prosecutions announced a few days after the decision in *Abbate* and *Bartkus.*

> In two decisions on March 30, 1959, the Supreme Court of the United States reaffirmed the existence of a power to prosecute a defendant under both federal and state law for the same act or acts. That power, which the Court held is inherent in our federal system, has been used sparingly by the Department of Justice in the past. The purpose of this memorandum is to insure that in the future we continue that policy. After a state prosecution there should

9 *Id.* at 169.
10 *Id.* at 151.
11 359 U.S. at 203.

> be no federal trial for the same act or acts unless the reasons are compelling. . . .
>
> . . . I doubt that it is wise or practical to attempt to formulate detailed rules to deal with the complex situation which might develop, particularly because a series of related acts are often involved. However, no federal case should be tried when there has already been a state prosecution for substantially the same act or acts without the United States Attorney first submitting a recommendation to the appropriate Assistant Attorney General in the Department. No such recommendation should be approved by the Assistant Attorney General in charge of the Division without having it first brought to my attention.[12]

III. The Discretion of the Prosecutor

The discretion of the prosecutor is, of course, of immense importance in estimating the practical impact of any program of law enforcement. The abuse of prosecutorial discretion can create civil liberties problems where none would exist. The Attorney General's program provides an opportunity for abuse because not all violators of the law's letter are to be prosecuted and because the program is aimed at a narrow group of persons — and sometimes one suspects at specific individuals.

The purpose of the Fugitive Felon Act is not to secure federal convictions. The Attorney General himself has said that its purpose "is to help and assist the States . . . , not to try to gain jurisdiction ourselves. . . . In the last five years, we picked up somewhere around 5,500 individuals, and we have only prosecuted 25 of them."[13]

The legislation forbidding travel in aid of an unlawful enterprise is apparently not designed for full enforcement. All violators are not to be prosecuted. Attorney General Kennedy was candid on the point when House Judiciary Committee Chairman Cellers put examples to him of petty actions which might be punishable by the five years of imprisonment.

> As I say, the Department of Justice, or law enforcement people, are going to have to use and always have to use every day, every hour, some discretion.
>
> The Federal Government, I think, has used discretion in the past in matters such as this — again including the example that you gave including the fact that in many states gambling is illegal; yet people in their own homes are playing cards and betting.
>
> You don't have law enforcement people who are coming by and ringing the doorbell and arresting them. That kind of thing is not going on because that is not the intention of the statute.[14]

In my view, legislation which is so drafted that a large number of persons may fall into the net of which only a few will be punished is legislation that threatens civil liberties. Under such an arrangement, a defendant may go to prison because of a prosecutor's decision that the defendant is an undesirable

12 Statement of Attorney General William P. Rogers, Press Release of United States Department of Justice, April 6, 1959.

13 Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 87th Cong., 1st Sess., ser. 16, p. 42 (1961).

14 *Id.* at p. 36.

person and not because of a decision that prosecution should be undertaken in order to deter or punish forbidden conduct.

Some discretion is, of course, inevitable and desirable but the exercise of discretion ought not to be arbitrary or capricious. Some constitutional law has been developing on this point which suggests that there are limitations on a prosecutor's discretion flowing from the equal protection clause of the fourteenth amendment.

The first important case respecting discrimination in the enforcement of a criminal statute is *Yick Wo v. Hopkins*.[15] A Chinese was prosecuted in California for operating a laundry without the appropriate license. He responded by saying that it was the practice in San Francisco to refuse licenses to Chinese persons while licenses had been granted freely to Caucasians. Yick Wo was nevertheless convicted. The Supreme Court of the United States reversed the conviction upon the ground that the practical administration of the licensing ordinance had made an arbitrary and unjust discrimination between persons based solely on race.

The constitutional issues in *Yick Wo* were later faced in an interesting 1943 opinion of the District Court of Appeals of California, 1st District.[16] There the defendant was tried and found guilty of perjury for making a false statement in an affidavit of registration as an elector in California. The defendant had asserted that his name was Sam Darcy and that his birthplace was New York City. In fact, his name was Srool Dardeck and the place of his birth was the Ukraine, Russia. He sought to introduce proof that he had been singled out for prosecution for the sole reason that he was a communist. He offered to show, through certain deputy county clerks, that hundreds of untrue statements pertaining to birth and name were found in the records of San Francisco and that in many instances registrants voluntarily or upon notice had corrected the affidavits. The only prosecution instituted was directed against him. Further, he offered to show that never before in the history of California had anyone been prosecuted for perjury for filing a false affidavit of this sort where the person, in fact, had been, as Dardeck was, a qualified elector.

The majority of the court rejected his argument by simply taking the position that one may not prove himself innocent by showing others to be guilty. *Yick Wo* was distinguished on the ground that Yick Wo had not charged that he had been *convicted* because he was a Chinese, but that he had been *refused a license* on account of his nationality. California officials were attempting to keep Chinese from operating laundries; they were not singling out guilty Chinese for criminal punishment.

The dissenting judge failed to be persuaded by the distinction, saying in part:

> The basic principle of our system of government is that our people, including the weak, the outnumbered and the nonconformist stand before the courts on the basis of equality with all other lit-

15 118 U.S. 356 (1886).

16 People v. Darcy, 59 Cal. App. 2d 342, 139 P. 2d 118 (1943). On this issue, generally, see Comment, *The Right to Nondiscriminatory Enforcement of State Penal Laws*, 61 COLUM. L. REV. 1103 (1961).

> igants. If the criminal process can be deliberately and intentionally abused to prosecute a particular individual because he is a communist, not because of what he has done but because of his beliefs, the fundamental cause for which we are now fighting a great war becomes a hollow mockery. The protecting arm of the Fourteenth Amendment prohibits prosecutions based on prejudice and persecution.[17]

Darcy has not gone unchallenged in California. A 1960 case, *People v. Harris*,[18] involved convictions for violations of the gambling laws. The trial court rejected offers of proof designed to show that these statutes had been enforced in such a way as to discriminate against Negroes. For example, the defendants offered to show that during 1957 and 1958 a total of 358 Negroes were arrested for gambling, while only 27 white persons were so arrested. The defendants were nevertheless convicted.

The appellate court reversed and ordered a new trial basing its decision on a principle said to be announced in *Yick Wo v. Hopkins*: "An actual discrimination arising from the method of administering a law is as potential in creating a denial of equality of rights as discriminations made by law."[19]

In another 1960 case a Pennsylvania trial court raised the question whether the equal protection clause had been violated by a police policy of enforcing Sunday closing laws only against large retail establishments.[20] Presumably the police department had followed the policy because the personnel and money available were not sufficient to support total enforcement. In spite of this assertion, the court issued an injunction. Discrimination in enforcement as a "definite policy on the part of a public official" denied equal protection of the laws to the plaintiff retailer.

In the 1962 case of *Oyler v. Boles*,[21] the Supreme Court of the United States hinted, if only by negative implication, that a fourteenth amendment question may be raised if discrimination in prosecution is unjustifiable. In that case, the Court rejected the defendant's contention that he had been the victim of discrimination. However, a convincing showing had not been made. In rejecting the defendants' argument, the Court said, "Even though the statistics in this case might imply a policy of selective enforcement, it was not stated that the selection was deliberately based upon an unjustifiable standard such as race, religion or other arbitrary classification."[22]

The most thorough discussion of the point that the arbitrary exercise of discretion may establish a defense to a charge of crime is found in a recent case in the New York State Supreme Court, Appellate Division, decided February 22, 1962.[23] Upon a charge of unlawfully making sales on Sunday in violation of the New York Penal Law, the defendant attempted to show that the prosecution was a part of a discriminatory pattern aimed at the defendant and others

17 59 Cal. App. at 359, 139 P. 2d at 129.
18 182 Cal. App. 2d 837, 5 Cal. Reptr. 852 (1962).
19 182 Cal. App. 2d at 842, 5 Cal. Reptr. at 856.
20 Bargain City v. Dilworth, 29 U.S.L. Week 2002 (Pa. C.P. June 10, 1961).
21 Oyler v. Boles, 368 U.S. 448 (1962). See also, Two Guys From Harrison-Allentown v. McGinley, 366 U.S. 582, 588-589 (1961).
22 368 U.S. at 456.
23 People v. Utica Daw's Drug Co. 12 A.D. 2d 12, 225 N.Y.S. 2d 128, (1962).

engaged in the operation of "cut-rate" drugstores. Those not featuring a cut-rate policy remained unmolested on Sunday.

The Appellate Division formulated a principle based on *Yick Wo v. Hopkins.* Laxity in enforcement or mere nonenforcement against others are in themselves insufficient to establish the unlawful exercise of discretion; however, intentional discrimination against a particular defendant would establish a defense. The court drew an analogy between the defendant's position in such a case and the defense of entrapment. The opinion accepted the principle of the dissenters in the leading entrapment case of *Sorrells v. United States.*[24] According to that opinion, judges should embrace a policy of not applying the criminal law to cases of crimes illegally induced by police officials. In like manner, when a court finds a purposefully discriminatory prosecution, without justification, the court itself should quash the action in order to vindicate the constitutional right of a defendant against governmental overreaching. "The question," the Appellate Division said, "is rather whether in a community in which there is general disregard of a particular law with the acquiescence of the public authorities, the authority should be allowed sporadically to select a single defendant or a single class of defendants for prosecution because of personal animosity or for some other illegitimate reason."[25]

In the recent court cases where a defense of discriminatory enforcement has been recognized, the persons victimized were discriminated against because they were members of a class which was the object of unequal treatment. They were not prosecuted because they were disliked individuals.

Furthermore, in the New York drugstore case, the policy of enforcement presumably had no relation to the proper enforcement of the criminal law. Such a statement cannot be made against a policy of enforcement which aims at getting the "king pins," the "top men" or the "big wheels" which run the "syndicates." Nevertheless, "big wheels," "top men" and "king pins" are not easy to identify. Their position may be nothing more than the result of widely held opinion on the part of police that they are "involved" in criminality and that for some reason their criminal activities are so successfully hidden that they cannot be proven.

For example, a leading New York labor leader recently died. His obituary pointed out his underworld role, the many criminal trials in which he had been a defendant, and the fact that he had never been convicted. Presumably, he would be a target of selective law enforcement.

The kind of law enforcement attitude which sparks a wide-ranging search for a basis of prosecution against a certain person can be illustrated by two quotations, one from a former high-ranking official of the Justice Department and the other a former law teacher and judge. First:

> What we need to fight them, we feel in the Department of Justice, is a long-range, permanent plan built into the Department of Justice. We also attach to that the idea of looking at individuals, picking the top hundred, and attacking them by looking at everything they do,

24 287 U.S. 435 (1932).
25 12 A.D. 2d at 17, 225 N.Y.S. 2d at 133.

> rather than looking to see if they violate the narcotics law, or looking to see if they violate the Hobbs Racketeering Act. We are looking at everything they do, and we are coming up with evidence of antitrust violations where they have crept into business.[26]

And secondly:

> It is the duty of the prosecution attorney to enforce all criminal laws regardless of his own judgment of public convenience or safety. Compromises and "bargain days" in criminal courts lead to disrespect for law because this process conflicts with enforcement of law. *Contradiction.* It is the duty of the prosecuting attorney to solve the problem of public order and safety using the criminal code as an instrument rather than as a set of commands. This makes it proper and necessary that some laws should be enforced, others occasionally enforced, and others ignored according to the best judgment of the enforcing agency. The criminal problem must be looked at as a war on dangerous individuals and not as a law enforcement problem, unless we want to escape from reality by taking refuge in an ideal world of false assumptions concerning both criminal codes and criminals.[27]

Indeed, we have examples of federal legislation being used against selected individuals. The Mann Act was passed with the purpose of repressing the transportation of women in interstate commerce for purposes of prostitution. In the famous *Caminetti* case[28] the act was interpreted to forbid the interstate transportation of any woman for immoral purposes even though no commercial aspect appeared in the circumstances. The author of the note to Section 207.1 in Tentative Draft No. 4 of the Model Penal Code informs us that the *Caminetti* interpretation of the Mann Act "has provided a means of imprisoning alleged 'racketeers' by showing that they take their girl friends on trips to Florida." The writer goes on to say: "This is a technique that could be easily turned against vulnerable individuals or groups."

The constitutional rules with respect to discriminatory enforcement of the law have yet to be formulated authoritatively. But, for the moment, we might reflect upon a part of the opinion in the *Utica Drug* case.

> Furthermore, even if the enforcement of a particular law is selective, it does not necessarily follow that it is unconstitutionally discriminatory. Selective enforcement may be justified when the meaning or constitutionality of the law is in doubt and a test case is needed to clarify the law or to establish its validity. Selective enforcement may also be justified when a striking example or a few examples are sought in order to deter other violators, as part of a bona fide rational pattern of general enforcement, in the expectation that general compliance will follow and that further prosecutions will be unnecessary. It is only when the selective enforcement is designed to discriminate against the persons prosecuted, without any intention to follow it up by general enforcement against others, that a constitutional violation may be found.[29]

On principle, a prosecutor should not be able to prosecute infractions of

---

26 Anderson, *What Price Conviction,* A.B.A. SECT. OF CRIM. LAW PROCEEDINGS 42 (1958).
27 Arnold, *Law Enforcement—An Attempt at Social Dissection,* 52 YALE L. J., 1, 18 (1932).
28 242 U.S. 470 (1917).
29 12 A.D. 2d at 21, 225 N.Y.S. 2d at 136.

a criminal statute against a certain class of persons and to fail to prosecute another group unless the legislature could constitutionally have made the same classification. The prosecutor's classificatory scheme in law enforcement ought to be subject to the same equal protection limitations as a legislative design.

On principle, a classification which selects a single individual for special treatment under the law is unconstitutional unless a bona fide law enforcement objective is likely to be reached by such a classification. If the Constitution is violated when Negroes, large retailers, or cut-rate drugstores are prosecuted discriminatorily, it is clear that a more serious violation occurs if only John Doe is brought to book while all others are unmolested. Proof of unlawful discrimination against an individual may be difficult but it may well be possible. The writer believes *People v. Darcy* was incorrectly decided.

Law enforcement which aims at supposedly bad men smacks of harassment and tyranny. When laws, generally formulated, are enforced only against certain persons, the subjects of such enforcement not only have an equal protection argument to assert but also may protest that their position is similar to someone who is subjected to unconstitutionally imprecise and vague legislation. The principle of legality may be undercut by discriminatory enforcement.

In addition to constitutional limitation of prosecutorial discretion, self-limitation is possible. The prosecutor may announce rational criteria for limiting and rationalizing federal criminal prosecutions. Five factors are listed in a well-known article by Professor Schwartz of the University of Pennsylvania.

> Considering the vices of dual criminal jurisdiction, it is important to develop definite criteria for limiting the number of federal prosecutions under criminal laws which are merely auxiliary to state law enforcement. The Criminal Division of the Department of Justice must work these out in detail for each offense, but in general it can be said that federal action is justified in the presence of one or more of the following circumstances: (1) When the states are unable or unwilling to act; (2) When the jurisdictional feature, e.g., use of the mails is not merely incidental or accidental to the offense, but an important ingredient of its success; (3) When, although the particular jurisdictional feature is incidental, another substantial federal interest is protected by the assertion of federal power; (4) When the criminal operation extends into a number of states, transcending the local interests of any one; (5) When it would be inefficient administration to refer to state authorities a complicated case investigated and developed on the theory of federal prosecution.[30]

It is important to point out that to initiate prosecution against someone believed to be a particularly dangerous, undesirable or unsavory person is not one of the criteria listed.

IV. The Problem of a Fair Trial

A fair trial implies a set of certain charges and the establishment of those charges by evidence relevant to the accusation. The charge, not the bad character of the defendant, is to be proved. The crime-curb program creates prob-

30 Schwartz, *Federal Criminal Jurisdiction and Prosecutor's Discretion,* 13 Law & Contemp. Prob. 65, 73 (1948).

lems relating to this ideal. A case brought under legislation unconnected with the program against organized crime illustrates the issue.

In *Rutkin v. United States,*[31] the defendant was convicted of wilfully avoiding the payment of income taxes. The conviction was based upon a demonstration to the jury that $250,000.00 had been obtained by extortion. The extorted funds consisted of money paid the defendant in New Jersey by a citizen of that state. The payments were made in response to the defendant's threat to use a gun and to kill the victim and his family. The majority of the Supreme Court saw the case simply as raising the issue of whether the unlawful gain constituted taxable income and made an affirmative answer.

In dissenting, Mr. Justice Black, speaking for himself and three others — Justices Reed, Frankfurter and Douglas—pointed out that, under a prior decision, embezzled money would not be taxable income inasmuch as the embezzler had no bona fide legal claim to the money. Hence, Justice Black argued, one who extorts does not receive income. He then went on to question the wisdom of the prosecution. "Today's decision," he said, "illustrates an expansion of federal criminal jurisdiction into fields of law enforcement heretofore wholly left to states and local communities."[32] He thought this tendency to give Washington more power to punish purely local matters to be unwise:

> [T]he overriding federal authority forces them to surrender control over the manner and policy of construing and applying their own laws. State courts not only lose control over the interpretation of their own laws, but also are deprived of the chance to use the discretion vested in them by state legislatures to impose sentences in accordance with local ideas. Moreover, state prosecutors are deprived of the all-important function of deciding what local offenders should be prosecuted. Final authority to make these important decisions becomes located in the distant city of Washington, D.C. Here, as elsewhere, too many cooks may spoil the broth.[33]

The remoteness of federal power and the centralizing effect of *Rutkin* were not Mr. Justice Black's only concerns. He was also concerned with fairness at the trial. "Moreover, I doubt if this expansion of federal criminal jurisdiction can be carried on in a manner consistent with our traditional ideas of what constitutes a fair trial in criminal cases."[34] He saw the ideal of a fair disposition of criminal cases threatened in several ways. First, he was disturbed about the problem of multiple prosecution for the same event. He was concerned with the loss of equality which arises by the fact that federal penalty and the state penalty may be quite different. For example, under the Mann Act, a man can be imprisoned for five years because of conduct many states do not hold to be criminal at all. Secondly, Mr. Justice Black was concerned about the confusion of issues which may arise to undercut the defendant's right to be tried on a specific charge unhampered by the prejudice. He was fearful that a defendant may be convicted because he is thought to be a "bad man" or a "scoundrel."

In the course of trying Rutkin for income tax violation, the prosecution

31 343 U.S. 130.
32 *Id.* at 141.
33 *Id.* at 143.
34 *Ibid.*

had been permitted to prove that money was received under threats of death. "From the beginning to the end," Mr. Justice Black said, "the evidence in this case was devoted to showing the lawless life Rutkin, Reinfeld and their associates led from the 1920's to 1950, ranging from bootlegging to bribery to gambling."[35]

The same dangers of using such inflammatory materials are possible in proceedings instituted under some of the provisions of the Attorney General's program.

A defendant charged under the Travel Ban Act, may find himself charged with traveling "with intent to promote, manage, establish, carry on . . . any unlawful activity" (*e.g.*, a business enterprise involving handling narcotics or prostitution). He is likely to find that the case against him involves a sensational and prejudicial demonstration of much lawbreaking. If the defendant is charged with managing a business enterprise involving gambling, the prosecution is not limited to a specific gambling enterprise carried on within a particular day. The extent of the unlawful operation, the amount of money which has been earned by the illegal enterprise, its relationship to other illegal enterprises, for which no possibility of prosecution exists under the new federal law, can almost certainly be admitted into evidence. In addition, the prior history of the business is relevant to the charge. The prejudicial effect of such testimony cannot be denied.

In this connection, it is interesting to note that in the first reported case brought under the Travel Ban Act, there were 15 defendants joined together for prosecution.[36] Defendants were joined in a prosecution charging violation of the act, and aiding and abetting. We can be certain that the new legislation will feed some of the problems which have been recognized in connection with mass trials and in connection with conspiracy trials in general. The great danger of tarring two or three persons with the black brush of some highly visible and obviously guilty codefendants is very great. This is not of course a new problem in respect to federal prosecutions. Complaints have been received against the conspiracy charge and the mass trial for a long time. The new legislation adds to a serious situation precisely because it is aimed at organized criminality.

V. The Call to Arms

Finally, it must be said that there is something threatening to civil liberties in the very atmosphere created by the push for the program to control organized crime. Perhaps the crime situation is as serious as the Attorney General's arguments assert, but civil liberties do not flourish when the people believe that drastic, uncompromising action is necessary. In wartime, we are tempted to take short cuts.

Some of the language surrounding the crime-curb program has been a call to armed crusading. Robert Kennedy has spoken of the "Enemy Within." In testifying on behalf of the Justice Department proposals, he asserted, "If those bills are enacted, the Department of Justice is going to be involved in a large-

35 *Id.* at 146.
36 United States v. Barrow, 212 F.Supp. 837 (E. Dist. Pa. 1962).