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Federal Criminal Law: The Need, Not for Revised Constitutional Theory or New Congressional Statutes, But the Exercise of Responsible Prosecutive Discretion

by
G. ROBERT BLAKEY*

The safety of the people is the Supreme law.**

Introduction

Justice Frankfurter put it well: "In law . . . the right answer usually depends on putting the right question."1 My basic point is that major aspects of systems of legal justice deal with antisocial behavior. That an aspect of these systems may be categorized as "criminal," "civil," "state," "federal," or "international," is relevant principally to a question of legal theory or governmental organization, which is fundamentally secondary to the character of the behavior itself.2 In short, we have to look at the behavior first—and only then ask ques-

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** Montesquieu, Spirit of the Laws bk. XXVI, ch. 23 (Ewing ed., 1751).
2. The criminal/civil distinction, for example, is rooted in history, not the essential character of things, though it has constitutional implications. See, e.g., Hicks v. Feiok, 405 U.S. 624, 631 (1988) (criminal or civil labels affixed to contempt as proceeding under state law not controlling for federal constitutional analysis). See generally Mary M. Cheh, Constitutional Limits on Using Civil Remedies to Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction, 42 Hastings L.J. 1325 (1991); Kenneth Mann, Punitive Civil Sanctions: The Middleground Between Criminal and Civil Law, 101 Yale L.J. 1795 (1992).
tions of legal theory or governmental organization. Holmes also put it well: "The first call of a theory of law is that it should fit the facts." This Symposium—or at least some of its participants—are asking the wrong question. We should not be talking about "federalization." That is a constitutional question to which we now have a fairly clear constitutional answer. Little or no need presses on us to debate it anew. Here we need only turn to the history of lotteries in the nineteenth century, which amply demonstrates that our federal and state systems of criminal justice are not—as the "federalization" question tends uncritically to assume—mutually exclusive. In fact—if not in theory—they exercise "concurrent jurisdiction" today over most forms of antisocial behavior—at least on the domestic side. The nation needs lawyers who read more than law reports; its needs can be


4. The appendix to this Article sets out materials that trace the development of federal criminal law. Unless this history is to be rewritten, it is time to turn to the question of how the nation's systems of state and federal justice can be made to work to meet the needs of its people. But see infra note 93. It is time, too, to turn away from sterile questions of theory divorced from needs, for theory to one side, no meaningful distinction can be drawn, in fact, between the operation of state and federal courts. "[W]e need to view our systems as one resource and use that resource as wisely and efficiently as we can." Hon. William H. Rehnquist, Welcoming Remarks: National Conference on State-Federal Judicial Relationships, 78 VA. L. REV. 1657, 1658 (1992).

Unless efforts are made to draw functional distinctions between the two systems of justice, however, the alternatives are stark. The Committee on Long Range Planning of the Judicial Conference of the United States argued in its Proposed Long Range Plan for the Federal Courts:

The allocation of limited jurisdiction to the federal courts is justified both in theory and as a practical necessity. Unless a distinctive role for the federal court system is preserved, there is no sound justification for having two systems. If federal courts were to begin exercising, in the normal course, the broad range of subject-matter jurisdiction traditionally allocated to the states, they would lose both their distinctive nature and, due to burgeoning dockets, their ability to resolve fairly and efficiently those cases of clear national import and interest that properly fall within the scope of federal concern. Under that unfortunate scenario, all courts—federal and state—might as well be consolidated into a single system to handle all judicial business. To follow this course—toward either a single national court system or two systems engaged in essentially identical businesses—would be disastrous.

COMMITTEE ON LONG RANGE PLANNING OF THE JUDICIAL CONFERENCE OF THE UNITED STATES, PROPOSED LONG RANGE PLAN FOR THE FEDERAL COURTS 19 (Nov. 1994) [hereinafter COMMITTEE ON LONG RANGE PLANNING]. Nevertheless, the Committee recognized that, "[a]s Congress continues to 'federalize' crimes previously prosecuted in the state courts, and to create civil causes of action over matters previously resolved in the state courts," that is precisely what is happening. Id. at 20. Legally, the state and federal courts, in short, largely exercise concurrent jurisdiction over most matters. The task facing the nation is to rationalize that jurisdiction functionally. That is the task that this Symposium should have set for itself. That it did not was a tragic waste of intellectual resources.
more easily seen by reading newspapers. If we want to make a meaningful evaluation of our federal system of criminal justice, we ought to focus most sharply on asking, for example, if it is adequately responding to those forms of international antisocial behavior that only it has the legal and other resources to meet. That is a question worth taking up. Unfortunately, I have heard too little about that sort of question in these proceedings.

I. Ideology

What Cardozo said of law may be said of criminal justice: Each person tends to see it through his or her own eyes. Many perspectives could, of course, give us a better view. Nevertheless, insight into

5. This is not to gainsay that the "workload of the federal courts [is not] continu[ing] to grow substantially." ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1992 ANNUAL REPORT OF THE DIRECTOR 10 [hereinafter U.S. COURTS 1992]. While in 1962 only 4,800 appeals were docketed and 100,000 district courts matters filed, in 1992, the figures rose to 47,000 and 277,000, nearly a tenfold increase in appeals and a threefold increase in district court filings. Id. The rise in criminal filings, however, has not been as sharp: there has been only a 27% increase over the last ten years. Id. fig. 1. In fact, excluding the District of Columbia, during "the period 1955 to 1991 total criminal filings in the district courts ranged from a low of about 28,000 cases (1956-61 and 1980) to a high of about 47,000 (1972 and 1989). During the period since 1930, although the nature of the crimes prosecuted and the types of cases have changed, total federal filings have remained within a limited range, averaging about 35,000 cases annually." NORMAN ABRAMS & SARA SUN BEALE, FEDERAL CRIMINAL LAW AND ITS ENFORCEMENT 12 (2d ed. 1993). In contrast, reports from 35 states, including the most populous states except Pennsylvania, indicate that more than 1,077,000 felony cases are filed each year at the state level. Id. at 13. While criminal filings have remained relatively stable, district court judgeships have increased from 245 in 1960 to 649 in 1993, an 165% increase. COMMITTEE ON LONG RANGE PLANNING, supra note 4, tbl. 6. This should be contrasted with the 1,798 active state trial court judges. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 1993 tbl. 221.66 [hereinafter SOURCEBOOK 1993].

6. Here, too, Holmes put it well:

The rational study of law is still to a large extent the study of history. History must be a part of the study, because without it we cannot know the precise scope of rules which it is our business to know. It is a part of the rational study, because it is the first step toward an enlightened skepticism, that is, toward a deliberate reconsideration of the worth of those rules.

When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth and claws, and see just what is his strength. But to get him out is only the first step. The next is either to kill him, or to tame him and make him a useful animal. For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics.

Oliver Wendell Holmes, The Path of the Law, 10 HARV. L. REV. 83, 96-97 (1897).

7. "We may try to see things as objectively as we please. Nonetheless, we can never see them with any eyes except our own." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 13 (1921).
a particular aspect of a problem is often reified. The error lies in treating abstractions as if they were concrete objects. "Federalization" is an abstraction. We need to turn our attention to more concrete objects. But "federalization" is not the only abstraction that stands in the way of effective solutions to practical problems.

Our earliest legal traditions responded to antisocial behavior by making criminal justice a substitute for revenge or an instrument to promote the public peace.8 Religious thought, particularly after the Reformation, tended to equate law with morality. Crime became sin, and punishment found its rationale in expiation. During the Enlightenment, the criminal law became a means of crime prevention through deterrence of rationally responsible individuals. In the modern day, many people turn away from any view holding that individuals are morally or rationally responsible.9 Instead, they see antisocial


9. For example, in a 1993 national survey, people were given proposed reasons for crime and asked whether they considered them "critical," "important," or "not important." Thirty-eight percent of those surveyed believed that the influence of drugs was a "critical" factor influencing crime; 45% found the availability of guns to be "critical"; 38% believed television to be a "critical" influence; 36% felt that absence of fathers in young people's homes was a "critical" influence on crime; finally, the poor quality of schools was voted "critical" by 34%. Of those surveyed, 51% also considered lack of moral training in the home to be "critical." Nevertheless, phrased in this way, it is a question, not of the individual's moral responsibility, but of the moral character of his environment. In short, people today tend to believe that some factor other than the individual himself is responsible for the individual's conduct. A similar question was also asked regarding the main causes of violent crime; people were asked to name, on their own, three or four factors that they believed to be the main causes of violent crimes. Drug abuse was rated highest, with 51% of the people naming it; 41% stated that crime was caused by parents' failure to teach right and wrong. "Lack of morals" did come in third, but notably it tied with "living in poverty" and "guns being easy to get." Other reasons given included child abuse, exposure to television, influence of friends, alcohol abuse, and lack of education. Sourcebook 1993, supra note 5, tbls. 2.24, 2.25.

Additionally, those surveyed were asked whether certain environmental influences contributed a "lot," a "little," or "not at all" to violence. Lack of adult supervision of children, easy availability of handguns, television, and movies each were thought by a majority to contribute a "lot" (89%, 70%, 61%, and 60% respectively). Video games and local television news reports were thought by fewer people to contribute "a lot" to violence, but the results were not insignificant; 38% of those surveyed thought video games contributed "significantly" to violence, while 40% thought they contributed "a little." Similarly, only 35% of participants in the survey felt that local news reports contributed "a lot," but 46% felt that they did contribute "a little." Id. tbl. 2.26. Public perception of the
behavior as principally the product of environment or aberrations of personality. Crime is explained not by reference to original sin or conscious choice, but rather to poverty, passion, discrimination, or mental disease. Reform of these social or economic conditions, or of the offender, become prime goals. Issues of legal theory or governmental organization are of less significance.

None of these ideological outlooks is wholly wrong or wholly right. If each had emerged merely to supplement—but not to supplant—the other, we might have developed a better perspective, for criminal justice is all of these things, yet none of these things. Instead, discussions of criminal justice today are marred by the extremes of right and left. “Conservatives” feel the need for security, denounce our loss of a sense of personal responsibility, and tend to support the forces of law enforcement. “Liberals” see a threat to liberty, chide our insensitivity to social injustice, and tend to seek alternatives to effective law enforcement. Similarly, questions of legal theory or governmental organization like “federalization” misdirect our attention from—in Pound’s justly famous phrase—“the law in action to the law in the books.” Viewed through an ideological framework, proposals from each side are too often viewed as mutually exclusive alternatives. Debate becomes emotional and polarized. Division, deadlock, and delay are the result. Stubborn ideology faces stubborn ideology. But if ideologies are stubborn, so are facts.

relationship between television and crime was also reflected in the response to the question, “Do you think there is a relationship between violence on television and the crime rate in the United States, or not?” Seventy-five percent responded “yes.” Id. tbl. 2.110. Here, too, some factor other than the individual himself was thought to be responsible. People are seen today, in short, to be dependent causes, not independent causes.

10. Increasingly, the public sees, for example, such social changes as restricting the supply of drugs as an effective tool for combatting crime. BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, TECHNICAL APPENDIX: DRUGS, CRIME AND THE JUSTICE SYSTEM 32 (1993). On a more general level, the following question was posed to subjects of a 1993 national survey: “To lower the crime rate in the United States some people think additional money and effort should go to attacking the social and economic problems that lead to crime, through better education and job training. Others feel more money and effort should go to deterring crime by improving law enforcement with more prisons, police, and judges. Which comes closer to your view?” Fifty-one percent stated that money should be spent on social and economic problems; only 38% believed the money would be better spent on police, prisons, and judges; 10% were undecided. SOURCEBOOK 1993, supra note 5, tbl. 2.43.

II. Kinds of Crime

Traditionally, we have classified crimes in terms of individual actions—murder, rape, robbery, and the like. When the task is the assessment of antisocial behavior, this approach is not only inadequate, but misleading. Antisocial behavior must be analyzed in terms of more than legal definitions or organizational theory. For present purposes, it is far more meaningful to speak of "street crime," "white collar crime," and "organized crime"—of whatever sort. This topology permits us to focus on the people involved and the consequences of their actions for others. Then—and only then—does it make sense to talk about how our legal systems should respond—or are responding—to them.

A. Street Crime

Many Americans today consider "crime" to be one of the most


13. In the 1964 Presidential campaign, "crime in the streets" became a national issue; it led to the enactment of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, 82 Stat. 197, and the creation of the ill-fated Law Enforcement Assistance Administration, the rise and fall of which is ably chronicled and analyzed in Thomas E. Cronin et al., U.S. v. Crime in the Streets (1981). Any effort to rethink the federal system of criminal justice—much less to integrate it functionally with state and local systems—needs to begin with an analysis of what happened and why with the 1968 Act. The Cronin book is a good place to begin, particularly its concluding chapter. The authors' concluding remarks in the book first approvingly quote these sobering, but thoughtful conclusions of now-Dean Gerald Caplan, then a LEAA official, in an address entitled, "Losing the War on Crime":

First, we have more crime than any other place in the world, more this year than last, and much, much more than we had in 1964 when Senator Goldwater became the first Presidential candidate to argue that the Federal government must do something about crime in the streets.

Second, most of the increase occurred in the midst of high employment, and unprecedented affluence and during a period when the Federal government launched a new, multi-billion dollar anti-crime program.

Third, despite the persistent, often clarion, calls for "law and order," no significant strengthening of the punitive or deterrence features of the criminal justice system took place during the past decade.

Fourth, efforts to understand better the underlying causes of crime have progressed little. Even among serious observers, the attachment to particular explanations has been promiscuous, one theory yielding to another in quick succession.

Fifth, today virtually no one—scholars, practitioners and politicians alike—dares to advance a program which promises to reduce crime substantially in the near future.

The authors then concluded:
serious domestic problems. Rightly or wrongly, they fear crime, and the crime they fear is the crime that affects their personal safety, especially on our public streets. While our primarily rural population of

The national role in fighting crime in the streets is, and will doubtless remain, a small one. Any prudent national crime control policy will need better data, more experiments, better evaluation, and more focused research. Such a policy should concentrate on juvenile justice and continue to work towards certainty of sentencing. More money is needed for systematic research and development of crime prevention strategies. The national government should be much more in the business of designing, testing, and publicizing crime prevention strategies than of pouring out money and organizing conferences. It should continue to improve crime statistics, develop evaluation methods, and run pilot research programs. A more scientific approach will not necessarily reduce crime but could enable us to understand who is helped or hurt by different strategies and how much various strategies cost.

These days it is fashionable to talk of the limits of government. But the limits of government are a pallid excuse for the political exploitation of the crime issue, the mismanagement of LEAA, and the ineffective national leadership that characterized so much of the war on crime.

Twelve years, however, is a short time for what should have been viewed as a long-term campaign. Focus and stamina, over the long haul, have been cardinal ingredients in almost all policy successes. If we have learned to be skeptical about presidential promises, if we have learned government alone cannot solve the crime problem, if we have learned there is a price inexact but high, that must be paid if we are to make sure crime doesn't pay, then we have profited by this defeat. Politics will not—and should not—be separated from crime control policy while the solutions are still uncertain and while there still are conflicting values to be addressed. But politics that amounts to fact-free rhetoric, politics that does not make frank reference to value conflicts, can be dangerous. We now know it was dangerous to play to the public's fears, to oversell LEAA as a "war" on crime, to claim successes in time for the next election. It will be dangerous not to examine the causes of crime, not to debate where accountability should be placed, and not to lay down straight what the cost of crime control is.

In his second address to Congress, Abraham Lincoln put it this way:

The dogmas of the quiet past are inadequate to the stormy present. The occasion is piled high with difficulty and we must rise with the occasion. As our case is new, so we must think anew. We must disenthrall ourselves, and then we shall save our country.

Id. at 181-82.

14. When asked in 1993 what two forms of social change were most desired for the United States in the next five years, 25% of those surveyed stated that they wished crime would decrease. This was second only to better health care, and it was equal to lower unemployment. SOURCBOOK 1993, supra note 5, tbl. 2.4. In a 1994 survey, 56% of those questioned stated that crime was one of the two most serious problems facing our country. This far exceeded the runner-up, health care, which came in at 21%. In a related question, 36% of those surveyed responded that crime was one of the two most important issues for the government to address. This was second to health care, which received 45% of the vote. Id. tbl. 2.2.

15. When asked in 1993 how uneasy they felt on the streets, 41% of a national survey of respondents stated that they felt more uneasy than they did only one year ago. SOURCBOOK 1993, supra note 5, tbl. 2.34. Forty-three percent of respondents stated that they would feel afraid to walk alone at night even in their own neighborhood. Id. tbl. 2.39.
yesterday could view crime as characteristic of a removed and immoral city, our primarily urban and suburban population of today looks at crime as an immediate threat.  

More generally, survey participants were asked how often they worried about several other situations. While the majority responded that the listed situations worried them "pretty seldom" or "very seldom," the percentages that responded they worried about these several situations "very frequently" or "pretty frequently" were significant, that is, 15% were "very frequently" worried about themselves or a family member being sexually assaulted or raped; 23% worried about it "pretty frequently." The prospect of having their homes burglarized when they were gone worried 14% of the survey participants "very frequently" and 21% "pretty frequently." Nine percent and twelve percent, respectively, worried about a burglary when they were there. Twelve percent worried "very often" about being attacked while driving their cars; 16% worried about it "pretty often." Eleven percent of respondents worried "very frequently" about getting mugged, beaten up, knifed, or shot; 15% worried "pretty often" about muggings and 12% "pretty often" about getting beaten, knifed, or shot. Finally, 8% of respondents worried very frequently about being murdered, while 11% worried about it pretty frequently. Id. tbl. 2.30. In 1993, 54% of respondents in a national survey felt the crime rate in their areas was increasing. Only five percent said they felt it was decreasing. Thirty-nine percent believed no real change had occurred. In a related question, people were asked whether they felt more or less uneasy on the streets as compared to a year ago. Forty-two percent felt "more uneasy"; only 5% felt less so. Fifty-one percent felt "not much different." Both of these questions have been asked for selected years between 1966 and 1993, and with respect to the first question, a consistent majority replied that they felt the crime rate was increasing in their areas, as opposed to decreasing or remaining the same; as for the second question, the "not much different" category outweighed the "more uneasy" category in several years. Nevertheless, the category responding that they felt less uneasy was consistently small—it never exceeded 10%. Id. tbl. 2.32.

16. The nation's population at the time of the first census in 1790 was small—only 4 million; by 1850 it was only 23 million. U.S. BUREAU OF THE CENSUS, STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT 7 (1965) [hereinafter STATISTICAL HISTORY]. The nation was then sparsely settled, with only 5 people per square mile in 1790; by 1850 only 8 people per square mile. Id. at 8. The nation itself was small; in 1790 it contained less than a million square miles; by 1850 it contained less than 3 million. Id. People lived in rural areas, and the nation was composed of a stable, largely homogeneous people; they farmed, largely by hand. In 1790 just over 200,000 lived in cities; by 1850 just over 3,500,000 did. Id. at 9. Cities, too, were small; in 1790 the nation had no cities over 50,000 in population; by 1850 there were only 10. Id. at 14.

By the beginning of the twentieth century, however, the population had grown. By 1930 it had risen to 123 million. The nation's population density was 34 per square mile. Id. at 8. The northeastern part of the United States was, of course, much higher—210 per square mile. Cities, too, were even much higher: New York City had 22,000 per square mile. U.S. BOOK OF FACTS, STATISTICS & INFORMATION 13, 20 (1965). The nation was no longer small; the shift from rural area to city was well past the halfway mark. STATISTICAL HISTORY, supra, at 9. The early nation of small farmers was, in short, fast disappearing. For a list of factors that ought to be considered in interpreting data on crime, see PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMIN. OF JUSTICE, THE CHALLENGE OF CRIME IN A FREE SOCIETY 27 (1967) [hereinafter 1967 PRESIDENT'S REPORT]; it includes density and size of population and the metropolitan area of which it is a part and the economic status of the people.

Currently, less than one-quarter of the nation's population resides in rural areas. BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, CRIME VICTIMIZATION IN CITY, SUB-
Rather than walk in their neighborhoods at night, many city dwellers stay behind locked doors. Poor people spend money they cannot afford on taxis because they are afraid to use public transportation. Moreover, what many people fear is the stranger, often the stranger of another race. Fear of crime makes our people want to move from the neighborhoods in which they live. This seemingly

...urban, and rural areas iii (1992). Not only has the nation’s population become more urban, but it has become alarmingly clear that crime is particularly an urban phenomenon. Between 1987 and 1989, the average annual rate of violent victimization among city residents was 92% higher than among rural residents; the rate of theft and household crimes for city residents also exceeded the rates for rural residents by approximately 90%; nationwide, city and suburban areas each accounted for approximately 42% of violent victimization, compared to 16% in rural areas. In 1993, 61% of city dwellers stated that they would be afraid to walk alone at night in some area within a mile of where they lived. These data are especially striking in light of the national results as a whole: those that would not feel afraid (56%) outnumbered those who said they would (43%). 

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ubiquitous fear is impoverishing the lives of many Americans. PTA
meetings and church services are not held at night. Library facilities
and other cultural opportunities are under-used. Kids carry guns to
school for protection. Women at night fear any footstep behind
them. We are an intimidated, not a free society.

Today it is not unusual, too, for a victim of a crime to go unaided.
The normal bonds of community seem to be breaking up. People are
reluctant to "get involved." Crimes also go unreported to the police.

Weapons used in homicides of teenage victims in 1986 were predominantly firearms of
some sort: 58% of victims aged 12 to 15 and 67% of victims aged 16 to 19 were killed with
a handgun, rifle, shotgun, or other type of gun. Further, statistics in that year indicated
that a significant number of victims were murdered by someone in their own age group.
Sixty percent of victims aged 12 through 15 were murdered by an offender aged 12 through
19, and 37% of victims aged 16 through 19 were murdered by offenders between ages 12
and 19. Id. tbs. 20, 22. In a 1991 survey, only 2% of students reported taking something
(such as a gun) to school to protect themselves. BUREAU OF JUSTICE STATISTICS, U.S.
DEP'T OF JUSTICE, SCHOOL CRIME: A NATIONAL CRIME VICTIMIZATION SURVEY REPORT
12 (1991) [hereinafter CRIME VICTIMIZATION].

Nevertheless, statistics indicate that many school-related crimes go unreported, which
may partially account for this low number. Specifically, in about 37% of all crimes on
school property, the police were not called; the crime was instead reported to a school
official or someone in a similar capacity. These percentages should be compared to the
mere 5% of unreported violent crimes on the streets. TEENAGE VICTIMS, supra, at 10.

Other recent statistics indicate that the problem of violence at school may be rapid-
ly increasing. In 1993, 22% of teens said they sometimes feared for their safety at school.
Additionally, teens were asked how big of a problem was presented in their schools by
students bringing weapons like guns or knives to school. Twenty-nine percent said that
they thought it was a "very big" or "fairly big" problem. SOURCEBOOK 1993, supra note 5,
tbs. 2.77, 2.78.

Respondents were asked for selected years ranging from 1973 to 1993 whether
they felt afraid to walk alone at night in their own neighborhoods; the group responding
"no" consistently outnumbered the group reporting that they were afraid, but for each year
surveyed, more than half of the women respondents indicated that they were afraid, and
the percentage of women responding "yes" in each year greatly outnumbered the percent-
age of men who so responded. SOURCEBOOK 1993, supra note 5, tbl. 2.39.

While general trends in reporting crimes to the police were slightly up as of 1992,
the percentages were still well below the 50% mark; only 39% of all crimes and only 37%
of personal victimizations were reported to the police. Crimes of violence were most likely
to be reported, with 50% of all such crimes being called to police attention. When crimes
of violence were broken down into more specific categories, reported rapes totaled 53%,
robberies 51%, aggravated assaults 62%, and simple assaults 43%. Household crimes were
reported 41% of the time (more specifically, 54% of burglaries, 26% of larcenies, and 75%
of motor vehicle thefts were reported). Crimes of theft were only reported 30% of the
time. CRIME VICTIMIZATION, supra note 20, at 5. While teenagers were more likely than
adults to be crime victims in 1985 through 1988, crimes against adults were the most likely
and crimes against teenagers were generally the least likely to be reported to law enforce-
ment agencies. TEENAGE VICTIMS, supra note 20, at 9.
for people feel—rightly—that the police can do little to protect them. They are not only afraid, but increasingly hopeless and angry.

Public alarm is warranted, although it reflects misperceptions. A majority of all major crime against the person—rapes, robberies, and assaults—occurs in fact on the street or in other public places. Honest disputes are present about the figures, but our best indicators tell

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24. Many respondents who failed to report crimes to the police cited as reasons their belief that the police are “inefficient, ineffective, or biased” or that they “would not want to be bothered.” Bureau of Justice Statistics, U.S. Dept of Justice, Highlights from 20 Years of Surveying Crime Victims: The National Crime Victimization Survey, 1973-92, at 33 (1993) [hereinafter Highlights]. When asked how much confidence they had in general in the police, 45% of participants in a 1994 survey answered that they had “some,” “very little,” or “no confidence” in the police. Sourcebook 1993, supra note 5, tbl. 2.8. With respect to the ability of the police to protect them, specifically from violent crime, 54% responded that their confidence in the police was not very much or none at all. Id. tbl. 2.17. Here, as in many other areas, race seems to play a factor; 45% of those surveyed in 1993 felt that police protection in Black neighborhoods was worse than in White neighborhoods, while only 41% of the Whites surveyed responded similarly. Id. tbl. 2.18.

25. In a breakdown of crimes of violence that occurred in 1992, more occurred on a public street, not near the victim’s home, than in any other place. Almost 26% of rapes occurred on such streets. In addition, just over 4% of rapes occurred on streets that were near the victim’s home; just over 6% occurred at a parking lot or garage; and nearly 9% occurred in an apartment yard, park, field, or playground. Assaults occurred on streets not near the victim’s home (17% of simple assaults and just over 27% of aggravated assaults) in nearly 21% of the cases. As for other public places, the statistics are as follows:

<table>
<thead>
<tr>
<th>LOCATION</th>
<th>TOTAL</th>
<th>SIMPLE</th>
<th>AGGRAVATED</th>
</tr>
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<tbody>
<tr>
<td>On Street near Home</td>
<td>4.0</td>
<td>3.1</td>
<td>5.8</td>
</tr>
<tr>
<td>On Street near Friend’s, Relative’s, or Neighbor’s Home</td>
<td>1.4</td>
<td>0.9</td>
<td>2.4</td>
</tr>
<tr>
<td>Inside Bar, Restaurant, or Nightclub</td>
<td>6.0</td>
<td>7.3</td>
<td>3.5</td>
</tr>
<tr>
<td>Parking Lot or Garage</td>
<td>7.3</td>
<td>7.0</td>
<td>8.0</td>
</tr>
<tr>
<td>In School Buildings</td>
<td>7.0</td>
<td>9.4</td>
<td>2.3</td>
</tr>
<tr>
<td>On School Property</td>
<td>7.1</td>
<td>7.7</td>
<td>5.8</td>
</tr>
<tr>
<td>On Public Transportation or in Station</td>
<td>1.2</td>
<td>1.3</td>
<td>1.0</td>
</tr>
<tr>
<td>In Apartment Yard, Park, Field, or Playground</td>
<td>4.4</td>
<td>4.1</td>
<td>5.1</td>
</tr>
</tbody>
</table>

Robberies were even more likely than rapes or assaults to occur in public places. Nearly 40% of all robberies occurred in streets not near the victim’s home. This figure included nearly 45% of completed robberies (over 43% with injury and over 45% without) and nearly 30% of attempted robberies (over 41% with injury and over 25% without). Other public places where robberies were likely to occur were on streets near the home (almost 6%), in restaurants, bars and nightclubs (1%), in parking lots or garages (nearly 14%), inside school buildings (nearly 3%), on school property (1%), in apartment yards,
us that the various forms of street crime are not increasing. While the rates are dropping, few contend that the nation does not have an intolerably high rate of crime. Certainly, then, our people have a valid concern about street crime.

Yet all aspects of public fears are not fully justified. Apart from robbery, many violent crimes against the person—murders, rapes, and assaults—are committed by family members, friends, or other persons previously known to their victims. It is true that race is a factor in

parks, fields or playgrounds (6%), and on public transportation or inside stations (nearly 3%). SOURCEBOOK 1993, supra note 5, tbl. 3.5.

26. Between 1973 and 1992, personal crimes dropped 26%; crimes of theft, 35%; and household crimes, 30%. SOURCEBOOK 1993, supra note 5, tbl. 3.3. Compare Dirk Johnson, Bank Robberies Soaring Despite the Risks, N.Y. TIMES, Mar. 28, 1995, at A1 (reporting that bank robberies—typically netting less than $2,500 and for which three of four perpetrators are caught—hovered around 2,000 annually in the 1970s then shot up to 5,000 in the 1990s; the record was 9,300 in 1991; 1993 had 8,800) with Clifford Krauss, Burglaries Show Big Decline in New York City, N.Y. TIMES, Mar. 15, 1995, at A12 (reporting that burglaries in city and suburbs dropped; 1974 marked the modern-day high nationally (93.1 per 1,000 households), dropping to 62.7 in 1985 and 48.7 in 1992; the drop in New York City was attributed in part to police tactics that resulted in more arrests and convictions, including taking fingerprints at the scene and computerized fingerprinting processing).

27. Crimes of violence—rape, robbery, and assault—are predominately committed by strangers, 3.9 million versus 2.6 million; however, the percentages (60% vs. 40%) do not reflect the nation's disproportionate fear of the stranger. SOURCEBOOK 1993, supra note 5, tbl. 3.23. Of the 22,540 murders in 1992, 3,053 were clearly thought to be stranger homicides, while in 8,818 the victim had an unknown relation to the offender; the rest were homicide by those who were related to or known by the victim. Id. tbl. 3.125. Nevertheless, the trend in homicides is converging on the nation's worst fears. If felony-type murders (those committed in connection with rape (137), robbery (2,254), burglary (206), etc. and drugs (1,291) as well as other offenses) are added to gangland killings (137) and juvenile gang killings (809), the resulting number (5,833) is an increasing percentage of all homicides (nearly 26%). SOURCEBOOK 1993, supra note 5, tbl. 3.125. In 1965, 31% of all homicides occurred within the family; in 1992 the figure had dropped to 12%. FEDERAL BUREAU OF INVESTIGATION, U.S. DEP'T OF JUSTICE, UNIFORM CRIME REPORTS 1993 tbl. 5.3 [hereinafter UNIFORM CRIME REPORTS 1993]. While the nation's homicide rate per 100,000 was 9.3 in 1992, the historical high actually occurred in 1980 (10.2), a rate that roughly doubled from 1965 (5.1). Id. at 283. The most striking change is the number of victims from 15 to 24, nearly a 50% jump; the victim rate by race and age reveal that Blacks aged 24 and younger constitute 41% of Black murder victims, which makes homicide the leading cause of death for young, Black males. Id. The Federal Bureau of Investigation concluded:

The typical assumptions associated with homicides throughout this century must be reevaluated in view of the unprecedented shift in national homicide patterns as evidenced during the 1990's. Every American now has a realistic chance of murder victimization in view of the random nature the crime has assumed. This notion is somewhat supported by the fact that a majority of the Nation's murder victims are now killed by strangers or unknown persons. The advent of this trend has generated a profound fear of murder victimization in that the circumstances surrounding homicides are perceived to be more irrational. In the past, the accepted normality was based upon clearly defined circumstances such as felonies,
street crime. The ratio of Blacks among arrested perpetrators is higher than that of Whites. Nevertheless, to get a complete picture, factors relating to socioeconomic conditions must be correlated with

passion, and arguments among family members or acquaintances. The concern about homicide is further perpetuated by youthfulness of both victims and offenders, as illustrated by the rise in juvenile gang killings during the past decade. The reasons for these changes in homicide patterns are multidimensional. Some suggested causal factors are related to the illicit drug trade, the disintegration of the family unit, and weapon proliferation.

Id. at 286-87. While homicide data increases tend to be the most reliable, they understate, in fact, the increase in violence in the nation, as they depend on the contingent fact of death. In short, modern technology, widely employed in emergency services and hospitals, prevents an unknown number of aggravated assaults from becoming homicides. See Warren E. Leary, More Gun Violence, and Better Care for Victims, N.Y. TIMES, Oct. 23, 1994, § 1, at 32 (“Most gun wound experts feel they are doing a better job of saving the shooting victims they see, even with the increasing use of semiautomatic pistols that fire more shots and the greater use of more potent, higher caliber, higher-velocity guns.”). See generally Fox Butterfield, A Historical Study of Homicide and Cities Surprises the Experts, N.Y. TIMES, Oct. 23, 1994, § 1, at 16 (“Historians now say that homicide rates were extraordinarily high in Europe during the Middle Ages—and high in the United States during the early 19th century—then declined steadily until the 1960s... [A]n increase in state power and courtly manners beginning in the 16th and 17th centuries helped curb impulsive, violent behavior... The 60's... marked a shift among many social, cultural and economic forces that worked against violence in previous eras. America began moving into a post-industrial economy, government authority came into question with the Vietnam war, and the traditional family was threatened by things like divorce.”). From 1984 to 1993, the aggravated assault rate, in fact, jumped from 215.8 assaults to 440.1 assaults per 100,000 people, that is, 103.9%. Id. tbl. 1.

28. Black Americans made up 12% of the population in 1990. WORLD ALMANAC AND BOOK OF FACTS 1992, at 72 (Mark S. Hoffman ed.) [hereinafter ALMANAC 1992]. Yet they made up 26% of those arrested. UNIFORM CRIME REPORTS 1991, supra note 20, tbl. 38. Of crimes of violence, 59% of those arrested for murder and nonnegligent manslaughter, nearly 46% for rape, nearly 63% for robbery, and nearly 43% for aggravated assault were Blacks. Id. Researchers differ on the interpretation of these arrest data; the disagreements are ably summarized in Charles V. Willie & Ozzie L. Edwards, Race and Crime, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE, supra note 8, at 1347, 1350:

Most of the research on race and crime has been concerned with differences in the crime rates of blacks and whites. One can hardly address the subject of traditional crime without being confronted with these differences. Some people deny that these differences are real, suggesting instead that they are a function of the sources of data compiled by researchers or the bias of law enforcement agents.

It is difficult to accept the position that the totality of black-white crime-rate differences can be attributed to such measurement errors. The fact is that for self-reported crimes and crimes reported by officials, the seriousness of offenses committed by blacks is likely to be greater, even when the crime rate is similar to that for whites. However, the criteria by which society measures the seriousness of a crime are not altogether without bias. White-collar crimes, corporate crimes, and syndicate crimes involve far more money than do the crimes that command the greatest share of the attention of the criminal justice system. Such crimes, by fostering unhealthy, impoverished, and even dangerous working and living conditions, may also produce much more human suffering and loss of life.
street crime. Non-Whites are also disproportionately victimized by street crimes—with the exception of larceny. 

This analysis has focused on economic and residential correlates that seem to link race and crime. The most significant of these is clearly class distinction. Rather than saying that traditional crime is disproportionate among blacks, Mexican-Americans, Puerto Ricans, or other ethnic minorities, one should say that it is disproportionate among poor members of these groups, and that these groups are disproportionately poor in American society. Thus, the cause—and appropriate solutions—will be seen to be much more social than biological or psychological in nature. Categorizing the criminal population in this way does not create complete homogeneity, but it reduces the variation to such an extent that explanations and solutions are far less difficult.

A second variable of critical significance is "community," a term that can be broadly defined to include such characteristics as size of place, racial composition, and social interaction patterns. These variables, in turn, represent such underlying conditions as social integration, type of social control (formal versus informal), and social stability. Such conditions probably account for the fact that youth crime rates are highest in poor, racially mixed neighborhoods rather than in neighborhoods that are simply poor or racially and ethnically different. Hence, it is not poverty alone, or merely the social consequences of minority status, that lead to delinquent behavior. Rather, it is in part the social conditions which characterize a community that constitute the preconditions for crime.

29. The point was authoritatively made long ago. President's Comm'n on Law Enforcement & Admin. of Justice, Task Force Report: Crime and Its Impact—An Assessment 78 (1967); it remains valid. See generally supra note 28. Despite gains—Black married couples had 84% of the income of White married couples—an all-time high—the poverty rate for Blacks in 1991 remained the highest for any group in the nation: nearly 32%. Almanac 1992, supra note 28, at 134. Sadly, the Black gain was not real; it resulted from a disproportionate drop in the income of White men, which fell almost 4%, the third consecutive year of decline. Id. The real, per capita income of all Americans declined in 1991 for the first time in eight years, by almost 3%. Id. The future is not bright. See Keith Bradsher, Gaps in Wealth in U.S. Called Widest in West, N.Y. Times, Apr. 17, 1995, at A1 (reporting that economic inequality is on rise in U.S. since 1970s; 10% of population holds 40% of wealth, in contrast to Great Britain; there, 1% of the population holds 18%, down from 1920 when it held 59%; the top 20% of Americans (with incomes of $180,000 or more) hold 80% of wealth).

30. Generally, Blacks have had significantly higher violent victimization rates than Whites or persons of other races; households headed by Blacks have the highest rates of household crimes, while Hispanics have somewhat higher violent victimization rates than non-Hispanics, and they have higher rates of household crimes than non-Hispanics. Highlights, supra note 24, at 18-19. In 1992 the rate of victimization per 1,000 people age 12 or older was higher for Blacks (4.7) than for Whites (15.6). The data was the same for assault victimizations in 1992; Whites had a rate of 24.6 while Blacks' rate was 33.5. The rate per 1,000 females age 12 or older was slightly higher for Blacks (1.0) than for Whites (0.8), while the 1992 data showed a slightly higher victimization rate for Blacks (60.4) than for Whites (58.8); the trend in previous years (the study collected data on 1973 through 1992) indicated that, generally, Whites had a higher larceny victimization rate. Sourcebook 1993, supra note 5, tbs. 3.26-3.29. In a 1990 study by the Bureau of Justice Statistics, data were collected on average annual victimization rates by race of victim and type of crime from 1979 to 1986. Blacks were more likely to experience crimes of violence than Whites. The overall rates were 44.3 for Blacks and 34.5 for Whites; when broken down, Whites had a slightly higher rate of simple assault (18.9) than Blacks (16.0), but Blacks were more
his victim tend to be from a broken home, poor, uneducated, unemployed, and a member of a minority group. Street crime is plainly related to socioeconomic factors.

B. White-Collar Crime

While street crime continues to occupy our attention, too little is said of white collar crime—fraud, embezzlement, tax evasion, price

often victimized by rape (1.5 as opposed to 0.8), robbery (13.0 as opposed to 5.4), and aggravated assault (13.8 as opposed to 9.3). The difference in household crimes was even more apparent: Blacks had an overall rate of 260.7, while that of Whites was only 201.0. Blacks were more likely to be victimized in each of the categories in the study: burglary (108.4 as opposed to Whites' 72.4), household larceny (127.9 as opposed to Whites' 113.7), and motor vehicle theft (24.5 as opposed to Whites' 14.9). Larceny is an exception: Whites were more likely to experience crimes of theft than Blacks (80.5 as opposed to 77.1), while Blacks were more likely to experience personal larceny with contact (5.6 as opposed to 2.6), Whites were more likely to experience personal larceny without contact (77.9 as opposed to 71.4). BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SPECIAL REPORT: BLACK VICTIMS 2 (1990).

31. Among other groups, Blacks, Hispanics, and the poor tend to have higher victimization rates than persons who do not possess these characteristics. CRIME VICTIMIZATION, supra note 20, at 6. Aside from simple assault, in which the victimization rate for Whites (16.8) was slightly higher than that for Blacks (15.2), Blacks were more likely to become victims. Specifically, the robbery rate for Blacks was 15.6, as opposed to Whites' 4.7; Blacks' rate for aggravated assault was 18.3, while Whites' was only 7.8; and Blacks' rate for crimes of theft (60.4) exceeded that for Whites (58.8). Hispanics were more likely to experience all crimes in the study than non-Hispanics. Their rate for robbery was 10.6, while that for non-Hispanics was 5.4; their rate of aggravated assault (10.0) exceeded that for non-Hispanics (58.9). The statistics followed a similar pattern when victims were broken down into income brackets. While crimes of theft were almost as likely to happen to those in the highest ($50,000 or more family income) bracket (71.0) as to those in the lowest (less than $7,500; rate 72.3), other crimes were much more likely to occur to those in the lower brackets. The rates for the lowest and highest brackets, respectively, were as follows: robbery, 11.1 and 3.7; aggravated assault, 23.1 and 5.5; simple assault, 28.8 and 11.4. For the middle brackets, seven in all, the rates fluctuated between these two extremes. Id. at 6. While those who were never married were the most likely to experience crimes of theft and violence, the "divorced/separated" group had significantly higher rates of victimization than those that remained married. Specifically, the violent crime rate was 19 for married men and 44 for divorced or separated men; for women, the rates were 11 and 45, respectively. For crimes of theft, married mens' rate was 43, while that for divorced or separated men was 95. Married women were also less likely to experience crimes of theft (44) than divorced or separated women (74). HIGHLIGHTS, supra note 24, at 18.

rigging, double dealing in securities, and the like. In 1949 Edwin Sutherland published his seminal study, White Collar Crime, which was an analysis of the crimes committed by seventy of the largest manufacturing, mining, and mercantile corporations in this country. Over an individual “life career” of forty-five years, the seventy corporations had an average of fourteen criminal convictions each. Today, statistics on this type of crime are not systematically collected. Attention is usually focused elsewhere. Seldom do people find white collar crimes in the headlines, so it is of less concern to them.

Many liberals also do not speak of white collar crime because it does not fit neatly into their ideology. How can it be “crime” if it is not the product of ignorance, poverty, discrimination, or disease? Many conservatives do not speak of it either because they might have

33. Questions are often raised on the definition “white-collar crime.” See generally Herbert Edelhertz, U.S. Dep’t of Justice, The Nature, Impact, and Prosecution of White-Collar Crime 3 (1970). Specifically, should it be categorized by the nature of the offense, by the characteristics of the offenders, or by the relationship between the offenders and their occupations? The most common method of definition seems to be by offense characteristics, and crimes typically categorized as “white-collar” include those mentioned here. “Fraud” is defined as “the intentional misrepresentation of fact to unlawfully deprive a person of his or her property or legal rights, without damage to property or actual or threatened injury to persons.” Tax cases are often considered a subcategory of fraud. Bureau of Justice Programs, U.S. Dep’t of Justice, White-Collar Crime: Special Report 2 (1987) [hereinafter White-Collar 1987] (citing Dictionary of Criminal Justice Data Terminology: Terms and Definitions Proposed for Interstate and National Data Collection and Exchange (2d ed. 1981)). “Embezzlement” is defined as “the misappropriation, misapplication, or illegal disposal of property entrusted to an individual with intent to defraud the legal owner or intended beneficiary.” The difference between fraud and embezzlement is that embezzlement involves a breach of trust that had previously existed between the victim and offender. Id. Securities cases generally fall into the category of “forgery,” that is, “the alteration of something written by another person or writing something that purports to be either the act of another or to have been executed at a time or place other than was in fact the case.” Id.


35. Id. at 20.


37. Sutherland, supra note 34, at 5-9. According to a study of white-collar offenses in 1984-85, white-collar offenders were much more likely to be White than non-White; overall, 66% of those arrested for white-collar offenses were White, while 34% were non-White; in each specific category aside from forgery—where Whites only outnumbered non-Whites by 4%—Whites outnumbered non-Whites by substantial margins:
to attack members of their own socioeconomic class or race. Its impact on our nation, however, can be great. The final damage figures

<table>
<thead>
<tr>
<th>Crime</th>
<th>% White</th>
<th>% Non-White</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax Fraud</td>
<td>93</td>
<td>7</td>
</tr>
<tr>
<td>Lending/Credit Fraud</td>
<td>81</td>
<td>19</td>
</tr>
<tr>
<td>Wire Fraud</td>
<td>69</td>
<td>31</td>
</tr>
<tr>
<td>Other Fraud</td>
<td>62</td>
<td>38</td>
</tr>
<tr>
<td>Embezzlement</td>
<td>68</td>
<td>32</td>
</tr>
<tr>
<td>Counterfeiting</td>
<td>76</td>
<td>24</td>
</tr>
<tr>
<td>Regulatory Offense</td>
<td>90</td>
<td>10</td>
</tr>
</tbody>
</table>

Id. at 7.

38. Id. at 33. Some courts are revealingly candid in expressing their attitudes toward alleged white-collar offenders. The Second Circuit, for example, suggested that the civil use of Title IX of the Organized Crime Control Act (RICO), 18 U.S.C. § 1961 et seq., against “respected and legitimate enterprises” was “extraordinary, if not outrageous.” Sedima S.P.R.L. v. Imrex Co., Inc., 741 F.2d 482, 487 (2d Cir. 1984), rev’d, 473 U.S. 479 (1985). E.F. Hutton was included among the cited “legitimate enterprises.” Id. But see Haroco, Inc. v. American Nat’l Bank & Trust Co., 747 F.2d 384, 395 n.14 (7th Cir. 1984), aff’d, 473 U.S. 606 (1985) (“[T]he white collar crime alleged in some RICO complaints against ‘legitimate’ businesses is in some ways at least as disturbing . . . .”); Chris Welles, Why the E.F. Hutton Scandal May Not Be Over, Bus. Wk., Feb. 24, 1986, at 98 (E.F. Hutton pleads guilty to 2,000 counts of mail fraud multi-million dollar bank scam). Those who make such remarks are apparently unaware of the substantial body of literature on white-collar crime by so-called respected businesses. See, e.g., Irwin Ross, How Lawless Are Big Companies, FORTUNE, Dec. 1, 1980, at 56 (1,043 major corporation between 1970-1980: 117 convictions or consent decrees for 98 antitrust violations; 18 kickbacks, briberies, or illegal rebates; 21 illegal political contributions; 11 frauds; 5 tax evasions). On the scope of criminal and civil RICO, including filing, see infra note 66 and accompanying text.

39. The Bureau of Justice Statistics Special Report concluded:

Although white collar offenses are less visible than crimes such as burglary and robbery, their overall economic impact may be considerably greater. Among the white collar cases filed by U.S. Attorneys in the year ending September 30, 1985, more than 140 persons were charged with offenses estimated to involve over $1 million each, and 64 were charged with offenses valued at over $10 million each. In comparison, losses from all bank robberies reported to police in 1985 were under $19 million, and losses from all robberies reported to police in 1985 totaled about $313 million.

WHITE-COLLAR 1987, supra note 33, at 1. The 1967 PRESIDENT’S REPORT, supra note 16, also concluded:

During the last few centuries economic life has become vastly more complex. Individual families or groups of families are not self-sufficient; they rely for the basic necessities of life on thousands or even millions of different people, each with specialized functions, many of whom live hundreds or thousands of miles away.

[White-collar crime [is]—[a term] now commonly used to designate those occupational crimes committed in the course of their work by persons of high status and social repute [that] . . . are only rarely dealt with through the full force of criminal sanctions.

Serious erosion of morals accompanies [the white collar offender’s violation]. [Those who so] flout the law set an example for other businesses and influence
cannot yet be calculated, but the savings and loan debacle may have cost the nation as much as $500 billion. President Bush told the

individuals, particularly young people, to commit other kinds of crime on the ground that everybody is taking what he can get.

See also JOHN E. CONKLIN, "ILLEGAL BUT NOT CRIMINAL": BUSINESS CRIME IN AMERICA 129 (1977):

[T]he criminal justice system treats business offenders with leniency. Prosecution is uncommon, conviction is rare, and harsh sentences almost non-existent. At most, a businessman or corporation is fined; few individuals are imprisoned and those who are serve very short sentences. Many reasons exist for this leniency. The wealth and prestige of businessmen, their influence over the media, the trend towards more lenient punishment for all offenders, the complexity and invisibility of many business crimes, the existence of regulatory agencies and inspectors who seek compliance with the law rather than punishment of violators all help explain why the criminal justice system rarely deals harshly with businessmen. This failure to punish business offenders may encourage feelings of mistrust toward community morality, and general social disorganization in the general population. Discriminatory justice may also provide lower class and working class individuals with justifications for their own violation of the law, and it may provide political radicals with a desire to replace a corrupt system in which equal justice is little more than a spoken ideal (citations omitted).


The degree to which fraud contributed to the debacle, as well as the extent of the losses, is in dispute. Congressional and other studies put the figure high. H.R. Rep. No. 1088, 100th Cong. 2d Sess. 2-13 (1988) (stating that criminal misconduct by insiders is a major contributing factor in approximately one-third of all commercial bank failures and three-fourths of all thrift failures and estimating loss from $31 to $80 billion); Office of Comptroller of the Currency, Bank Failure: An Evaluation of the Factors Contributing to the Failure of National Banks 9 (1988) (finding that insider abuse is a significant factor in 35% of the bank failures); see Savings Unit Fraud Cited, N.Y. TIMES, Feb. 28, 1990, at C2 (reporting testimony of L. William Seidman, Chairperson of FDIC and RTC, that 60% of savings and loan associations seized are tainted by fraud, which is more than triple the rate of commercial banks, and 1200 possible criminal prosecutions have been referred to the Department of Justice). On a present value basis, the loss may be lower: $150-175 billion. NATIONAL COMMISSION ON FINANCIAL INSTITUTION REFORM, RECOVERY AND ENFORCEMENT, ORIGINS AND CAUSE OF THE S & L DEBACLE: A BLUEPRINT FOR REFORM 4 (1993). The Commission concluded, too, that fraud was not the principal cause of the debacle; it was

a consequence of the perverse incentives, permissive regulation, and inadequate supervision that had been built into the system. While most S & L operators did not succumb to the temptation, the ability to use insured deposits for risky investment was too tempting for some. The profit potentials produced imprudent risk-taking, abusive practices, and fraud. There was a continuum of abusive practices running from aggressive pursuit of profit, and search for regulatory loopholes, to
country that "unconscionable risk-taking, fraud, and outright criminality [were] factors" that led to the crisis. Economically, street crime—steal and burglary—merely transfers wealth, usually from the rich to the poor. Yet, forms of fraud, price fixing, and the collusive allocation of markets undermine the trust that is essential to the working of our free enterprise system and typically transfer wealth from the poor and the middle class to the rich. When an individual in the upper middle class evades taxes, less revenue is available for needed social services, and persons whose wealth is more visible must make up the difference. In fact, we have ample reason for concern here, too.

C. Organized Crime

The public's attitude toward organized crime is strangely ambivalent. While academics debate whether a group such as the Mafia even exists, the core of domestic organized crime actually does consist of out-and-out fraud. Abusive practices of one form or another, mainly by S & L managers and owners but also by unscrupulous attorneys, accountants, appraisers, and investment bankers, figured in substantial taxpayer losses." Id. at 8. While the Commission, concluded that fraud only accounted for 10-15% of the losses sustained in the debacle, it found nonetheless that the fraud was "unprecedented" and "repugnant." Id.

The S & L debacle affected the work load of the courts. U.S. COURTS 1992, supra note 5, at 66 (7% increase—1359 to 1448—in cases dealing with lending institution fraud). See generally id. at 69-71.


43. When Senator Kefauver's Committee first examined the issue in depth in 1950, it concluded that "[t]here is a Nationwide crime syndicate known as the Mafia . . . ." S. REP. No. 307, 82d Cong., 1st Sess. 150 (1951) (Special Committee to Investigate Crime in Interstate Commerce, 3d Interim Rep.); see William Howard Moore, The Kefauver Committee and the Politics of Crime 1950-1952 (1974). Nevertheless, the origins of the word "mafia" reveal that it was originally used to refer to a way of life, not a group of people. While the individuals in 19th century Sicily who exemplified the values reflected in the concept of "mafia"—which, maybe surprisingly, included integrity, beauty, and excellence—were called "mafiosi," the word "mafia" was never used to refer to the people, but only the values they embodied. Accordingly, academics debate whether modern organized crime groups are tightly called "the Mafia." See, e.g., Joseph L. Albini, The American Mafia: Genesis of a Legend 135 (1971) ("Mafia" then is not an organization. It is a
system of patron-client relationships that interweaves legitimate and illegitimate segments of Sicilian society. "Mafioso" is not a rank or position within the patron-client relationship of Sicilian society itself."); Charles Tilly, Foreword to ANTON BLOK, THE MAFIA OF A SICILIAN VILLAGE xv (1973) ("Sicily has never had any single organization one could properly call The Mafia . . . . On the other hand, there really are mafiosi-men wielding power through the systematic use of private violence. The sum of their actions makes up the phenomenon called mafia."); HENNER HESS, MAFIA AND MAFIOSSI: THE STRUCTURE OF POWER 127 (Evald Osers trans., 1974) ("Mafia is neither an organization nor a secret society, but a method. In his social relations, the mafioso has recourse to physical violence or threatens such recourse. By means of this private application or threat of violence, declared illegal by the State, the mafioso not only achieves a personal material or prestige gain but also discharges certain functions within the sub-cultural system by entering the service of others."). Others, in fact, skeptically question the existence of a national organization. See, e.g., LAWRENCE MEIR FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 272-73 (1993) (footnotes omitted):

One factor that fed the movement toward federal involvement in crime control was fear of organized crime, "the syndicate," or the "Mafia." The Mafia was supposed to be a giant criminal conspiracy made up of Italian gangsters (Sicilians, to be specific). Senator Estes Kefauver of Tennessee headed a special committee of Congress to investigate racketeering and organized crime. The Kefauver Committee claimed it uncovered a lot of dirty linen, and it made superb use of publicity in the process. The committee's message was that the Mafia had its tentacles in every major city; it was growing rich and powerful on the spoils of vice and crime.

Viewed in the cold light of hindsight, Kefauver seems to have produced little in the way of hard evidence. But he produced a lot in terms of images and headlines, which to Kefauver and others on his committee were far more important. In the early sixties, the Justice Department under Attorney General Robert Kennedy also paid special attention to crime families and their networks. Whether any of this burst of activity did much good is also doubtful. But the Mafia theme was endlessly fascinating to the general public.

Was there a national Mafia, connected by ties of blood and sacred oaths? The evidence was, in fact, rather slim (or at least controversial); but the media hardly cared. The Mafia made good reading—good fodder for movies, books, and magazine articles.

The notion of a vast, hydra-headed crime syndicate had other values, too. It was a simple and satisfying explanation for at least some of the crime that plagued the nation. It put the blame on a single monster, an identifiable presence, a defeatable enemy—and a foreign enemy, at that. This belief was much more comforting than the main competing theory: that crime was a diffuse, poisonous substance that came, as it were, from nowhere, an invisible enemy, subtle and mysterious. Or the idea that crime had deep, difficult social and economic roots. Moreover, if the Mafia was a reality, who better to fight this vast interstate octopus than the federal government, the only entity capable of fighting and winning the war against crime? Only national power had any hope of destroying organized crime.

Sociologists may be forgiven, but the sight of an eminent historian of law who apparently does not read law reports is remarkable. See, e.g., United States v. Losascio, 6 F.3d 924, 943 (2d Cir. 1993) (prosecution of La Cosa Nostra boss John Gotti); cert. denied, 114 S. Ct. 1645 (1994); United States v. Bianco, 998 F.2d 1112, 1117-28 (1st Cir. 1993) (prosecution of Patriarca Family under RICO; induction ceremony recorded); United States v. Brooklier, 685 F.2d 1208, 1213 (9th Cir. 1982) (RICO prosecution of "members of La Cosa
twenty-four highly structured groups operating in our largest cities across the nation, concentrated mainly in the Midwest and Northeast. Their internal organization is patterned after the Mafia groups of Sicily. No one, though, ought to take comfort in the usual practice of identifying the ethnic character of the principal groups. Organized crime is not ethnic-specific. Members of all ethnic groups participate. Indeed, the most powerful groups today may well be

Nostra, a secret national organization engaged in a wide range of racketeering activities, including murder, extortion, gambling and loan sharking”), cert. denied, 459 U.S. 1206 (1983); see also Howard Blum, Gangland: How the FBI Broke the Mob (1993) (story of Gotti investigations and successful trial under RICO); Ralph Blumenthal, Foreword to The Gotti Tapes (1992) (transcripts of Gotti surveillance).

Concern that identification of the ethnic character of the dominant group in organized crime casts unfair reflection on Italian-Americans generally is misplaced, though it is immediately acknowledged that our society sadly and freely indulges in ethnic stereotyping, including crime jokes, about Italian-Americans that would be socially unacceptable if engaged in reference to Blacks, Jews, or other ethnic groups. Ralph Salerno, one of the nation's outstanding experts on organized crime, eloquently refuted the idea. When an Italian-American racketeer complained to him, "Why does it have to be one of your own kind that hurts you?"—Salerno answered:

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

The identification, however, does present real dangers. Finding that the "racketeers" are "foreigners," the nation runs the risk of "scapegoatism." The tendency is to blame the problem on others. The "culture is not only relieved of sin but [it] can indulge itself in an orgy of righteous indignation." Gus Tyler, The Roots of Organized Crime, 8 Crime & Delinquency 325, 334 (1962). The immigrant may have brought the Mafia with him, but to have survived and prospered, it must have found fertile soil here. More than nomenclature is involved in the change of the name of the group from "Mafia" to "La Cosa Nostra." The nation runs the risk, too, of blithely assuming that as soon as the acculturation process has been completed, the problem will disappear. See, e.g., Dunnell Bell, Crime as an American Way of Life, in The End of Ideology: On the Exhaustion of Political Ideas in the Fifties 127-50 (Collier ed., 2d rev. 1962). The idea is attractive; it calls for no action on the nation's part; it finds no fault in its present way of life. Unfortunately, it has shown little signs of happening. Finally, the tendency to identify organized crime with the Italian-American makes the nation blind to the operations of those of other ethnic derivations, which are considerable. See 1986 President's Report, supra note 44, at 81-94 (reporting activities of Chinese Triads and Tongs); 95-97 (Vietnamese gangs); 97-103 (the Japanese Yakuza); 104-17 (the Cuban Marielitos); 117-18 (Columbian groups); 118-21 (Irish groups); 121-25 (Russian groups) and 125-28 (Canadian groups).
Hispanic, not Italian or Sicilian. If academics debate its existence, others, particularly liberals, feel organized crime only "services" our moral failings. It is not really crime; the nation ought to decriminalize it. Touched by its corruption, political leaders also minimize its sig-


In comparison to other ethnic groups, Hispanic organized crime achieved almost exponential expansion during the 1980s, and commanded a prominent position in the drug trade within the Commonwealth. The decade witnessed a proliferation in the number and ethnic diversity of Hispanic organized crime groups, a shift to narcotics trafficking as the dominant activity, and an expansion of their influence beyond the Hispanic community. The same factors underlying the increased threat from Hispanic organized crime during the 1980s will influence trends of the 1990s.

The effectiveness of Hispanic organized crime groups in today's U.S. environment may be reflective of the narcotics boom, but also it reflects their entrepreneurial ability to move assets out of the United States and, therefore, out of danger of forfeiture to U.S. law enforcement. So long as they control the source of a major drug used worldwide, and can launder the proceeds of that traffic in an effective manner, the Hispanics will retain prominence in the criminal community.

Id. at 289-90. See also 1986 President's Report, supra note 44, at 104-18.

48. The classic statement of this perspective—reflected in comments during this Symposium—was penned by Walter Lippman in 1931. Lippman observed:

The underworld is what it is largely because Americans are too moral to tolerate human weakness, and because they are too great lovers of liberty to tolerate the tyranny which might make it possible to abolish what they prohibit. They have made laws which act like a protective tariff—to encourage the business of the underworld. Their prohibitions have turned over to the underworld the services from which it profits. Their prejudice in favor of weak governments has deprived them of the power to cope with the vast lawbreaking industries which their laws have called into being.

The dangers and inconveniences of this result are multiplying and have become ominous. The present deadlock between our legislative purposes and our administrative prejudices cannot continue forever. For while it lasts, lawlessness is growing, and in certain areas of the country the social structure is already badly shaken. Something will have to give way. Sooner or later the American people will have to make up their minds either to bring their legislative ideals down to the point where they square with prevailing human nature or they will have to establish an administrative despotism strong enough to begin enforcing their moral ideals. They cannot much longer defy the devil with a wooden sword.


Advocates of drug legalization in effect are urging the country to engage in a massive experiment. Incredibly, their hypothesis is that by legalizing all drugs
Yet thoughtful people see it as a threat. The organized crime groups of whatever ethnic character that plunder our people are more than mere criminal cartels. They are also para-governments within our society. They are active in professional gambling, the importation and distribution of narcotics, and loan sharkiing. Each of these offenses is parasitic, corruptive, and predatory in character, whose chief impact is on the urban poor and lower middle classes. Indeed, the economic price tag of organized crime may be higher than all other crime combined.49 Clearly, too, organized crime affects

and reducing their cost, the drug problem will decline if not wither away. This defies everything we know about markets, deterrence, and the propensity of people—especially Americans—to seek chemical solutions to life’s real or imagined problems and challenges. Moreover, if the legalization movement’s hypothesis proves wrong it will be too late to go back to the status quo ante. Returning to prohibition after a period in which millions of consumers developed a taste for new drugs would be a daunting challenge to say the least.

Given the extraordinary risks of such an experiment, and the fact that no other country in the world has sought to try it, one might have expected many people who today proclaim themselves to be “for legalization” to have demanded to know just what is meant by legalization, how it would work, and how it would affect key institutions of American society. Those questions are being asked all too infrequently. The legalization debate continues to be waged at an abstract and simplistic level. Perhaps the most important negative effect of this current debate is that it is diverting time, resources, and attention from the more pressing question of how to reform the war on drugs so as to reduce drug use more effectively, and to minimize social and economic costs while preserving civil liberties.

Id. at 41-42 (footnotes omitted). Nothing said in this Symposium leads inescapably to a different conclusion.

49. 1967 President’s Report, supra note 16, at 33, concluded that the economic scope of dealing in illegal goods and service was twice that of all other forms of crime. The estimate may be high. See ABT ASSocs., Unreported Taxable Income From Selected Illegal Activities 61, 108, 147 (1984) (estimating that the unreported taxable income in 1982 relating to drugs is $22.15 billion, to gambling is $2.39 billion, and to prostitution is $11.558 billion); Sima Fishman et al., The Income of Organized Crime, in 1986 President’s Report, supra note 44, at 423 (gross revenue for 1986: $65.7 billion (lower limit $41.6; upper limit $106.2) with a net income of $46.6 billion (lower limit $29.5; upper limit $75.9)).

More recent estimates of the drug traffic, however, remain high. The Office of National Drug Control Policy estimates that in 1990 the nation’s consumers spent:

$18 billion for cocaine
$12 billion for heroin
$ 9 billion for marijuana, and
$ 2 billion for other drugs.

street crime.\textsuperscript{50} A high percentage of theft, robbery, and burglary in large cities is related to the need to acquire money for drugs.\textsuperscript{51} But organized crime groups have not confined their activities to traditional criminal endeavors such as the marketing of narcotics. They have increasingly undertaken to subvert legitimate businesses and unions.\textsuperscript{52} The viability of some spheres of our economic life is threatened. More important, these criminals have in many places established corrupt alliances with the police, the prosecutors, the courts, and the legislators. Freedom from legal accountability is secured, often under the rhetoric of liberty. In many ways, organized crime is thus the most sinister kind of crime in America. It subverts the character of American institutions as well as the character of its individuals.\textsuperscript{53}

Obviously, this short review of the facts of antisocial behavior has not spoken about the international aspects of organized crime or even attempted to classify—or not classify—"terrorism" as a form of organized crime. More about these questions later, but it is time to turn now to our society’s response to antisocial behavior.

\section*{III. Systems of Criminal Justice}

To understand the weaknesses and strengths of our systems of criminal justice in our society today, we must first appreciate the problems of the administration of justice in a largely stable, homogeneous, pioneer, agricultural community during the first half of the nineteenth century; it is then necessary to understand the problems of the

\begin{footnotes}
\footnote{50. Drugs 1992, supra note 49, at 2-4.}
\footnote{51. Id. at 2.}
\footnote{52. See generally President’s Commission on Organized Crime, The Edge: Organized Crime, Business and Labor Unions (1986); New York State Organized Crime Task Force, Corruption and Racketeering in the New York City Construction Industry (1990).}
\footnote{53. See 1967 President’s Report, supra note 16, at 209:

\begin{quote}
[I]n many ways organized crime is the most sinister kind of crime in America. The men who control it have become rich and powerful by encouraging the needy to gamble, by luring the troubled to destroy themselves with drugs, by extorting the profits of honest and hardworking businessmen, by collecting usury from those in financial plight, by maiming or murdering those who oppose them, by bribing those who are sworn to destroy them. Organized crime is not merely a few preying upon a few. In a very real sense it is dedicated to subverting not only American institutions, but the very decency and integrity that are the most cherished attributes of a free society. As the leaders of Cosa Nostra and their racketeering allies pursue their conspiracy unmolested, in open and continuous defiance of the law, they preach a sermon that all too many Americans heed: The government is for sale; lawlessness is the road to wealth; honesty is a pitfall and morality a trap for suckers.
\end{quote}}
administration of justice in our mobile, heterogeneous, urban, industrial communities of today and the resulting difficulties involved in meeting those problems with legal doctrines and social institutions inherited from England and then adapted to an American society in the last century.\textsuperscript{54}

A. Law Enforcement Agencies

We inherited from England a medieval system of sheriffs, coroners, and constables, devised for a rural society and fashioned out of the struggle between the Crown and Parliament for political and religious freedom in the seventeenth century. A professional police force was then unknown; its emergence, too, was slow. Not until 1844, in fact, was a unified night and day police force established in this country, first in New York City.\textsuperscript{55} Its primary function was street patrol. Nearly one-half of the personnel of every city department are primar-


\textsuperscript{55} In a simpler society, common-law offenses normally occurred between neighbors. No specialized law enforcement system was necessary to bring them into the administration of justice. \textit{The Police, supra} note 54, at 1-2 put it this way:

In the preindustrial age, village societies were closely integrated. Everyone knew everyone else's affairs and character; the laws and rules of society were generally familiar and were identical with the moral and ethical precepts taught by parents, schoolmasters, and the church. If not by the clergy and the village elders, the peace was kept, more or less informally, by law magistrates (usually local squires) and constables. These in the beginning were merely the magistrates' agents, literally "citizens on duty"—the ablebodied men of the community serving in turn. Not until the 19th Century did policing even have a distinct name. Until then it would have been largely impossible to distinguish between informal peacekeeping and the formal system of law enforcement and criminal justice. The real outlaws—murderers, highwaymen and their ilk—were handled mostly by the military when normal procedures for crime control were unsuccessful.

This is, of course, not true today. For example, the 1967 President's Report, \textit{supra} note 16, at 247-48, analyzed 1,905 crimes reported during January of 1966 in Los Angeles. Only 25\% resulted in arrests or other clearance. But 90\% of those cleared through arrest were cleared by arrest made by the patrol force. Of the cleared cases, 63\% involved "named suspects." Of these, about half involved suspects known to the victim, about 30\% were on-the-scene arrests by patrol officers, and about 20\% were similar arrests by private security officers. Most of the cases cleared with unknown suspects were cleared because of an on-the-scene arrest, initiated either by radio call or field observation. Nevertheless, 88\% of the cases not involving named suspects were not cleared. Anonymity, so characteristic of urban life today, is thus seen to be one of the best shields against detection for the commission of a crime.
ily involved in street duty. The rest back up those on patrol by performing detective work and working in staff positions. Police work, in short, has changed comparatively little since 1844.

Popular fiction notwithstanding, scientific crime detection is still a limited tool in most police work. The radio and the automobile have had a greater impact on day-to-day law enforcement than the best the modern crime laboratory has had to offer, including the sort of DNA evidence that captures the imagination of those watching a prosecution that is taking place not too far south of here. Police work today,

56. In 1993 the nation's law enforcement community employed an average of 2.3 full-time officers for every 1,000 inhabitants. Considering full-time civilians, the overall law enforcement employee rate was 3.1 per 1,000 inhabitants, including 13,041 separate city, county, and state police agencies that report data to the Federal Bureau of Investigation. These agencies collectively offered law enforcement service to a population of over 244 million, employing 553,773 officers and 212,353 civilians.

Varying demographic and other jurisdictional characteristics greatly affect the requirements for law enforcement service from one locale to another. The needs of a community having a highly mobile or seasonal population, for example, may be very different from those of a city whose population is relatively stable. Similarly, a small community situated between two large cities may require a greater number of law enforcement personnel than a community of a similar size that has no urban centers nearby. The functions of law enforcement are also significantly diverse throughout the nation. In certain areas, sheriffs' responsibilities are limited almost exclusively to civil functions and the administration of the county jail facilities. Similarly, the responsibilities of state police and highway patrol agencies vary from one jurisdiction to another.

The law enforcement employee average for all cities nationwide in 1993 was 2.8 per 1,000 inhabitants. The nation's smallest cities, those with fewer than 10,000 inhabitants, employed an average of 3.5 employees per 1,000 population, while for the largest cities (over 250,000 population) the rate was 3.6 per 1,000. Cities with populations between 10,000 and 249,999 registered lesser rates ranging from 2.2 to 2.4 employees per 1,000 inhabitants. Rural and suburban counties averaged full-time law enforcement employee rates of 3.9 and 3.6 per 1,000 inhabitants. Uniform Crime Reports 1993, supra note 27, at 288.

Local governments (county and municipal) spent $23,080,597 in 1990 for police protection, 72.5% of the total of federal, state, and local expenditures, while state governments spent $4,714,460 in 1990 in direct police protection, 14.8% of the total of federal, state and local expenditures. Sourcebook 1993, supra note 5, tbls. 1.1. 1.2.

57. When the patrol force fails to prevent a crime or to apprehend the offender during its commission, the police must rely instead upon investigation: the detective function, development of which was slow. It was not, for example, until 1842, thirteen years after the formation of the Metropolitan Police in England, that a small body was detached for detective work, and not until 1878 that the Criminal Investigation Department was formally created. Patrick Barron Devlin, The Criminal Prosecution in England 18 (1959).

however, is still largely looking, questioning, and listening—even under the best of conditions and in the best of departments.

(1) Local Police

The general performance—effectiveness or fairness—of the local police is hardly impressive. Putting aside the question of community relations—too many times nonexistent—the clearance rate by arrest as opposed to conviction of crimes against either the person or the property is hardly high.59 Sadly, recall that the perpetrator is known to the victim in many crimes of violence. Under present law enforcement practices, the clearance statistics demonstrate, in short, that often crime does pay.

The truth is that the nation’s local police officers, despite some important advances, largely remain poorly paid, undertrained, and overworked. Professionalization is only just beginning. All too often, politics, if not corruption, taints their work. The experts agree that too few departments are well organized.60 A need is present for area-wide planning and statewide coordination, but local law enforcement remains largely fragmented, complicated, and frequently overlapping. America remains in too many places too often a nation of obsolete, small police forces. It has often been demonstrated that much could be done merely with more adequate personnel. The needs of local law enforcement, in short, are massive.

(2) State Police61

As the state’s chief executive, the governor of most states must see to it that the laws of the state are enforced. The governor, too, is usually the head of the National Guard, which backs up police agencies in civil disturbances. Traditionally, the state attorney general, however, is the state’s chief law enforcement officer. In this capacity, he or she generally has at least legal supervisory power over law enforcement in the state. But statewide police forces, now found in a majority of states and in all of the populous states, save California, are a comparatively new development. The state police force was first set up in Pennsylvania in 1905, principally because local county sheriffs or

59. Uniform Crime Report 1993, supra note 27, fig. 3.1 (murder, 66%; aggravated assault, 56%; forcible rape, 53%; robbery, 24%; burglary, 13%; larceny, 20%; motor vehicle theft, 14%).
60. See generally Herman Goldstein, Police: Administration, in 3 Encyclopedia of Crime and Justice, supra note 8, at 1125.
constables— institutions, with a few notable exceptions, now anachronistic—were unwilling or unable to enforce the law. Today the state police are the fastest growing of the police agencies. From the beginning, they have been characterized by a high degree of professionalism, largely free of corruption, and not dominated by politics. Usually, it is their job to train local officers, maintain statewide laboratories, keep statewide intelligence and other files, and otherwise back up local forces. In many ways, their contribution to state law enforcement is the hope of the future.

(3) Federal Law Enforcement

Unlike the states, the federal government has no common-law jurisdiction in the area of criminal justice. Like Topsy, in Uncle Tom's Cabin, the federal police agencies have "just growed." In 1789 the Revenue Cutter Service was started. Since then, innumerable different agencies have been established. Located in various departments of the federal government, the chief agencies are, among others, the Secret Service, the Drug Enforcement Administration, the Internal Revenue Service, and the Federal Bureau of Investigation. Although small in numbers—New York City has more than half as many police officers as the entire federal establishment—the impact of the federal agencies on criminal justice—federal, state, and local—is great.

While the attention of state and local agencies has been primarily directed at street crime, a major share of the burden of responding to white collar and organized crime has fallen to the federal government. Evaluation of the federal effort, however, is difficult because so few objective measures are available. The progress that is being made may be attributed in part to the enactment of the Organized Crime

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64. In 1990 the federal government spent $4,020,474 in direct expenditures for police protection, 12.6% of the total of federal, state, and local expenditures. Sourcebook 1993, supra note 5, tbls. 1.1, 1.2. The federal government in 1990 employed 65,490 persons in police protection. Id. tbl. 1.23.

65. Federal Bureau of Investigation, U.S. Dep't of Justice, Uniform Crime Reports 1990 tbl. 72 (New York City: total—36,407 (26,842, total officers; 9563, total civilians)).
Control Act of 1970, which gave federal agencies some of the legal tools they needed to act effectively against group crime.\textsuperscript{66} The failure


RICO covers violence, the provision of illegal goods and services, corruption in labor or management relations, corruption in government, and criminal fraud. Blakey, Civil Action, supra, at 300-06. Congress found that "the sanctions and remedies available" under the law in 1970 were "unnecessarily limited in scope and impact." \textit{Id.} It then provided a wide range of new criminal and civil sanctions to control these offenses, including imprisonment, forfeiture, injunctions, and treble damage relief for "person[s] injured" in their "business or property" by violations of the statute. 18 U.S.C. §§ 1963, 1964(c) (1984 & Supp. 1995). At the time, these sanctions were called for by no less than President Nixon, Message on Organized Crime, reprinted in Hearings Before the Senate Subcomm. on Criminal Laws and Procedures of the Comm. on the Judiciary, 91st Cong., 1st Sess. 449 (1969) [hereinafter Senate Hearings], and the American Bar Association. Hearings Before Subcommittee No. 5 of the House Comm. on the Judiciary, 91st Cong., 2nd Sess. 537 (1970); Senate Hearings, supra, at 259.

At first, the Department of Justice moved slowly to use RICO criminally. Today, it is the prosecutor's tool of choice in sophisticated forms of crime. \textit{Oversight on Civil RICO Suits, Hearings Before the Senate Comm. on the Judiciary, 99th Cong., 1st Sess. 109-11 (1985)} (testimony of Assistant Attorney General Stephen S. Trott). The Department of Justice is also moving to implement the civil provisions. \textit{Id.} at 116-17 (litigation against mob-controlled unions reviewed). Since 1970 criminal RICO has been effectively used against organized crime groups, United States v. Salerno, 868 F.2d 524, 528 (2d Cir. 1989) ("The RICO enterprise alleged in the indictment is an organization known as the 'commission' of La Cosa Nostra, a nationwide criminal society which operates through local organizations known as 'families.'"), compare Selwyn Raab, Curbing Mob Chiefs, N.Y. Times, Feb. 27, 1984, at B2 (indictment under RICO of nine mob leaders, five of whom sit on the "commission" and are the heads of the New York City area families) with \textit{S. Rep. No. 617, 91st Cong., 1st Sess. 36-43 (1969)} (five of nine individuals indicted in 1984 identified in 1969 in Senate Hearings, supra), white-collar crime prosecutions, United States v. Marubeni America Corp., 611 F.2d 763 (9th Cir. 1980) and violent groups, United States v. Yarbrough, 852 F.2d 1522, 1526-28, 1540, 1546 (9th Cir. 1988) (prosecution of "Order" or

Nevertheless, RICO is under attack by a wide range of groups. Criminally, the principal focus of the attack is on large trials. The Report of the National Association of Criminal Defense Lawyers on the “RICO Megatrial” is illustrative. National Ass’n of Crim. Defense Laws., Report on RICO Megatrials (1987) [hereafter NACDL Report]. See also ABA Crim. Justice Section on RICO Trials, Draft Report (1988); Committee on Crim. Advocacy of the Ass’n of the Bar of the City of New York, Megatrials: A Report (1988). Compare United States v. Gallo, 668 F. Supp. 736 (E.D.N.Y. 1987) (Weinstein, C.J.) (criticizing a RICO indictment of a substantial number of defendant indictments) with United States v. Casamente, 887 F.2d 1141, 1151-52 (2d Cir. 1989) (convictions upheld of 21 defendants tried over 17 months for RICO drugs and setting standards for complex trials: (1) prosecutor must make a good faith estimate of anticipated length of the case-in-chief, (2) if the trial will exceed four months, the prosecutor must justify it, and (3) such a trial of more than ten defendants must be especially justified), cert denied, 110 S. Ct. 1138 (1990). The NACDL Report, supra, which cites only 27 allegedly illustrative decisions, is analyzed and rejected, point by point, using a computer-generated study of all 900 decisions handed down during the period of the Report, in G. Robert Blakey, RICO: The Federal Experience (Criminal and Civil) and an Analysis of Attacks Against the State, in Handbook of Organized Crime in the United States 457-467 (Robert J. Kelly et al. eds., 1994). Independent studies conclude that RICO is effective against sophisticated forms of crime. The President’s Commission on Organized Crime had high praise for RICO and recommended that states adopt similar legislation. 1986 President’s Report, supra note 44, at 133-34 (concluding that RICO is one of the most powerful and effective weapons in existence for fighting organized crime). In its study of federal organized crime prosecutions, the General Accounting Office also concluded:

Prior to the passage of [RICO], attacking an organized criminal group was an awkward affair. RICO facilitates the prosecution of a criminal group involved in superficially unrelated criminal ventures and enterprises connected only at the usually well-insulated upper levels of the organization’s bureaucracy.

Before the act, the government’s efforts were necessarily piecemeal, attacking isolated segments of the organization as they engaged in single criminal acts. The leaders, when caught, were only penalized for what seemed to be unimportant crimes. The larger meaning of these crimes was lost because the big picture could not be presented in a single criminal prosecution. With the passage of RICO, the entire picture of the organization’s criminal behavior and the involvement of its leaders in directing that behavior could be captured and presented.

Organized Crime: 25 Years After Valachi: Hearing Before the Senate Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs, 100th Cong., 2d Sess. 72 (1988) (testimony of David C. Williams, Director of Special Investigations, General Accounting Office). Based on its hearings, the Senate Committee recommended that federal law enforcement agencies “should continue, in appropriate and deserving cases, their innovative and effective use of the enterprise theory of investigation, the task force approach, and the provisions of the RICO statute.” Senate Permanent Subcomm. on Investigations of the Comm. on Governmental Affairs, Federal Government’s Use of the RICO Statute and Other Efforts Against Organized Crime, S. Rep. No. 407, 101st
Law-enforcement officials generally credit a long-term strategy adopted by the Justice Department and the Federal Bureau of Investigation in the early 1980’s: developing cases against the top leaders of organized-crime families and relying largely on the Racketeer Influenced and Corrupt Organizations Act, or RICO, as a courtroom tool.

By concentrating on enterprises rather than individuals, Federal prosecutors in the last five years have removed the high commands of families through the convictions and long prison sentences of almost 100 top Cosa Nostra leaders.


The most thoughtful, thorough, and independent academic study is JAMES B. JACOBS, BUSTING THE MOB (1994). Jacobs concludes:

[S]ome law enforcement officials and academic observers predict[ . . . ] that America [is] on the threshold of defeating Cosa Nostra. While one cannot help being impressed by the government’s overwhelming successes in organized-crime prosecutions across the United States since 1980, one must also be impressed by Cosa Nostra’s power and expansive reach as evidenced in the testimony, wiretaps, and physical evidence that have been adduced . . . [in the current] trials. It is sobering to consider that, at least until recently, Cosa Nostra exerted powerful influence over the nation’s largest union (the Teamsters), several other important national unions (Longshoreman’s Association, Hotel Employees and Restaurant Employees International Union, and the Laborers International Union of North America), the New York City/New Jersey waterfront, the Fulton Fish Market, the New York City construction industry, garment industry, and trash-hauling industry, and numerous other businesses throughout the country. Over the last several decades, Cosa Nostra leaders have stood at the side of mayors, governors, and even presidents. The sum total of this much influence and power makes organized crime a significant part of the political economy of the United States.

Unfortunately, there is no systematic way to determine how successful the government’s organized-crime-control campaign has been, much less will be, in weakening or eliminating Cosa Nostra or in reducing the amount of racketeering and harm associated with Cosa Nostra. There are no systematic and reliable data on the health, wealth and power of Cosa Nostra as a whole or of its individual crime families. Hundreds of Cosa Nostra members have been sentenced to long prison terms, but we do not know whether replacements have or will move into their vacated roles. Many law enforcement professionals see the Cosa Nostra families as being in disarray and in permanent decline. But these observations are generally ad hoc and not part of systematic nationwide intelligence gathering and analysis effort. Electronic monitoring, computer systems, and the emergence of well-trained organized crime-control units and specialists make conceivable the implementation of an extensive intelligence operation. But resources and technology have to be supported by political will and organizational commitment. The danger is that attention will be drawn away from organized-crime control to other pressing law enforcement priorities and that, while the law enforcement
to do more is attributed to a failure to secure legally admissible evidence or to commit to the fight more resources, and organized crime's willingness to threaten, bribe, and murder those who would testify against its members.

machinery sleeps, Cosa Nostra will reconstitute itself. Finally, even if Cosa Nostra as an organization has been substantially weakened, we obviously cannot be sure that Cosa Nostra's racketeering activities have not been (or will not be) taken over by newly emerging crime groups, thereby negating any reduction in racketeering or societal harm.

Many of the economic and social forces that allowed organized crime to achieve such immense power are still operative. The citizenry's demand for illicit goods and services remains strong. Many unions remain vulnerable to labor racketeering, and those that have been "liberated" from organized crime have been very slow to repudiate their mob ties, if they have done so at all. Thus, it may be premature to predict that the investigations and trials of the 1980s constitute the beginning of the last chapter in the history of Cosa Nostra. Whatever the future may hold, the period from the late 1970s to the early 1990s has been marked by the most concerted and sophisticated attack on organized crime in the history of the United States.

Id. at 23-24.

The Organized Crime Control Act contained more than RICO. Title II authorized the general use of immunity techniques. 84 Stat. 926 (codified at 18 U.S.C. § 6001 et seq.) Since 1973 an average of 4,287 orders have been obtained each year. Sourcebook 1993, supra note 5, tbl. 5.1. Title V initiated the witness protection program. Since 1987 the program has protected 13,535 witnesses. Id. tbl. 1.56. Salvatore Gravano, the underboss in the John Gotti Family of La Cosa Nostra, is one of the most significant protected witnesses in the history of the program. See Joseph P. Fried, Ex Mob Underboss Gets Lenient Terms for Help as Witness, N.Y. Times, Sept. 27, 1994, at A1 (reporting a sentence of five years by Judge I. Leo Glasser despite his admission of involvement in nineteen murders for "invaluable aid" in Mafia prosecutions). Criminal RICO prosecutions are running at about the rate of 125 per year, 39% of which are in the organized crime area (not Mafia only, but also drugs, etc.), while 48% are in the white-collar crime area (government corruption, business fraud, etc.) and 13% are in other areas (violent groups, including terrorist, white-hate, etc.). Blakey, Myths, supra, at 120. General data on matters, defendants and sentences in racketeering prosecutions under RICO and related statutes are reported in Sourcebook 1993, supra note 5, tbs. 5.38, 5.39, 5.40, 5.41. Civil RICO filings are running at the rate of around 1,000 per year. Since 1988, though after 1989, the year of H.J., Inc. v. Northwestern Bell Telephone Co., 492 U.S. 229 (1989), the Supreme Court's "pattern decision," the number dropped 7.7% from 1991 to 1992. U.S. Courts 1992, supra note 5, tbl. C-A2 (230,503 total filings, of which 389% were RICO (897))). Estimates indicated that 58.6% of the civil filings would be in the federal courts on an independent basis of jurisdiction. Blakey & Cessar, supra, at 619.

67. In the white-collar area, the work of the Department of Justice that is the most impressive is its political corruption prosecutions. A Vice President and a Supreme Court Justice have had to resign; Senators and congressmen have been convicted as have attorneys general and other cabinet level appointees; at the state and local level, mayors, judges, prosecutors, sheriffs, and police officers have all been convicted. Between 1970 and 1991, the Department convicted 14,093 individuals (41% federal; 7.2% state; 24.1% local; 27.1% other). Sourcebook 1993, supra note 5, at tbl. 5.98.

68. See generally Witness Intimidation Called a Growing Problem, N.Y. Times, Aug. 7, 1994, § 1, at 30 (quoting Rep. Charles E. Schumer, "When thugs control the courthouse,
The need for such modern evidence-gathering techniques as court-ordered electronic surveillance, which was provided for in Title III of the 1968 Safe Streets Act, moreover, is established, yet not everywhere adopted, or if adopted, vigorously used. While results are good so far, much remains to be done.

they control the law. They control the streets.

69. The 1967 President's Report, supra note 16, at 192, identified the 17 states in which the wealthiest and most influential core group of "organized crime operated"; it then recommended the adoption of electronic surveillance legislation as part of a comprehensive law enforcement strategy to curtail organized crime. Id. at 203. Congress enacted the legislation in 1968. Pub. L. No. 90-351, 82 Stat. 211 (codified at 18 U.S.C. § 2510 et seq.). Congress also created a commission to study the first six years of operation of the statute. Id. at 225. Although not without dissent, the National Comm'n for the Review of Fed. & State Law, Report Relating to Wiretapping and Electronic Surveillance 3-5 (1976) concluded:

The considerations which led Congress to provide procedures for court authorization of electronic surveillance for law enforcement are still applicable. The Commission vigorously reaffirms the findings and statements of policy made by Congress in 1968 that

Organized criminals make extensive use of wire and oral communications in their criminal activities. The interception of such communications to obtain evidence of the commission of crimes or to prevent their commission is an indispensable aid to law enforcement and the administration of justice.

Court-authorized electronic surveillance under Title III has effectively assisted law enforcement in investigations of organized-crime-type offenses, including narcotics distribution, major fraud schemes, and other similar activity of an ongoing conspiratorial nature. Alternate investigative techniques were frequently ineffective in combatting these type of criminal activity.

Law enforcement would be more extensively in criminal investigations of substantial significance to the public interest, particularly in the investigation of narcotics importation and distribution and theft and fencing. If there is to be a Federal role in the investigation of interstate theft and fencing crimes, customs offenses, and manufacture, sale, and distribution of firearms, electronic surveillance would be a highly useful tool.

The 1986 President's Report, supra note 44, at 145, concurred ("Electronic surveillance is now an accepted law enforcement technique that has proven its effectiveness is organized crime investigations."). But see Sourcebook 1993, supra note 5, tbl. 2.53 (in 1974, 80% of those questioned disapproved of wiretapping; in 1993, only 72% disapproved; question does not distinguish between private surveillance and law enforcement use under court system).

Today, 37 states have authorized the use of electronic surveillance in law enforcement. Administrative Office of the U.S. Courts, Wiretap Report January 1, 1993 to December 31, 1993 tbl. 1 (1994). Of the seventeen states identified by the 1967 President's Report, supra note 16, only one (Michigan) has not enacted the recommended legislation, but among those states that did, five states (Illinois, Missouri, Ohio, Rhode Island, and Wisconsin) did not even use their statutes in 1993. Id. Of the seventeen states that did use the statute, the bulk of the surveillance orders were issued in only four states (Florida, 36; Maryland, 17; New York, 204; and Pennsylvania, 61). Indeed, 73% of the state orders were secured in only three states: New York, New Jersey, and Pennsylvania.
B. Courts

It is not possible, of course, to talk about criminal justice without talking about the courts, both state and federal. Popular fiction and the media make much of the drama of the criminal trial. It is supposed to be, of course, a contest between the forces of good and evil from which the truth emerges—established in a process characterized by a high regard for individual rights. Attention is also focused on the work of the appellate courts, particularly the Supreme Court. There, we are told rights are vindicated and justice done. But the reality is very different.

A substantial portion of all criminal defendants are poor—and poorly represented at trial. Seldom is a defendant judged by a jury of his peers—his guilt is usually established as a result of a bargaining process with the prosecutor, in which the merits of the case are not always the chief consideration. Popular fiction notwithstanding, criminal justice today is largely administrative, not judicial. When cases are not resolved by pleas, the conviction rate is not necessarily impressive.

In fact, while the federal government secured 450 orders, and while federal orders increased 32%, state orders decreased 9%. Id. at 2. Organized crime—in particular the drug traffic—must not be as widespread in these states as the earlier studies found. The best academic piece on electronic surveillance—analytically and functionally—is Goldsmith, The Supreme Court and Title III: Rewriting the Law of Electronic Surveillance, 74 J. CRIM. LAW & CRIMINOLOGY 1 (1983).

70. Comprehensive data on poverty in the administration of federal, state, and local systems of criminal justice are not collected annually. All agree, however, that a substantial portion of those processed by the criminal justice system is indigent. See, e.g., BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, REPORT TO THE NATION ON CRIME AND JUSTICE 75 (2d ed. 1988) ("40% of all defendants charged with felonies are classified as indigents."). Data on appointment of counsel in the federal courts is collected in U.S. COURTS 1992, supra note 5, at 78-79 (1992: 82,907 appointments, a 5% increase over 1991.).

71. See, e.g., ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 1990 ANNUAL REPORT OF THE DIRECTOR tbl. D-4 (of 46,725 convicted defendants, 3,973 (85%) were convicted by guilty pleas, 718 (1.8%) were convicted of pleas of nolo contendere, while 1,063 (2.67%) were convicted by the court, and 5,210 (13%) were convicted by the jury) [hereinafter U.S. COURTS 1990]; SOURCEBOOK 1993, supra note 5, tbl. 5.57 (selected states: 91% guilty pleas). Guilty pleas are one method of cutting down on caseloads. Crowding in federal courts can, however, be caused by a variety of factors beyond legal theory or new legislation. Even conscientious and able judges can be bad administrators of their dockets. See Doreen Carvajal, New York's Clogged U.S. Courts Delaying Civil Verdicts for Years, N.Y. TIMES, Apr. 17, 1995, at A1 (reporting that Judge I. Leo Glasser, a former dean of the Brooklyn Law School, has 50 civil cases pending longer than 3 years; in one case, a nonjury trial heard in 1984, the judge has not made a decision yet).

72. See, e.g., U.S. COURTS 1990, supra note 71, at 66 (of 56,519 defendants, 46,735 (82.6%) were convicted; of the 9,794 (12.4%) not convicted, 8,193 (83.6%) were dismissed; 630 (6.4%) were acquitted by the court; and 971 (9.9%) were acquitted by the jury; of the
Our courts today operate with rules of evidence and criminal procedure that were fashioned in an age dominated by the death penalty and fearful of the suppression of religious or political dissent. Law enforcement was consciously debilitated. Insistence upon the common-law rights of an Englishman in the latter half of the eighteenth century—pressed to the limits of their logic in our formative years by a Puritan and pioneer distrust of all government itself—ultimately produced a complicated, expensive, and time-consuming process, which has now largely broken down. The adjudication of guilt or innocence, in short, is at best a matter of chance. A system designed for the leisurely pace of a rural society is now operating as a mass production scythe of the poor and as a means of enabling the better off to evade legal responsibility. As the course of the O.J. Simpson prosecution amply demonstrates, it is not race, but wealth that affects its direction. Volume alone makes a mockery of justice.

We experienced in the last several decades, moreover, both a revolution and a counter-revolution in criminal procedure, led by the Supreme Court, which has been both good and bad. The elimination of the violence of the third degree—now largely an accomplished fact—was a great advance. In 1936, for example, in Brown v. Mississippi, the Supreme Court overturned a conviction because it was based on a confession obtained by physical torture. No other result was possible. But as the Supreme Court moved on to less clear-cut issues of “fairness,” some of its members sought, in the name of individual rights—defined by an eighteenth century ideology—to convert the criminal trial from a test of the defendant’s innocence or guilt into an inquiry into the propriety of the policeman’s conduct. Surely, the high water mark of that revolution was Escobedo v. Illinois, in which a habitual offender, Danny Escobedo, had his murder conviction overturned because of an alleged abuse of his “absolute right to remain silent.” Danny was let go free. Subsequently, he was convicted of dealing in narcotics, taking indecent liberties with a minor, and attempted murder. Whatever weight ought to be given to

7,874 tried to court or jury; 6,273 (79.6%) were convicted, while 1,602 (20.4%) were acquitted; Sourcebook 1993, supra note 5, tbl. 5.73 (selected states: 64% convicted; 31% not convicted; 5% deferred or diverted).
73. 297 U.S. 278 (1936).
75. Id. at 485.
76. ‘Lucky’ Criminal Behind Bars Again . . . But for How Long?, CHI. TRIB., Oct. 22, 1985, at A17 (reporting Escobedo’s conviction in 1967 for dealing in narcotics, for which he served 8 years of a 22-year sentence, and his 1984 conviction for taking indecent liberties
Danny’s “absolute right to remain silent,” few ought to argue with the proposition that too little weight was given to the other, equally important rights of those to whom Danny sold drugs, whom he sexually abused, or whom he tried to kill. Fortunately, Escobedo is now in prison where he belongs.

The revolution in criminal procedure that reached its peak in the 1960s, however, is now at an end. Indeed, the counter-revolution is well under way. The liberal block no longer dominates the Supreme Court. President Nixon’s unprecedented four appointments in 1969, voting together roughly seventy percent of the time, managed to turn the Court around. Statistics tell at least part of the story. During the last term of the Warren Court (1968-69), the Court heard and decided twenty-six appeals in criminal cases. The prosecution won only eight, or thirty-one percent. Sixteen, or sixty-three percent, were reversed. In contrast, during the first term of the Burger Court (1969-70), the Court heard and decided twenty-nine appeals in criminal cases. This time, the prosecution won eighteen, or sixty-two percent. This was a one hundred percent reversal. The “search and reverse” policy of the Warren Court is gone. What was begun under Chief Justice Berger now continues under Chief Justice Rehnquist. Arguably, it may have gone too far in the other direction.

While we all have sympathy with the goals of the Warren Court—accurate fact finding, the recognition of human dignity, the preservation of privacy—it may be rightly questioned whether it is the courts that should modernize criminal justice. The tool of reversal, the only one generally available, is much too blunt. Better police training, higher pay, and attitudes of fair-minded professionalism are needed. The judiciary cannot provide these. Rather, they must come from legislative and executive action.

C. Corrections

Our criminal justice system must be viewed as an integrated whole—even if in practice it is not. Any account of the system calls for a look at corrections, too. On any given day our correctional institutions are responsible for a staggering number of offenders. Here, with a 12 year old, for which he was sentenced to 12 years); Linnet Myers, Escobedo Sentenced to 11 Years For Murder Attempt, Chi. Trib., Mar. 5, 1987, at 3 (reporting Escobedo’s guilty plea to attempted murder and sentence to 11 years, 2 months in prison, which occurred while he was appealing his indecent liberties conviction).

77. In 1992, 883,656 prisoners were incarcerated in federal and state institutions. Sourcebook 1993, supra note 5, tbl. 6.31. 441,889 prisoners, on an average daily population, were in jails. Id. tbl. 6.17. Federal institutions held 80,259 prisoners, while state insti-
too, the central role of the states is evident. All states have prison and parole systems. Yet "corrections" do not correct. Life in many institutions is at best barren, at worst unspeakably brutal and degrading. Most institutions are confronted with serious problems of racketeering, violence, and non-consensual homosexuality. Treatment is aimed at the imprisoned or supervised offender, while many of the causes of his crime lie in the outside environment, which is left untouched. Probation or parole is often a joke. Caseloads of the probation or parole office are unreasonably high. Although over half of the adult offenders are "supervised," frequently this supervision is limited to ten or fifteen-minute interviews once or twice a month with an officer carrying over a hundred other cases. Trained officers are few. Parole decisions are often related to little more than institutional capacity—the necessity to release or parole as many as are imprisoned.

We speak of rehabilitation, yet a majority of those in corrections work are involved in custody and maintenance. Thirty-seven of our major state institutions are over one hundred years old. Our recidivism statistics, which are inadequate because they depend on catching an offender an additional time, indicate a measure of our failure.

Institutions held 803,706 prisoners. Id. tbl. 6.31. 65,706 of the federal prisoners had sentences of more than a year, while 781,565 of the state prisoners had sentences of more than one year. Id. Corrections systems in 1990 cost $24,960,606, of which direct federal costs were 6.3%, direct state costs were 66.9%, and direct local costs were 26.8%. Id. tbl. 1.

78. In 1993, 40 inmates were killed in state institutions, while 3 were killed in federal institutions; 3,923 assaults that resulted in an injury on staff occurred in state institutions, while 906 similar assaults occurred in federal institutions; 7,397 assaults that resulted in injury on other inmates occurred in state institutions, while 823 similar assaults occurred in federal institutions. Id. tbl. 6.106.

79. In fact, 264 of 1,207 state institutions are under court order to limit population because of various legally unacceptable prison conditions. Id. tbl. 1.91.

80. Of the 108,580 persons released from prisons in 11 states in 1983, representing more than half of all released state prisoners that year, an estimated 62.5% were rearrested for a felony or serious misdemeanor within three years, 46.8% were reconvicted, and 41.4% were returned to prison or jail. Before their release from prison, the prisoners were arrested and charged with an average of more than 12 offenses each; nearly two-thirds were arrested at least once in the past for a violent offense; and two-thirds were previously in jail or prison. By year-end 1986, those prisoners who were rearrested averaged an additional 4.8 new charges. An estimated 22.7% of all prisoners were rearrested for a violent offense within three years of their release.

Other findings from the 1983 survey include the following:

—An estimated 68,000 of the released prisoners were rearrested and charged with more than 326,000 new felonies and serious misdemeanors, including approximately 50,000 violent offenses (of which 17,000 were robberies and 23,000 were assaults), more than 141,000 property offenses (of which 36,000 were burglaries), and 46,000 drug offenses.

—Recidivism rates were highest in the first year; one of four released prisoners was rearrested in the first six months and two of five within the first year after their release.
Frequently, too, a progression towards violence is seen. This data, although partial, sadly documents the existence of persistent or hard core offenders, who contribute substantially to the overall crime problem.

D. International Organized Crime

In early June 1994 the upper house of the German legislature killed a crime bill that stiffened penalties for neo-Nazis. The lower house, controlled by Chancellor Helmut Kohl's conservative coalition, approved the bill. The upper house was controlled by the opposition Social Democrats, who especially objected to provisions allowing the federal intelligence agency to monitor international phone calls on behalf of federal prosecutors.

When Russia's President Boris N. Yeltsin announced in late June 1994 that he was preparing an urgent decree to reckon with his country's looming organized crime groups, the nation was jubilant; when he released the decree a few days later—following a weekend in which the police tallied nearly a dozen bombings and eight contract

—The more extensive a prisoner's prior arrest record, the higher rate of recidivism; over 74% of those with 11 or more prior arrests were rearrested, compared to 38% of the first-time offenders. Prisoners with a greater number of prior arrests were also arrested more quickly than those with fewer prior arrests. Moreover, regardless of how long prisoners stayed away from rearrest following their release, those with longer prior records had higher rates of rearrest in subsequent time periods than those with shorter records.

—Released prisoners were often rearrested for the same type of crime for which they had served time in prison; within three years, 31.9% of released burglars were rearrested for burglary; 24.8% of drug offenders were rearrested for a drug offense; and 19.6% of robbers were rearrested for robbery.

—Recidivism rates were the highest in the first year. Four of every ten released prisoners were rearrested in the first year; nearly one in four was convicted of a new crime; and nearly one in five was returned to prison or sent to jail.

—Overall, between mid-year 1983 and year-end 1986, prisoners released in 1983 accounted for 2.8% of the Index crime arrests in the 11 states surveyed. By the end of the first year after release, nearly one in five prisoners was reincarcerated and was not liable for rearrest, and by the second year, nearly one in three had been returned to prison or jail.

—The new offenses occurred not only in the states in which the prisoners were released from prison but other states as well. More than one of every eight rearrests were made in states other than the state in which the prisoner was released. An estimated 5.5% of the released prisoners were rearrested only in states other than those in which they were released. An additional 4.7% of the prisoners were rearrested both in their state of release and in another state.


killings in the capital—the reaction was a unanimous avalanche of outrage, which cut across the political spectrum, an unanimity rare in Russia these days. The outrage focused on those aspects of the decree that suspended some of the country's newest and most basic civil liberties.

These two events are not unrelated to anyone who studies those facts that unmistakably point to an emerging and disturbing alliance of the world's major organized crime syndicates. They have not yet coalesced into a global syndicate; rather, they have evolved into a series of troublesome ventures in drug dealing, arms trafficking, and the theft of property for its worldwide redistribution.

The relation between the Sicilian Mafia and its American counterpart in organized crime is generally well known. The operations of Columbian cartels in cocaine trafficking are also common knowledge. Less well known are international operations of the Chinese Triads, the Japanese Yakuza, and, most significant, the revitalization of Russian organized crime, vorovskoy mir, that is, "Thieves' World," and its elite, vory v zakone, that is, "Thieves Within the Code."

82. Michael Specter, Yeltsin's Anti-Crime Decree Sets Off a Storm of Outrage, N.Y. Times, June 19, 1994, § 1, at 14 [hereinafter Specter, Yeltsin's Anti-Crime Decree]. The desire of the Russian people for strong organized crime control measures is understandable. See generally Michael Specter, New Moscow Mob Terror: Car Bombs, N.Y. Times, June 10, 1994, at A6. Apart from the now common gangland killings, daytime robberies, and the bribery of officials, car bombings are becoming the frequent devices of Muscovite mobs. Beginning in June 1994, bombs exploded in some of the most populated pedestrian areas, often during rush hour. The city's residents felt less safe than ever. President Yeltsin calls crime in Russia a superpower and promises to make law and order a top priority. The law his cabinet proposed made the prosecution of organized crime leaders easier, although the right-wing political leaders called for harsher measures, including the immediate execution of gang members. While estimates vary, most experts agree that gangsters control at least half of the private enterprise in Russia. Thousands of gangs extort money freely and openly from the small businessman, the large industrial enterprises, and everyone in between. More than a dozen bankers had been killed by mid-1994 by mobsters. Private businesses are the daily targets of intimidation campaigns. Aleksandr Mikhailov of the domestic state security service said, "[Gangsters] attack when they want to. It no longer matters to them how many people are around when they do it." Id. Killings rose by 43% in the first five months of 1994 as compared to the same period in the previous year, after doubling from 1992. Police officials estimated that at least 150,000 illegal handguns are owned by criminals. After security officials installed metal detectors in Parliament, twenty guns were confiscated in the first five days. The police officials warned that unless tougher measures were taken, the situation would continue to worsen. Statistics released by the Interior Ministry last summer showed that more than 5,600 gangland groups are operating now in Russia, almost 10 times the number in 1990; in the last year, more than $70 billion worth of merchandise was confiscated from criminals; nearly 25,000 crimes were committed with firearms last year, and by mid-1994 homicides had increased nearly 50% in the capital. Specter, Yeltsin's Anti-Crime Decree, supra.
For anyone curious enough, a wealth of fascinating detail on international organized crime can be compiled from commissions, parliamentary inquiries, international law enforcement seminars, and court proceedings. These developments, too, must be put into the context of two of the most important social, economic, and political developments worldwide: the creation in 1992 of the European Economic Community's integrated market and the collapse of the Soviet Empire. Something, too, ought to be said about efforts to integrate the economics of North and South America. What can be seen ought to be a matter of deep concern for anyone who cares about peace and justice in the world. In fact, international organized crime is the challenge of the future for criminal justice. 83

America is, in fact, decades ahead of any country in the world in fighting organized crime, yet much remains to be done. On May 25, 1994, FBI Director Louis Freeh told the Senate Permanent Subcommittee on Investigation that it had taken the nation thirty-five years to recognize the threat of the mob, obtain the necessary legal tools to fight it, and to reorient law enforcement to the task, yet the mob had still “not been overcome.” 84 The individual countries of Europe remain where the United States was in the 1920s and 1930s, and international organized crime is not being dealt with effectively by any governmental body. “Borders have gone down,” suggests international investigative reporter Claire Sterling, “for crooks but not for cops.” 85 If the world loses in its war against international organized crime, she argues, “it will be largely because . . . [it is] hampered by all the baggage of statehood—patriotism, politics, accountable governments, human rights, legal structures, international conventions, bureaucracy, diplomacy—whereas the big criminal syndicates have no national allegiances, no laws but their own, no frontiers.” 86 She could just as easily have added debates about “federalization.” It is a sobering thought. Almost as sobering as Freeh’s testimony that the merging international organized crime groups “may already have the capability to steal nuclear weapons, nuclear weapons components, or weapon-grade nuclear materials.” 87

83. See generally CLAIRE STERLING, THIEVES’ WORLD: THE THREAT OF A NEW GLOBAL NETWORK OF ORGANIZED CRIME (1994).
84. 15 ORGANIZED CRIME DIGEST 3 (June 8, 1994).
85. STERLING, supra note 83, at 245.
86. Id. at 244.
87. ORGANIZED CRIME DIGEST, supra note 84, at 1. Terrorists do not need nuclear weapons to do horrible damage to persons and property. See John Kifner, AT LEAST 21 ARE DEAD, SCARES ARE MISSING AFTER CAR BOMB ATTACK IN OKLAHOMA CITY WRECKS 9-STORY FED-
E. Terrorism

If international organized crime is an issue largely ignored, what of international terrorism? In fact, it is likely that when international organized crime successfully steals nuclear materials, it will sell them to terrorist groups.

88. See generally U.S. DEP'T OF STATE, PATTERNS OF GLOBAL TERRORISM 1993, at 1. Four hundred and twenty-seven international terrorist attacks occurred in 1993, an increase from the 364 incidents recorded in 1992. The main reason for the increase, however, was an accelerated terrorism campaign perpetrated by the Kurdistan Workers Party (PKK) against Turkish interests. Most of the group's 150 attacks took place on only two days, June 24, 1993 and November 4, 1993; they were staged throughout Western Europe. Had it not been for these two days of coordinated attacks, the level of terrorism would have continued the fortunate downward trend of recent years. Fortunately, too, anti-US attacks fell to 88 last year from the 142 recorded in 1992. Approximately 21% of the international terrorist attacks last year were directed at US targets, and while the number is down, the underlying factors that give rise to terrorism are not substantially changed. The most spectacular international terrorist incident was the February 26, 1993 bombing of the World Trade Center (WTC) in New York City. The effects of the blast and the ensuing fire and smoke caused six deaths and 1,000 injuries. The WTC bombing is considered an act of international terrorism because of the political motivations that spurred the attack and because most of the suspects who have been arrested are foreign nationals. Some of the suspects arrested in the case are also closely linked to others arrested in July in a thwarted plot to blow up selected targets in New York City, including the United Nations building and the Holland and Lincoln Tunnels. Umar Abd al-Rahman, the Muslim cleric from Egypt who resided in New Jersey, and several of his followers were indicted in connection with this plot and were charged with conspiracy. The case went to trial in September 1993, and four suspects were convicted in March 1994. Western Europe had more international terrorist incidents in 1993—180 attacks—than any other region, primarily because of the two waves of PKK violence. The Middle East had the next highest number—101—followed by Latin America with 97. Iran remains the world's most active and most dangerous state sponsor of terrorism, through its own state agents and the radical groups it supports. Iraq also continues to sponsor terrorism. Iraq planned to assassinate former President George Bush during his visit to Kuwait in April, and its agents were responsible for numerous attacks on international humanitarian and relief personnel in Iraq. Last year 109 people were killed in terrorist attacks, and 1,393 were wounded, the highest casualty total in five years. See also SOURCEBOOK 1993, supra note 5, tbls. 3.173 (terrorist incidents and preventions in the United States 1982-1992), 3.174 (terrorist incidents 1982-92 aggregates), 3.175 (casualties resulting from international terrorism involving U.S. citizens); Wayne A. Kerstetter, Terrorism, in 4 ENCYCLOPEDIA OF CRIME AND JUSTICE, supra note 8, at 1529.

89. See Craig R. Whitney, Smuggling of Radioactive Material Said to Double in a Year, N.Y. TIMES, Feb. 18, 1995, § 1, at 2 (reporting, however, that as yet no hard evidence exists that terrorists or states trying to acquire nuclear weapons are intended recipients of materials).
IV. Evaluation

The four chief factors that influence the quality of criminal justice were identified by Pound as personnel, administration, procedure, and substantive law. If we seek to evaluate—effectiveness or fairness—our dual systems of criminal justice, we must look at those factors, local area by local area, state by state, jurisdiction by jurisdiction. We must also focus on the distinct kinds of crime: street crime, white collar crime, and organized crime. Abstract discussions of "federalization" are arid debates. The answer to the question of the best division of labor between local, state, and federal law enforcement as well as state or federal prosecution will, in fact, be different in different places and at different times. Unlike socks, one size will not fit all. Abstract questions of legal theory or governmental organizations have little to do with what our people want from our systems of criminal justice or how we should design our responses to the various challenges of the various forms of antisocial behavior. The roles of courts in interpreting the Constitution or other legal provisions, of legislatures in enacting general rules of procedure or substantive law, or of law professors in commenting on questions of legal theory or governmental organization will surely play a secondary part to the roles of legislatures in providing necessary resources and executives in exercising wise administrative and prosecutorial discretion. This analysis may not be

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90. Roscoe Pound, Toward a Better Criminal Law, 60 A.B.A. REP. 322 (1935). Pound suggests, too, that these factors ought to be ranked in this same order of relative importance.

91. If too many criminal cases of the wrong types are in federal courts, the blame lies, not with the courts for their current interpretation of the Constitution, or Congress for its enactment of new legislation, but with the executive department for its misguided exercise of prosecutorial discretion. No indictment may be prosecuted without the signature of a United States Attorney. Fed. R. Crim. P. 7(c)(1). No court has the power to require that a United States Attorney sign and prosecute a charge he or she does not want to bring. United States v. Cox, 342 F.2d 167, 170-72 (5th Cir. 1965). Nor may the exercise of discretion to bring a charge be second-guessed. Newman v. United States, 382 F.2d 479, 480-82 (D.C. Cir. 1967). The exception to these salutary rules is narrow and narrowly read. See, e.g., Wayte v. United States, 470 U.S. 598, 608 (1985) (discriminatory effect brought about by discriminatory purpose, that is, on an unjustifiable standard such as race, religion, or other arbitrary classification) (citing Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)). Justice Powell in Wayte put it well:

This broad discretion rests largely on the recognition that the decision to prosecute is particularly ill-suited to judicial review. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake. Judicial supervision in this area, moreover, entails systemic costs of particular concern. Examining the basis of a prosecution delays the
CRIMINAL PROSECUTION, threatens to chill law enforcement by subjecting the prosecutor's motives and decisionmaking to outside inquiry, and may undermine prosecutorial effectiveness by revealing the Government's enforcement policy. All these are substantial concerns that make the courts properly hesitant to examine the decision whether to prosecute.

Id. at 607-08. Proposals in this Symposium to make the exercise of prosecutive discretion subject to judicial review ignore this wise teaching. The nation, however, must hold the executive politically accountable. That it has not done. The failure here is one of leadership on the part of the executive, who should formulate careful plans for the exercise of prosecutive discretion, articulating defensible priorities, subject matter by subject matter, state by state, area by area, and then stand or fall accordingly on the insights behind his or her judgment and how his or her policies play out in fact. See, e.g., COMMITTEE ON LONG RANGE PLANNING, supra note 4, at 20-23 (setting out possible general standards, but not particularizing them subject matter by subject matter, etc.). Sadly, for too long now, with some important, but limited exceptions, the Department of Justice, under a long series of Attorneys General, has been little more than a "Department of Litigation" that tries cases, and whose public policy proposals constitute little more than an effort to increase its power, personnel, or advantage in the adversary process. The Department of Justice, in short, has no overall vision of justice or concrete strategy to obtain it, or, if it does, it has largely kept it to itself. Until the nation learns how to demand more of the Department, it is unlikely it will get it. A few units in the executive department are, however, an exception. Compare David Johnson, Strength Is Seen in a U.S. Export Law Enforcement, N.Y. Times, Apr. 17, 1995, at A1 (reporting that American law enforcement is being exported by the FBI, DEA, and CIA in response to the surge of international terrorism, narcotics trafficking, links between terrorists and drug dealers, illegal immigrant smuggling, financial fraud, corruption, arms smuggling, money laundering, and the potential theft and sale of nuclear materials and chemically or biologically hazardous substances) with Fox Butterfield, New Prisons Cast Shadow on Higher Education, N.Y. Times, Apr. 12, 1995, at A21 (reporting that money for prisons is being shifted from higher education budget; with three-strike statute, 15 more prisons are needed by year 2000 at cost of $415 billion; if fully implemented by year 2002, corrections will consume 18% of budget; universities 1%) and Fox Butterfield, "3 Strikes" Law in California Is Clogging Courts and Jails, N.Y. Times, Mar. 23, 1995, at A1 (reporting juries failing to convict, since they do not want long sentences, most defendants in felony cases refusing to accept pleas, since three convictions mandate a sentence of 25 years to life; courts are clogged; jails are overcrowded, and non-violent inmates are being released early; prior to law, 94% of felonies handled with pleas; since law, only 14% of second strikes and 6% of third-strike cases are pleading; civil suits are confined to rich who can hire retired judges to hear cases) and Garvin Ifill, White House Offers Version of Three-Strikes Crime Bill, N.Y. Times, Mar. 2, 1994, at A13.

Why the nation should use its limited governmental resources to incarcerate the old who are well-past the high points in their criminal careers rather than to give opportunities to the young and at the expense of the civil justice system is unexplained by the political figures who pander to public fears. See Timothy Egan, A 3-Strike Law Shows It's Not as Simple as It Seems, N.Y. Times, Feb. 15, 1994, at A1 (reporting law will create a population of geriatric prisoners at a current cost of $25,000 per year, while peak crime years of street offenders is 15 to 25; offenders, too, resist arrest more violently because of the disproportionate consequences of convictions). See Rehnquist, supra note 4, at 1660 (criticizing D'Amato Amendment on Guns and Violence against Women Act of 1991: "[T]he issue here is not about whether gun crimes or violence against women should be severely and properly punished [but] . . . whether the federal courts should be further burdened with another area of overlapping litigation that state courts have already competently handled.").
happy news for symposiums of this sort. Finding out that questions dear to one's heart are largely irrelevant to real world considerations seldom pleases intellectuals, but it is time to recall Holmes's apt comment about the relation between theory and fact.

This short analysis of criminal justice must be inevitably incomplete. Nevertheless, certain conclusions can be drawn. The remarkable thing about our crime problem is not that it is bad, but that it is not far worse. For too long now we have dissipated our energies in ideological debates over issues often of symbolic value only—consensual homosexuality, capital punishment, police review boards, coddling of criminals, "federalization," and the like. The problems of crime, of course, involve more than criminal justice. Long term solutions must be sought. But symptoms must be treated also.

Every part of our systems of criminal justice is undernourished. Personnel are insufficient, poorly paid, untrained, and unorganized. Our legal theories were developed in another age to deal with other problems. We have tended, moreover, to forget that the liberty of the King's subjects presupposes the establishment of the King's peace.92 In too many areas of our national life, our writ no longer runs. Virtually every aspect of each system—state and federal—must be rethought—and the rethinking must focus principally on questions of administration, not theory. It is time we start asking the right questions.

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92. Roscoe Pound, 3 Jurisprudence 292 (1959) ("the safety of the people is the highest law"; "it is an interest in peace and public order") (citing Case of King's Prerogative in Saltpetre, 12 Coke 12 (E.R. 1607) ("for the necessary defense of the Kingdom") and Sir Matthew Hale, Historia Placitorum Coronal: History of the Pleas of the Crown 53 ("The necessity of the preservation of the peace of the Kingdom").
Appendix

I. The Federalization of Criminal Law

3 THE COLLECTED PAPERS OF FREDERIC WILLIAM MALTLAND 439 (1911):

To-day we study the day before yesterday, in order that yester-
day may not paralyse to-day, and to-day may not paralyze to-
morrow.

II. U.S. Constitution

A. Specific Crimes

U.S. CONST. art. I, § 6 (treason); art. I, § 8 (counterfeiting and piracy); art. II, § 4 (treason and bribery); art. III, § 3 (treason); art. IV, § 2 (treason).

B. Necessary and Proper Clause

U.S. CONST. art. I, § 8 ("To make all laws . . . necessary and proper").

THE FEDERALIST No. 45, at 290-91 (John Madison) (Putnam ed., 1888):

The powers delegated by the proposed Constitution to the Fed-
eral Government are few and defined. Those which are to remain in the State Governments are numerous and indefinite. The former will be exercised principally on external objects, as war, peace, nego-
tiation, and foreign commerce; with which last the power of taxa-
tion will for the most part be connected. The powers reserved to the several States will extend to all the objects, which, in the ordi-
nary course of affairs, concern the lives, liberties and properties of the people; and the internal order, improvement, and prosperity of the State.

The operations of the Federal Government will be most exten-
sive and important in times of war and danger; those of the State Governments, in times of peace and security. As the former periods will probably bear a small proportion to the latter, the State Gov-
ernments will here enjoy another advantage over the Federal Gov-
ernment. The more adequate indeed the federal powers may be rendered to the national defence, the less frequent will be those scenes of danger which might favur [sic] their ascendancy over the governments of the particular States.

If the new Constitution be examined with accuracy and candur [sic], it will be found that the change which it proposes, consists much less in the addition of NEW POWERS to the Union, than in the invigoration of its ORIGINAL POWERS. The regulation of commerce, it is true, is a new power; but that seems to be an addi-
tion which few oppose, and from which no apprehensions are entertained.


Objections To This Constitution of Government

The Judiciary of the United States is so constructed and extended, as to absorb and destroy the judiciaries of the several states; thereby rendering law as tedious, intricate and expensive, and justice as unattainable, by a great part of the community, as in England, and enabling the rich to oppress and ruin the poor.

Under their own construction of the general clause, at the end of the enumerated powers, the Congress may grant monopolies in trade and commerce, constitute new crimes, inflict unusual and severe punishments, and extend their powers as far as they shall think proper; so that the State legislatures have no security for the powers now presumed to remain to them, or the people for their rights.

Compare THE FEDERALIST No. 39, at 246 (John Madison) (Putnam ed., 1888) ("in strictness, neither a national nor a federal constitution; but a composition of both") with THE FEDERALIST No. 16, at 116 (Alexander Hamilton) (Putnam ed., 1888) ("the government ... must be able to address itself immediately to the hopes and fear of individuals"); Gibbons v. Ogden, 22 U.S. (9 Wheat.) 1, 194-95 (1824) (holding that the Commerce Clause confers "general power").

United States v. Fox, 95 U.S. 670, 672 (1877): There is no doubt of the competency of Congress to provide, by suitable penalties, for the enforcement of all legislation necessary or proper to the execution of powers with which it is intrusted ... Any act, committed with a view of evading the legislation of Congress passed in the execution of any of its powers ... may properly be made an offense against the United States. But an act committed within a State, whether for a good or a bad purpose, or whether with an honest or a criminal intent, cannot be made an offense against the United States, unless it have some relation to the execution of a power of Congress, or to some matter within the jurisdiction of the United States. An act not having any such relation is one in respect to which the State can alone legislate.

III. Judiciary Act of 1789

Act of Sept. 24, 1798, ch. 20, § 9, 1 Stat. 76 (the newly created district courts were given "exclusively of the courts of the several States, cognizance of all crimes and offenses that shall be cognizable under the authority of the United States").
IV. The Crime Act of 1790

Act of Apr. 30, 1790, ch. 9, 1 Stat. 112 (prohibiting certain offenses against the government, on the high seas, against the law nations, or in federal enclaves).

V. No Common-Law Crimes

1 Life and Letters of Joseph Story 297 (W. Story ed., 1851):

Few, very few, of the practical crimes, (if I may so say,) are now punishable by statutes, and if the courts have no general common law jurisdiction, (which is a vexed question,) they are wholly dispensable. The State Courts have no jurisdiction of crimes committed on the high seas, or in placed ceded to the United States. Rapes, arsons, batteries, and a host of other crimes, may in these places be now committed with impunity.

United States v. Hudson & Goodwin, 11 U.S. (7 Cranch) 32, 34 (1812) (“The legislative authority of the Union must first make an act a crime, affix a punishment to it, and declare the Court that shall have jurisdiction of the offence.”); United States v. Coolidge, 14 U.S. (1 Wheat.) 415 (1816).

VI. Federal Criminal Jurisdiction

United States v. Bevans, 16 U.S. (3 Wheat.) 336, 391 (1818) (murder on board a warship, lying within Boston harbor, not cognizable as federal crime, since Congress had not conferred such admiralty jurisdiction on federal courts); United States v. Wiltberger, 18 U.S. (5 Wheat) 76, 105 (1820) (similar holding for manslaughter on American ship on Tigris River in China).

VII. The Crimes Act of 1825

Act of Mar. 3, 1825, ch. 65, §§ 1-26, 4 Stat. 15 (drafted by Story, J., and Senator Daniel Webster) (definitions of “high seas”; offenses within federal enclaves assimilated to like offenses under state law).

VIII. Revised Statutes of 1873-1878

Act of June 27, 1866, ch. 140, § 2, 14 Stat. 75 (Of 5,600 sections of the Revised Statutes revised between 1873 and 1878, 227 dealt with crimes, grouped by chapters: crimes against the existence of government, crimes arising within the maritime and territorial jurisdiction, crimes against justice, crime against the operators of the government,
official misconduct, crimes against the electives franchise and civil rights, the punishment of accessories, etc.

IX. Excursus on Lotteries and the Constitution


Lotteries flourished in the United States from the colonial period through the 1830's. Generally condoned by the law at their outset, lotteries were not only popular but also respectable:

For many years after [the lottery] began to prevail it was not regarded at all as a kind of gambling; the most reputable citizens were engaged in these lotteries, either as selected managers or as liberal subscribers. It was looked upon as a kind of voluntary tax for paving streets, erecting wharves, buildings, etc., with a contingent profitable return for such subscribers as held the lucky numbers. Many states soon banned private lotteries, largely because they competed with state lotteries and engendered fraud and corruption. To further stifle competition, states also prohibited the in-state sale of tickets for neighboring state lotteries. Nevertheless, reflecting Jacksonian ideals—animosity toward legislatively-created privilege, concern for efficiency in government, distaste for fraud and corruption, and sympathy for the poor upon whom the burden of the lottery system was thought to fall—the states (and the District of Columbia through congressional regulation), one by one, proscribed lotteries altogether, usually by constitutional amendment.

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11. See id. at 193. See generally J. Ezell, supra note 9, at 102-05.

12. See Developments, supra note 9, at 74-88; A. Spofford, supra note 10, at 193. The development of the law of lotteries in the District of Columbia—a federal enclave under the jurisdiction of Congress (see U.S. Const. art. I, § 8, cl. 17)—accurately reflects changing national attitudes and policies toward gambling and lotteries in particular. Washington, D.C. "had a special experience with lotteries." WASHINGTON LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, LEGALIZED NUMBERS IN WASHINGTON 11 (1973). Lotteries were a popular means of financing public improvements at the turn of the nineteenth century, and Washington, D.C., as a planned city, needed many new buildings. See
J. Ezell, supra note 9, at 102-08. A number of lotteries were conducted, with scandal associated from the beginning. The most notorious was a lottery operated by Samuel Blodget in the 1790's, which ended with Blodget sacrificing his personal property to cover prizes he was unable to deliver as promised. Id. at 102-05. In 1812, Congress authorized lotteries for the District of Columbia, but the amount to be raised on an individual project could not exceed $10,000, and the President had to approve. See Act of May 4, 1812, ch. 75, § 6, 2 Stat. 721. Congress also authorized specific lotteries. See, e.g., Annals of Cong., 14th Cong., 1st Sess. 90 (1816) (lottery to benefit Georgetown University). Cf. Annals of Cong., 10th Cong., 2d Sess. 501 (1808) (petition for lottery to benefit Alexandria church). For early cases arising from problems associated with lottery ventures, see Shankland v. Mayor of Washington, 30 U.S. (5 Pet.) 389 (1831); Clark v. Mayor of Washington, 25 U.S. (12 Wheat.) 40 (1827); Mayor of Washington v. Young, 23 U.S. (10 Wheat.) 406 (1825); Brent v. Davis, 23 U.S. (10 Wheat.) 395 (1825) (irregularities in lottery offering challenged); Cohens v. Virginia, 19 U.S. (6 Wheat.) 264 (1821) (District of Columbia not authorized to sell lottery tickets outside its borders). Young, Clark, and Shankland all involved attempts by ticket purchasers in the same lottery to collect from its manager.

Congress responded to the corruption associated with gambling ventures in the District of Columbia. In 1831, the first congressional effort to establish comprehensive penal laws for the District of Columbia contained a section limiting the operation of gaming tables. See Act of Mar. 2, 1831, ch. 37, § 12, 4 Stat. 499. In 1842, Congress also outlawed the sale of lottery tickets in the District of Columbia by providing that maintaining a place of business for the sale of such tickets would be unlawful, that contracts for the sale of lottery tickets would be void, and that money paid for such contracts could be recovered. See Act of Aug. 31, 1842, ch. 282, 5 Stat. 578. Despite the new legislation, gambling persisted, and in some cases became legend. The Palace of Fortune, operated by Edward Pendleton, was allegedly the favorite of lobbyists and legislators alike in the decades before the Civil War. When Pendleton died, President Buchanan attended the funeral, and prominent Democrats served as pallbearers. H. Chafee, supra note 9, at 182.

During the post-Civil War period, national attitudes toward gambling, and particularly toward lotteries, changed. Congress began to move in earnest against gambling ventures in the District of Columbia. Congress added "gift enterprises" to the list of prohibited activities in 1873 (see Act of Feb. 17, 1873, ch. 148, 17 Stat. 464), strengthened the prohibition regarding lottery tickets in 1878 (see Act of Apr. 29, 1878, ch. 68, 20 Stat. 39), and in 1883, adopted "[a]n act more effectually to suppress gaming in the District of Columbia" (Act of Jan. 31, 1883, ch. 40, 22 Stat. 411). In 1901, Congress largely codified the existing law and prohibited lotteries, gaming tables, three-card monte, and bookmaking. See Act of Mar. 3, 1901, ch. 854 §§ 863-869, 31 Stat. 1189. A Washington court summarized the law and public opinion concerning lotteries as follows:

Although formerly permitted by law, and even encouraged, public opinion for nearly half a century almost everywhere in this and all civilized countries has recognized lotteries as fruitful sources of unmitigated mischief; as a cunning scheme by which crafty knaves plunder the silly and credulous; destructive of thrift and honest industry, and pandering to idleness and vice... The keeping of a shop within this District for the sale of lottery or policy tickets is something affecting the entire country... United States v. Green, 19 D.C. (8 Mackey) 230, 241 (1890). The laws of the District of Columbia continue to prohibit many forms of gambling. See D.C. Code §§ 22-1501 to -1515 (1973). Before the provision was held unconstitutionally vague in Holly v. United States, 46 F.2d 796 (D.C. Cir. 1927), it was also illegal to be present at an "illegal establishment," which was defined to include a "gambling establishment." See D.C. Code § 22-1515(a) (1973).
Two obstacles, however, hampered the efforts of states to shelter their citizens from the perceived evils of the nineteenth century lotteries. One was the contract clause of the Constitution. Chief Justice Marshall’s opinion in *Trustees of Dartmouth College v. Woodward* established that any state’s attempt to revoke a state charter would impermissibly impair the obligation of contracts. After *Dartmouth College*, states could forefend new lotteries but had to avoid interfering with existing lotteries.

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15. Id. Although many historians cite *Dartmouth College* as establishing the sanctity of legislatively-granted charters (see, e.g., A. Schlesinger, Jr., *The Age of Jackson* 324-25 (1945)), the careful legal historian must comment on Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810), which was, in fact, the first Supreme Court case to hold a state legislative enactment violative of the contract clause. *Fletcher* arose from the so-called "Yazoo Land Fraud" scandals which involved sales of public lands by a corrupt Georgia Legislature. Upon discovering the corruption, subsequent legislatures attempted to rescind the sales, even though the land had since been resold. The purchasers retained Alexander Hamilton, who advised them that the legislature’s action contravened the contract clause. See B. Wright, Jr., supra note 13, at 21-22. In his opinion for the Court, Chief Justice Marshall agreed with Hamilton. See 10 U.S. (6 Cranch) at 136-39. The land grants were, to be sure, executed rather than executory obligations as demanded by the contract clause, but the land grants were attended, in Marshall’s opinion, by an “implied contract” on the part of the grantor not to claim again the thing granted. Id. at 137. Consequently, the legislature could not act to set aside the sales.

16. The Missouri Supreme Court, for example, affirmed an acquittal of one selling lottery tickets in State v. Hawthorn, 9 Mo. 389, 396-97 (1845), on the ground that the contract clause prevented the Missouri Legislature from repealing prior grants and criminalizing lottery ticket sales formerly permitted. In 1821, the antilottery movement secured a constitutional amendment banning lotteries in New York. See N.Y. Const. art. 7, § 11 (1821), reprinted in 2 B. Poore, *The Federal and State Constitutions, Colonial Charters and Other Organic Laws of the United States* 1341 (2d ed. 1878). Legislation enforced the ban prospectively (see Act of Mar. 15, 1822, ch. 71, § 1, 1822 N.Y. Laws 73), but existing lotteries continued. In 1833, the legislature reached a compromise with the firm of Yates & McIntyre—assignees of all of New York’s outstanding lottery grants—whereby all lotteries would cease after one more year of operation. See Act of Apr. 30, 1833, ch. 306, 1833 N.Y. Laws 484. Public pressure on Yates & McIntyre had been building. See J. Ezell, supra note 9, at 214-15. McIntyre was a member of the legislature and also State Comptroller from 1806 to 1821. J. B. Yates, in turn, was a member of Congress and his brother was Governor of New York from 1823 to 1825. See id. at 86. There was a basis in fact, therefore, for the Jacksonian fear of legislatively-created privilege and profit in the operation of state-chartered lottery systems.
Dartmouth College symbolized the Marshall Court’s policy of upholding property and privilege against the power of the people acting through state legislatures. With Marshall’s death, however, the Court began to expand the power of state legislatures to pursue the public good at the cost of individual wealth. A line of decisions gradually subjected existing state-chartered lotteries to the policy choices of state legislatures. In Charles River Bridge v. Warren Bridge, the Court announced that state charters should be narrowly construed. Chief Justice Taney, Marshall’s successor and a Jackson appointee, wrote for the Court: “While the rights of private property are sacrosanctly guarded, we must not forget that the community also have rights, and that the happiness and well being of every citizen depends on their faithful preservation.” Phalen v. Virginia created a greater threat to existing lotteries. The Court upheld a state’s power to impose reasonable limits on the duration of a lottery charter subsequent to granting it. Phalen, a weak precedent because the charter involved “had become obsolete by non-user,” received reinforcement in Stone v. Mississippi. Chief Justice Waite wrote for a unanimous Court:

The contracts which the Constitution protects are those that relate to property rights, not governmental. It is not always easy to tell on which side of the line which separates governmental from property rights a particular case is to be put; but in respect to lotteries there can be no difficulty . . . . Certainly the right to suppress them is governmental, to be exercised at all times by those in power, at their discretion. Any one, therefore, who accepts a lottery charter does

18. Id. at 548. Men of privilege and property immediately recognized the implications of Charles River Bridge. Chancellor Kent commented that the decision “undermin[ed] the foundations of morality, confidence and truth.” A. SCHLESINGER, JR., supra note 15, at 327 (quoting Kent, Supreme Court of the United States, 2 New-York Review 372, 387 (1838)). An article in the North American Review, a Whig journal, lamented: “We have fallen under a new dispensation in respect to the judiciary.” Id. at 328 (quoting Davies, Constitutional Law, 46 North American Review 126, 153 (1838)).
20. Id. The Court’s attitude toward lotteries shone through oft-cited language: The suppression of nuisances injurious to public health or morality is among the most important duties of government. Experience has shown that the common forms of gambling are comparatively innocuous when placed in contrast with the wide-spread pestilence of lotteries. The former are confined to a few persons and places, but the latter infects the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple.
Id. at 168.
21. Id. at 169.
22. 101 U.S. 814 (1880).
so with the implied understanding that the people, in their sovereign capacity, and through their properly constituted agencies, may resume it at any time when the public good shall require, whether it be paid for or not. A cycle that began with Marshall, who found implied contracts in order to protect legislative charters, ended with Waite, who found implied understandings in order to overturn them.

Even after *Stone* swept the contract clause from the paths of the antilottery forces, state legislatures faced still another obstacle. Although a state legislature could prohibit lotteries from operating in the state, it could do little to prevent the distribution, through the mails, of tickets for lotteries chartered by other states. The problems of enforcement were too great. Because the antilottery state lacked the power to prosecute out-of-state operators or to regulate the mails, it would have had to attack lotteries at the consumer level—a difficult, expensive, and unpopular task. States seeking a more efficient method of controlling lotteries called upon the federal government to halt the flow of lottery tickets through the mails. The antilottery forces found an ally in the United States Post Office. The Postal Service had discovered exploitation of the mails by several fraudulent lottery schemes, and was seeking legislation to bolster its regulatory powers. Prior to 1868, the only federal legislation concerning use of the mails by lotteries forbade postal authorities from acting as the lotteries' agents.

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23. Id. at 820-21.


25. For example, a firm in New York would obtain the names of persons living in rural districts throughout the country and send them circulars through the mail advertising a fraudulent “gift enterprise” scheme. The firm would receive in response large amounts of money daily. Whenever a customer complained that he had not received the “gift,” the firm would reply either that it had never received the money from the purchasers or that it had already mailed the package, thus placing the blame on the Post Office, which could not disprove the allegations. See S. Misc. Doc. No. 57, 39th Cong., 1st Sess. 2 (1866).


B. Early Federal Attempts To Control Lotteries Through Regulation of the Mails

Congress enacted its first significant limitation on state lotteries in 1868. Hidden in an "Act to further amend the postal Laws," the provision stated that: "it shall not be lawful to deposit in a post office, to be sent by mail, any letters or circulars concerning lotteries, so-called gift concerts, or other similar enterprises offering prizes of any kind on any pretext whatever." A provision that would have allowed the postmaster to open letters suspected of containing lottery materials was eliminated in conference, making the new statute difficult to enforce. A provision imposing penalties on postal employees for unlawfully detaining or delaying mail remained in force, and, although it did not apply to mail prohibited by the new statute, postal authorities had no way, in the typical situation, to ascertain the contents of suspected letters without contravening the fourth amendment. When Congress codified the postal laws in 1872, it rewored the 1868 limitation on the mailing of lottery materials, leaving only illegal lotteries subject to the prohibition.

28. Act of July 27, 1868, ch. 246, 15 Stat. 194. The Act concerned, inter alia, the free return of nondeliverable mail (id. § 1), the establishment of postal money orders (id. § 2), and a discount for sales of postage stamps to vendors (id. § 12).

29. Id. §13. The Senate had added the antilottery provision to the House bill. See Cong. Globe, 40th Cong., 2d Sess. 4175 (1868).

30. Cong. Globe, 40th Cong., 2d Sess. 4412 (1868). Chairman Farnsworth of the House Committee on the Post-Office and Post-Roads reported that this would be a "dangerous power to confer upon postmasters." Id. The limitation on the mailing of lottery tickets, however, sparked little dispute and no open debate.

31. See Rev. Stat. §§ 3890, 3891 (1875). The Attorney General observed:

While it may be lawful ... to detain and refuse to deliver a letter or circular within the prohibition of the statute, it is unlawful for him to detain or delay any letter which is not ... within that prohibition ... . The officer may have acted in perfect good faith ... he may have had reasonable ground to believe ... that the letter detained was within the prohibition of the statute; and yet I cannot say ... that such a plea would be a good defence, either to a public prosecution, or to a private suit, by the person aggrieved.


32. Ex parte Jackson, 96 U.S. 727 (1878).


34. The section provided:

That it shall not be lawful to convey by mail, nor to deposit in a post-office to be sent by mail, any letters or circulars concerning illegal lotteries, so-called gift-concerts, or other similar enterprises offering prizes, or concerning schemes devised and intended to deceive and defraud the public for the purpose of obtaining money under false pretenses ....

Id. § 149. Because no open debate or report discussed the new language, it is not clear whether Congress intended a policy change. Chairman Farnsworth of the House Committee on the Post-Office and Post-Roads introduced the bill, H.R. 1, 42d Cong., 2d Sess.
During the next few years, while the nation fought a depression, criticism of remaining state-chartered lotteries intensified. Between 1872 and 1876, seven additional states enacted constitutional amendments forbidding their legislatures to authorize lotteries for any purpose. Yet the populace apparently bought more tickets than ever. The Assistant Attorney General of New York, for example, reported that in New York City alone, thirty-three lottery agencies received an average total of more than 9,500 letters each week.

In 1876, Congress amended the restriction on the mailing of lottery materials by striking the word "illegal." The change reflected a congressional determination to exclude from the mails materials from all lotteries, including those chartered by state legislatures. Major and recurring constitutional questions were fervently argued on the Senate floor and decisively answered with a vote adopting the proposed amendment.

(1872), and said that it made no major changes in existing law. Cong. Globe, 42d Cong., 2d Sess. 15 (1871). The law continued to prohibit postal officials from acting as lottery agents. See Act of June 8, 1872, ch. 335, § 79, 17 Stat. 294.
35. See J. Ezell, supra note 9, at 238-41.
36. A. Spofford, supra note 10, at 193. Eastern states adopted antilottery amendments based on experience with the lotteries. Antilottery provisions in Western constitutions (see, e.g., Nev. Const. of 1864, art. IV, § 24, reprinted in 2 B. Poore, supra note 16, at 1247), however, are apparently examples of lawyers copying old documents when drafting new texts (see Developments, supra note 9, at 417-18).
37. J. Ezell, supra note 9, at 238. The report cited 7,661 ordinary and 1,993 registered letters as the weekly average. Id.
38. See Act of July 12, 1876, ch. 186, § 2, 19 Stat. 90.
40. The Senate clearly saw the issues raised by the federal prohibition:
The difficulty which the [Post Office] Department labors under is in determining what are and what are not legal lotteries. A great many schemes are gotten up, some in the Territories, some of them in operation to-day apparently with the forms of law, but yet of doubtful legal force, and they are transmitting their matter through the mails, and the whole thing proves to be a fraud upon the community; and the question arises whether it is not wiser and better to treat all lotteries, whether legal or illegal, as precisely the same, or as a system of gambling which a wise course in legislation will not only justify but demand at our hands shall be stopped.
4 Cong. Rec. 4262 (1876) (remarks of Senator Hamlin). Debate in the Senate also touched upon the propriety of congressional action with respect to local lottery activity: [I]f a State chooses to authorize and legalize a lottery, call it gambling, if you please, and gambling it is, that is a matter entirely for the consideration of that State . . . .
A year later, the Supreme Court considered the constitutionality of closing the mails to lottery materials. The Court, in *Ex parte Jackson*,41 held that "[t]he power possessed by Congress embraces the regulation of the entire postal system of the country."42 By construing the prohibition as it would any other postal regulation, the Court avoided the issue of interference with prerogatives reserved to the states by the tenth amendment. Instead, the Court warned against the infringement of individual rights:

The right to designate what shall be carried necessarily involves the right to determine what shall be excluded. The difficulty attending the subject arises, not from the want of power in Congress to prescribe regulations as to what shall constitute mail matter, but from the necessity of enforcing them consistently with rights reserved to the people, of far greater importance than the transportation of the mail.43

Thus, subject to first and fourth amendment constraints, *Jackson* sustained the power of Congress "to refuse its facilities for the distribution of matter deemed injurious to the public morals."44

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*Id.* (remarks of Senator West). The breadth of the prohibition was a particular concern:

Certainly the Senate does not mean to decide that the citizens of a State where lotteries are legal have no right to send a lottery scheme or circular from one portion of the State to another. That seems to me to be interfering with the rights of the people of the States where they choose to think that the sale of lottery tickets is not criminal or improper.

*Id.* (remarks of Senator Whyte).

41. 96 U.S. 727 (1878).

42. *Id.* at 732.

43. *Id.* The Court discussed potential first and fourth amendment problems under the statute (*see id.* at 733-34), and then announced the limits of permissible interference with the mails, cautioning Congress not to violate constitutional guarantees:

Letters and sealed packages of this kind in the mail are as fully guarded from examination and inspection, except as to their outward form and weight, as if they were retained by the parties forwarding them in their own domiciles. The constitutional guaranty of the right of the people to be secure in their papers against unreasonable searches and seizures extends to their papers, thus closed against inspection, wherever they may be. Whilst in the mail, they can only be opened and examined under like warrant, issued upon similar oath or affirmation, particularly describing the thing to be seized, as is required when papers are subjected to search in one's own household. No law of Congress can place in the hands of officials connected with the postal service any authority to invade the secrecy of letters and such sealed packages in the mail; and all regulations adopted as to mail matter of this kind must be in subordination to the great principle embodied in the fourth amendment of the Constitution.

*Id.* at 733.

44. *Id.* at 736. The holding of *Jackson* became the subject of much dispute in ensuing years. The Senate Committee on Post-Offices and Post-Roads reported S. 1017, 48th Cong., 1st Sess. (1884), which would have prohibited the mailing of newspapers containing lottery advertisements. The Report cited *Jackson* as authorizing the enactment of such
The 1876 statutory change, however, failed to eliminate state-chartered lotteries. The Postmaster General initially instructed postmasters not to accept or deliver letters addressed to lottery companies or their agents on the assumption that such mail concerned lotteries. Nevertheless, the Attorney General concluded that the statute conferred no powers of seizure or detention; the statute contemplated only one enforcement mechanism—a fine. The Attorney General also determined that newspapers, which were open to inspection, were not "circulars" and were thus outside the statutory prohibition. Consequently, the federal statute could not effectively guard against misuse of the mails by lottery companies; it was a watchdog without teeth.

legislation. See 15 Cong. Rec. 4380 (1884). The Minority Report limited Jackson to the statute it construed (see id. at 4383) and emphasized language in the case that spelled out restrictions upon the power of Congress to interfere with freedom of the press:

Nor can any regulations be enforced against the transportation of printed matter in the mail, which is open to examination, so as to interfere in any manner with the freedom of the press. Liberty of circulating is as essential to that freedom as liberty of publishing; indeed, without the circulation, the publication would be of little value (Ex parte Jackson, 96 U.S. at 733 (quoted in 15 Cong. Rec. 4383 (1884))). Because Jackson affirmed the 1876 lottery restrictions, but also cautioned against overextensions of congressional power in violation of constitutional guarantees, Congressmen repeatedly cited the case in an exaggerated fashion to support diametrically opposed positions during the congressional battle with the Louisiana Lottery. See notes 53 & 57 infra.

45. J. Ezell, supra note 9, at 240. In 1895, Congress gave the Postmaster General the explicit authority to refuse to deliver ordinary letters addressed to persons or companies operating lotteries. See Act of Mar. 2, 1895, ch. 191, § 4, 28 Stat. 963. Congress had earlier conferred similar powers with respect to registered mail. See Act of Sept. 19, 1890, ch. 908, § 2, 26 Stat. 465.


The management [of the Louisiana Lottery] decided to test the legality of the federal law of 1876. Ben Butler, stormy petrel of the Civil War, postwar political king-pin and the brother-in-law of the Secretary of the Treasury, headed a corps of nine lawyers to press the fight. [The Lottery's agent] reportedly hurried to Washington for personal interviews with President Rutherford B. Hayes and Secretary of the Treasury John Sherman, a move interpreted by northern newspapers as an attempt to inject the lottery into national politics. Despite numerous indications that the lottery was unpopular, the Attorney General handed down a decision which was berated by lottery foes as sustaining the law of 1876 but at the same time preventing its enforcement.

J. Ezell, supra note 9, at 247-48.

47. I do not think that a newspaper or periodical is rendered non-mailable by containing a lottery advertisement. This does not transform the newspaper into a "circular" within the purview of section 3894 . . . .

Meanwhile, the Louisiana Lottery, which had helped to spur the 1876 amendment, continued to operate in flagrant violation of the national will. In 1868, a New York gambling syndicate had secured, by bribery, an exclusive lottery franchise from the Louisiana Legislature.\textsuperscript{48} Declaring that the franchise would increase state revenue and stop the flow of gambling dollars out of the state, the legislature gave the syndicate a lucrative monopoly by prohibiting the sale of other lottery tickets in the state.\textsuperscript{49} Although the lottery developed foes in Louisiana, its supporters squelched attempts to revoke the franchise or authorize a second lottery.\textsuperscript{50} The lottery embarked on its most profitable decade three years after Congress passed the 1876 statute; the lottery obtained ninety-three percent of its revenue from outside of Louisiana.\textsuperscript{51}

\begin{itemize}
\item\textsuperscript{48} J. Ezell, supra note 9, at 243.
\item\textsuperscript{49} Id. at 243-44. In exchange for $40,000 per year for 25 years, the Louisiana Legislature exempted the lottery from all state taxes. Id. at 244. The lottery and its shareholders prospered:

This is a private corporation and its affairs are veiled in the greatest secrecy. The number of its stockholders is not known, but they are believed to be less than twenty in number. Some five or six control the great majority of the stock. All the proceedings and workings of the company are carefully concealed from the public. Four national banks in New Orleans . . . guaranty the prizes drawn.

The stock of the company embraces 12,000 shares at a par value of $1,200,000. Owing to the large dividends paid by the company the shares are quoted at $1,200, or an aggregate of $12,000,000.

The dividends are believed to exceed, on the average, 100 per cent., and [in 1889] . . . were 170 per cent. This dividend, large as it is, represents only half of the profits of the company for a single year. The other profits go to certain preferred stockholders, very few in number.

. . . . [T]he daily drawings . . . exceed $2,000,000 annually [in addition to $28,000,000 from monthly and special drawings] making the enormous annual income of $30,000,000, or twice the sum that was paid Napoleon by Jefferson in 1801 for the entire Louisiana Purchase.

The remarkable thing about this lottery is the fact that 93 per cent of income is derived outside the State of Louisiana, from the other States of the Union and the Territories. There is not a city or considerable village in the country which does not contribute to the enormous revenues of this gigantic gambling concern. It was the boast of the champions of the company in the recent struggle before the Louisiana Legislature that it was “enriching the State by millions.”

\item\textsuperscript{50} See J. Ezell, supra note 9, at 245.
\item\textsuperscript{51} Id. at 248-49, 251; 21 CONG. REC. 8705-06, 8721 (1890) (remarks of Rep. Moore and Rep. Price). Many smaller schemes were also in operation at the same time, although after 1878 none were legal. See J. Ezell, supra note 9, at 241. Two other states, Delaware and Vermont, permitted lotteries when authorized by their own legislatures, but their legislatures authorized no lotteries during this period. See H.R. REP. NO. 787, 50th Cong., 1st
Pressure on Congress to take further action against lotteries mounted over the next decade. Scores of petitions begged for congressional eradication of the Louisiana Lottery, by then dubbed the "Serpent."\textsuperscript{52} Countless bills were introduced, but most died in committee.\textsuperscript{53} In a special appeal to Congress, President Benjamin Harri-

\textsuperscript{52} J. Ezell, supra note 9, at 268.

\textsuperscript{53} Approximately ten bills a year concerning lotteries were read and sent to committee from the 48th to 51st Congresses. One such bill was H.R. 5933, 50th Cong., 1st Sess. (1888), which would have prohibited the advertisement of lottery tickets in the District of Columbia. Debate concerning H.R. 5933 typified the arguments and divisions of Congress during this period. See 19 Cong. Rec. 1153-61 (1888). The bill's opponents relied upon \textit{Ex parte Jackson} to show that the first and fourth amendments imposed restrictions upon Congress with regard to lottery regulation. See id. at 1155 (remarks of Rep. Rogers). They further argued:

What is the Louisiana lottery? It is an institution authorized, organized, and created by the organic law of a sovereign State of this Union. It is a legal institution in so far as the State of Louisiana can make it so, as completely as any institution chartered by any State in this broad land. Now, my friend from Illinois [Rep. Cannon] knows that in so far as we can exercise this power in reference to the Louisiana lottery we can equally exercise it with reference to any banking institution chartered in the State of Louisiana or elsewhere. Now, I wish to ask my friend this question: If we can say to this lottery company, a chartered institution, bearing the stamp and impress of the authority of a State law—nay, of the constitution of one of the States of this Union—"Your advertisement shall not be published in any newspaper issued in the District of Columbia," why can we not say to some banking corporation authorized in the State of Louisiana, or if you choose, in the District of Columbia, "You shall not receive the moneys of this lottery company as deposits in your vaults?"

\textit{Id.} at 1157 (remarks of Rep. Compton). Proponents of the bill often argued emotionally, denying that the bill would violate constitutional guarantees:

I know it will be insisted that the provisions of the bill will be an abridgment of the "freedom of the press;" but, Mr. Speaker, it will not abridge any "freedom of the press" to do right or to publish whatever may promote the good of mankind. It is not designed to take away any proper or legitimate right of the press, but only to restrain and prohibit all license to perpetrate a wrong by enticing the young and unsuspecting into habits that will lead them into ruin, as has heretofore been done in many instances. Some of the blackest deeds in the catalogue of crimes have been committed under the plea of liberty. On the way to the guillotine Madame Roland, [sic] exclaimed, "O, Liberty! Liberty! what crimes are committed in thy name."
son urged that without federal aid the states were powerless to control the lotteries:

If the baneful effects of the lotteries were confined to the States that give the companies corporate powers and a license to conduct the business, the citizens of other States, being powerless to apply legal remedies, might clear themselves of responsibility by the use of such moral agencies as were within their reach. But the case is not so. The people of all the States were debauched and defrauded. The vast sums of money offered to the States for charters are drawn from the people of the United States, and the General Government through its mail system is made the effective and profitable medium of intercourse between the lottery company and its victims. . . . The use of the mails by these companies is a prostitution of an agency only intended to serve the purpose of a legitimate trade and a decent social intercourse.54

C. Lottery Statutes of the 1890's.

1. Tightening Antimailing Restraints

The President's urgent request provided the impetus for new legislation to eliminate the Louisiana Lottery. In 1890, Congress banned from the mails newspapers that contained lottery advertisements,55 a

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54. See Act of Sept. 19, 1890, ch. 908, § 1, 26 Stat. 465. The Act provided in pertinent part:

[N]or shall any newspaper, circular, pamphlet, or publication of any kind containing any advertisement of any lottery or gift enterprise of any kind offering prizes dependent upon lot or chance, or containing any list of prizes awarded at the drawings of any such lottery or gift enterprise, whether said list is of any part or of all of the drawing, be carried in the mail or delivered by any postmaster or letter-carrier.
move it had long contemplated. The new legislation broadened the definition of prohibited matter, and specifically authorized postal authorities to refuse to deliver registered letters suspected of being lottery-related.

The 1890 Act culminated fifteen years of congressional debate over a recurring issue of federalism. Advocates of the bill contended that more than Louisiana's rights were at issue; the rights of the other states were also involved. Because federal control of the mails precluded the other states from caging the Louisiana Lottery

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Id. In 1888, Congress considered a similar provision for the District of Columbia. See note 53 supra.


57. See Act of Sept. 19, 1890, ch. 908, § 2, 26 Stat. 465. The Act empowered the Postmaster General to return to the senders all registered mail addressed to any person or company (or agent of same) suspected of conducting a lottery. Although he could not open letters, the Postmaster General could ground his suspicion on any "evidence satisfactory to him." Id.

58. The Minority Report issued in connection with S. 1017, 48th Cong., 1st Sess. (1884), a bill analogous to that enacted in 1890, cogently framed the issue:

Assuming that the States are competent to protect the morals of their people against the corrupting and injurious effects of lotteries and lottery advertisements, and that the duty to furnish such protection rests with them, this bill presents the grave question as to how far Congress may legitimately go in exercising unquestionable powers for the accomplishment of objects and purposes that do not come lawfully within its jurisdiction. In other words, can Congress properly regulate the mail service of the country, under its authority "to establish post-offices and post-roads," for the purpose of preventing the circulation of newspapers containing lottery advertisements and the suppression of lotteries?

S. Rep. No. 233, 48th Cong., 1st Sess. 13-14 (1884) (emphasis in original). After references to Ex Parte Jackson, 96 U.S. 727 (1878), the framers of the Constitution, Calhoun, Webster, and other luminaries, the Minority Report concluded that: "The present bill is a long departure from the conservative opinions entertained and acted upon by the great statesmen of 1836. If not unconstitutional it embodies a principle and policy of a most dangerous character and tendency . . ." S. Rep. No. 233, 48th Cong., 1st Sess. 16 (1884). Quoting Jackson, the Minority Report directly addressed the freedom of the press issue:

Liberty of circulating is as essential to that freedom [freedom of the press] as liberty of publishing; indeed, without the circulation the publication would be of little value. [Ex parte Jackson, 96 U.S. 727, 733 (1878) (emphasis added by Minority Report).]

... The freedom of circulation by the ordinary channels of communication is the very essence of the press's freedom . . . Deny to the press the right to circulate through the mails and over post-routes, which now include all public highways, railroads, and navigable streams (unless sent as merchandise), and the guarantee thrown around its freedom by the Constitution is worthless.

Id. at 15 (emphasis in original).

59. The States are powerless to extirpate the Louisiana lottery. They are powerless even to protect themselves from its insidious brigandage. They have ex-
only Congress could "crush this hydra-headed monster, which is de-
moralizing the young, the poor, and the needy throughout the coun-
try, as no other institution in America has ever done."60

The 1890 Act broke the back of the Louisiana Lottery. "A fear-
less man was appointed postmaster in New Orleans and thousands of
pieces of mail were seized and immense masses of evidence col-
lected."61 Business at the New Orleans post office decreased by one-
third.62 In 1892, the Supreme Court upheld the constitutionality of
the Act in In re Rapier:63

We cannot regard the right to operate a lottery as a fundamen-
tal right infringed by the legislation in question; nor are we able to
see that Congress can be held, in its enactment, to have averted
the freedom of the press. The circulation of newspapers is not pro-
hibited, but the government declines itself to become an agent in
the circulation of printed matter which it regards as injurious to the
people.64

hausted their resources. The mails, the national banks, and the channels of
interstate transportation are controlled by the national authority and by national
authority alone. The national Congress and the national Executive are alone
equal to the overthrow of this pestilent corporation, which has become the rich-
est, the most audacious, and the most powerful gambling institution that the
world has ever known.

1st Sess. (1890)). In general, the House debates over the 1890 legislation reiterated earlier
arguments. See id. at 8698-721.

60. Id. at 8705 (remarks of Rep. Moore). Representative Hays responded in vain,
with a federalism argument:

[I]f Congress, in its supremacy, can indirectly undermine, discriminate against,
and in effect destroy the legislation of the States in matters exclusively reserved to
the States, our system is destroyed, the rights of the States under their reserved
powers practically ended, and the Government is centralized, with the States
mere figure-heads. To apply it: If a State, for purposes of revenue or from policy,
desires to establish, tolerate, or legalize lotteries, which it has an undenied and
undoubted authority to do, and which is a matter over which Congress has no
earthly concern, and then Congress can, by indirect, through the exercise of
another power, practically nullify and invalidate this action and make criminals of
those within that State that do the customary and essential acts to its existence
and prosperity according to its design and the law of the State, then the State
might as well go out of business and cease to exist.

Id. at 8703 (Minority Report of Rep. Hays).

61. J. Ezell, supra note 9, at 263-64.

Cong., 2d Sess. 14-15 (1890). The following year, the Postmaster General reported in-
creased convictions under the lottery statutes. See Report of the Postmaster-General,
H.R. Exec. Doc. No. 1, pt. 4, 52d Cong., 1st Sess. 18 (1891). The new statutes also
drew accolades from the press. Of 2,259 editorials in 850 newspapers, 2,172 opposed the
use of the mails by lottery companies and 87 favored such use. Id. at 22.

63. 143 U.S. 110 (1892).

64. Id. at 134.
2. Regulation Beyond the Mails: Legislation Under the Commerce Clause

Congress struck at lotteries once again in 1895. Reaching beyond its postal authority to its powers under the commerce clause, Congress outlawed the importation and interstate carriage of lottery-related materials. The catalyst for the new legislation was, once again, the Louisiana Lottery. Wounded by the 1890 Act and having finally lost its state charter, the "Serpent" had regenerated in Honduras in an attempt to operate without using the United States mails.

The Supreme Court heard oral argument three times before sustaining the constitutionality of the 1895 law by five to four majority in

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

66. See Act of Mar. 2, 1895, ch. 191, § 1, 28 Stat. 963 (current version at 18 U.S.C. § 1301 (1976)). Sections 2 and 3 of the 1895 legislation integrated the new changes into prior federal antilottery statutes. Section 4 permitted postal officials to refuse to deliver any mail, including ordinary letters, relating to lotteries.

Representative Broderick explained the need for additional legislation:

Mr. Speaker, in 1890 Congress forbade the use of the United States mails to companies and individuals for the purpose of advertising lottery schemes. That law has been evaded by using for such purposes the express, and it has been deemed necessary to amend the law so as to prohibit carrying in any way matter intended to advertise lotteries. This bill has been commended by the Post-Office Department. The law as it exists has given the Department much trouble. [An excerpt from the Postmaster General's most recent report was read, urging that a bill such as the one under consideration would "strike at the root of this great evil and eradicate it."]

A few years ago we had but one lottery in the United States. Public sentiment was aroused against it. When the institution was driven out by the legislation of the Congress and by the States it was reorganized in the territory of Honduras, and has been operating from that territory throughout the States of the Union, so that to-day, instead of having one lottery, as we had a few years ago, we have a number. This lottery business has grown to such an extent that it has shocked the moral sense of the people of the entire country, and it ought to be suppressed.


67. See J. Ezell, supra note 9, at 267.

68. See 27 CONG. REC. 3013 (1895) (remarks of Rep. Broderick); 26 CONG. REC. 2356 (1894). In attempting to eradicate the Louisiana Lottery, Congress also affected charitable lotteries despite an intention to avoid doing so:

I have not the slightest objection to confining it to the lottery business, but to provide that the offering of prizes shall be a penal offense at innocent church fairs and other little enterprises of that sort, it seems to me, is going beyond what we ought to attempt.

Id. at 4313 (remarks of Senator Gorman). The problem lay in the broad language of the statute.
Champion v. Ames. Although petitioner argued that the statute infringed upon powers reserved to the states by the tenth amendment, the Court emphasized the commerce clause and Chief Justice Marshall's opinion in Gibbons v. Ogden. Justice Harlan dismissed the tenth amendment issue because "the power to regulate commerce among the States has been expressly delegated to Congress.” Although the propriety of the statute was not for the courts to determine, its constitutionality was clear:

If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

Irony characterized the history of gambling law. At the outset, Chief Justice Marshall's expansive opinion in Dartmouth College stalled reform. It took a revolution in constitutional thinking, touched off by Chief Justice Taney in Charles River Bridge, to restore power to state legislatures. Ultimately, however, the end of the state-chartered

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69. 188 U.S. 321 (1903). Champion was first argued in early 1901 and then was joined with Francis v. Ames, 188 U.S. 375 (1903), for reargument in October 1901 and again in December 1902. In Francis, Justice Holmes found that the definition of lottery materials in the 1895 provisions did not encompass the operator's records of numbers chosen by lottery customers. See notes 82-86 and accompanying text infra. The ultimate 5 to 4 decision in Champion coupled with the restrictive decision in Francis shows that the 1895 provisions troubled the Court.

70. 188 U.S. at 330-32. Champion sought habeas corpus relief from a conviction under the 1895 statute. Id. at 325.

71. 22 U.S. (9 Wheat.) 1 (1824). Writing for the Court in Champion, Justice Harlan quoted extensively from Gibbons:

[The commerce power] is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in Congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the Constitution.

188 U.S. at 347 (quoting Gibbons v. Ogden, 22 U.S. (9 Wheat.) at 9 (emphasis added in Champion)).

72. 188 U.S. at 357.

73. Id. at 358. The dissenters argued that the tenth amendment prohibited the congressional action and that the "scope of the commerce clause of the Constitution cannot be enlarged because of present views of public interest." Id. at 372 (dissenting opinion, Fuller, C.J.).
lottery systems was made possible through an expansive reading of the Constitution. That reading came in Champion, ironically rooted in Marshall's own opinion in Gibbons. The Court created a federal police power where none existed before. First, federal power grew, and stood in the way; then federal power shrunk, and stood aside; finally, federal power grew, and fought the last battle itself.74

X. Penal Code of 1909

S. Rep. No. 10, 60th Cong., 1st Sess. 9 (1908) ("The foreign and interstate commerce of this country has assumed proportions so vast, is growing so rapidly, and legislative enactments pertaining thereto are already so numerous that it also seemed proper to collect the penal legislation relative thereto under a distinctive head.").

XI. One People Concept

A. Prostitution


We shall discuss at length but one of these grounds...[that is,] [t]he power of Congress under the commerce clause of the Constitution...[,] the ultimate determining question. If the statute be a valid exercise of that power, how it may affect persons or States is

74. Many interests that first expressed support for Dartmouth College, and then voiced alarm at Charles River Bridge, now expressed concern with Champion, 3 C. Warren, The Supreme Court in United States History 457-60 (1922). A report to the American Bar Association in 1917 characterized Champion as the Pandora's box from which burst forth with amazing speed and ever-increasing velocity the tendency to federalize and centralize, beyond the dreams of Alexander Hamilton, a government whose centripetal forces had already been too greatly strengthened as a result of the Civil War. It was the beginning of that steady, unending, unceasing movement in Congress to stretch far beyond its real meaning and far beyond what any fair construction, however liberal, warranted the Commerce Clause of the Constitution. This movement has progressed so steadily, has been pressed so persistently, and has gone so far that it threatens to utterly annihilate our dual system of government, to utterly destroy the police powers of the several States, and finally to be about to deprive our people of the inestimable blessings of local self-government, unless it be checked speedily and sharply.

not material to be considered. It is the supreme law of the land and persons and States are subject to it.

Congress is given power "to regulate commerce with foreign nations and among the several States." The power is direct; there is no word of limitation in it, and its broad and universal scope has been so often declared as to make repetition unnecessary. And, besides, it has had so much illustration by cases that it would seem as if there could be no instance of its exercise that does not find an admitted example in some one of them. Experience, however, is the other way, and in almost every instance of the exercise of the power differences are asserted from previous exercises of it and made a ground of attack. The present case is an example.

Commerce among the States, we have said, consists of intercourse and traffic between their citizens, and includes the transportation of persons and property. There may be, therefore, a movement of persons as well as of property; that is, a person may move or be moved in interstate commerce. And the act under consideration was drawn in view of that possibility. What the act condemns is transportation obtained or aided or transportation induced in interstate commerce for the immoral purposes mentioned. But an objection is made and urged with earnestness. It is said that it is the right and privilege of a person to move between States and that such being the right, another cannot be made guilty of the crime of inducing or assisting or aiding in the exercise of it and "that the motive or intention of the passenger, either before beginning the journey, or during or after completing it, is not a matter of interstate commerce." The contentions confound things important to be distinguished. It urges a right exercised in morality to sustain a right to be exercised in immorality. It is the same right which attacked the law of Congress which prohibits the carrying of obscene literature and articles designed for indecent and immoral use from one State to another. Act of February 8, 1897, 29 Stat. 512, c. 172. United States v. Popper, 98 F. 423 (1899).... It is the same right which was excluded as an element as affecting the constitutionality of the act for the suppression of lottery traffic through national and interstate commerce. Champion v. Ames, 188 U.S. 321, 357 (1903).... It is the right given for beneficial exercise which is attempted to be perverted to and justify baneful exercise as in the instances stated and which finds further illustration in Reid v. Colorado, 187 U.S. 137 (1902).... This constitutes the supreme fallacy of plaintiff's error. It pervades and vitiates their contentions.

Plaintiffs in error admit that the States may control the immoralities of its citizens. Indeed, this is their chief insistence, and they especially condemn the act under review as a subterfuge and an attempt to interfere with the police power of the States to regulate the morals of their citizens and assert that it is in consequence an invasion of the reserved powers of the States. There is unquestionably a control in the States over the morals of their citizens, and, it may be admitted, it extends to making prostitution a crime. It is a control, however, which can be exercised only within the jurisdiction of the States, but there is a domain which the States cannot reach and over
which Congress alone has power; and if such power be exerted to control what the States cannot it is an argument for—not against—its legality. Its exertion does not encroach upon the jurisdiction of the States. We have cited examples; other may be adduced. The Pure Food and Drugs Act (June 30, 1906, ch. 3915, 34 Stat. 768) is a conspicuous instance. In all of the instances a clash of national legislation with the power of the States was urged, and in all rejected.

Our dual form of government has its perplexities, State and Nation having different spheres of jurisdiction, as we have said, but it must be kept in mind that we are one people; and the powers reserved to the States and those conferred on the Nation are adapted to be exercised, whether independently or concurrently, to promote the general welfare, material and moral. This is the effect of the decisions, and surely if the facility of interstate transportation can be taken away from the demoralization of lotteries, the debasement of obscene literature, the contagion of diseased cattle or persons, the impurity of food and drugs, the like facility can be taken away from the systematic enticement to and the enslavement in prostitution and debauchery of women, and, more insistently, of girls.

B. Narcotics


Brolan v. United States, 236 U.S. 216, 222 (1915) (Act of Feb. 8, 1909, upheld) (stating that police power in respect to public health, morals, and welfare may only be exercised by states is an argument “so wholly devoid of merit as to be frivolous”).


C. Extortion


XII. Revision of 1948


XIII. 18 U.S.C. § 891


The question in this case is whether Title II of the Consumer Credit Protection Act . . . as construed and applied to Petitioner is a permissible exercise by Congress of its powers under the Commerce Clause of the Constitution.

The Commerce Clause reaches, in the main, three categories of problems. First, the use of channels of interstate or foreign commerce which Congress deems are being misused, as, for example, the shipment of stolen goods (18 U.S.C. §§ 2312-2315) or of persons who have been kidnapped (18 U.S.C. § 1201). Second, protection of the instrumentalities of interstate commerce, as, for example, the destruction of an aircraft (18 U.S.C. § 32), or persons or things in commerce, as, for example, thefts from interstate shipments (18 U.S.C. § 659). Third, those activities affecting commerce. It is with this last category that we are here concerned.

Chief Justice Marshall in Gibbons v. Ogden said:

The genius and character of the whole government seem to be, that its action is to be applied to all the external concerns of the nation, and to those internal concerns which affect the States generally; but not to those which are completely within a particular State, which do not affect other States, and with which it is not necessary to interfere, for the purpose of executing some of the general powers of the government. The completely internal commerce of a State, then, may be considered as reserved for the State itself.

Decisions which followed departed from that view; but by the time of United States v. Darby, the broader view of the Commerce Clause announced by Chief Justice Marshall had been restored. Chief Justice Stone wrote for a unanimous Court in 1942 that Congress could provide for the regulation of the price of intrastate milk, the sale of which, a competition with interstate milk, affects the price structure and federal regulation of the latter. In United States v. Wrightwood Dairy Co., he said the commerce power "extends to those activities intrastate which so affect interstate commerce, or the exertion of the power of Congress over it, as to make regulation
of them appropriate means to the attainment of a legitimate end, the effective execution of the granted power to regulate interstate commerce."

*Wickard v. Filburn* soon followed in which a unanimous Court held that wheat grown wholly for home consumption was constitutionally within the scope of federal regulation of wheat production because, though never marketed interstate, it supplied the need of the grower which otherwise would be satisfied by his purchases in the open market. The Court said: "[E]ven if appellee's activity be local and though it may not be regarded as commerce, it may still, whatever its nature, be reached by Congress if it exerts a substantial economic effect on interstate commerce, and this irrespective of whether such effect is what might at some earlier time have been defined as 'direct' or 'indirect.'"

In *United States v. Darby*, the decision sustaining an Act of Congress which prohibited the employment of workers in the production of goods "for interstate commerce" at other than prescribed wages and hours, a class of activities was held properly regulated by Congress without proof that the particular intrastate activity against which a sanction was laid had an effect on commerce. A unanimous Court said:

Congress has sometimes left it to the courts to determine whether the intrastate activities have the prohibited effect on the commerce, as in the Sherman Act. It has sometimes left it to an administrative board or agency to determine whether the activities sought to be regulated or prohibited have such effect, as in the case of the Interstate Commerce Act, and the National Labor Relations Act, or whether they come within the statutory definition of the prohibited Act, as in the Federal Trade Commission Act. And sometimes Congress itself has said that a particular activity affects the commerce, as it did in the present Act, the Safety Appliance Act and the Railway Labor Act. In passing on the validity of legislation of the class last mentioned the only function of courts is to determine whether the particular activity regulated or prohibited is within the reach of the federal power.

That case is particularly relevant here because it involved criminal prosecution, a unanimous Court holding that the Act was "sufficiently definite to meet constitutional demands." Petitioner is clearly a member of the class which engages in "extortionate credit transactions" as defined by Congress and the description of that class has the required definiteness.

It was the "class of activities" test which we employed in *Heart of Atlanta Motel, Inc. v. United States* ... to sustain an Act of Congress requiring hotel or motel accommodations for Negro guests. The Act declared that "any inn, hotel, motel, or other establishment which provides lodging to transient guests' affects commerce per se." That exercise of power under the Commerce Clause was sustained. "[O]ur people have become increasingly mobile with millions of people of all races traveling from State to State; ...
Negroes in particular have been the subject of discrimination in transient accommodations, having to travel great distances to secure the same; . . . often they have been unable to obtain accommodations and have had to call upon friends to put them up overnight . . . and . . . these conditions had become so acute as to require the listing of available lodging for Negroes in a special guidebook. . . ."

In emphasis of our position that it was the class of activities regulated that was the measure, we acknowledged that Congress appropriately considered the "total incidence" of the practice on commerce.

Where the class of activities is regulated and that class is within the reach of federal power, the courts have no power "to excise, as trivial, individual instances" . . . of the class. *Maryland v. Wirtz* . . .

Extortionate credit transactions, though purely intrastate, may in the judgment of Congress affect interstate commerce. In an analogous situation, Mr. Justice Holmes, speaking for a unanimous Court, said: "[W]hen it is necessary in order to prevent an evil to make the law embrace more than the precise thing to be prevented it may do so." In that case an officer of a state bank which was a member of the Federal Reserve System issued a fraudulent certificate of deposit and paid it from the funds of the state bank. It was argued that there was no loss to the Reserve Bank. Mr. Justice Holmes replied, "But every fraud like the one before us weakens the member bank and therefore weakens the System." In the setting of the present case there is a tie-in between local loan sharks and interstate crime.

The findings by Congress are quite adequate on that ground.

The essence of all these reports and hearings was summarized and embodied in formal Congressional findings.

We have mentioned in detail the economic, financial, and social setting of the problem as revealed to Congress. We do so not to infer that Congress need make particularized findings in order to legislate. We relate the history of the Act in detail to answer the impassioned plea of petitioner that all that is involved in loan shark- ing is a traditionally local activity. It appears, instead, that loan shark- ing in its national setting is one way organized interstate crime holds its guns to the heads of the poor and the rich alike and syphons funds from numerous localities to finance its national operations.

**XIV. Racketeering**


[I]t is urged that the interpretation of RICO to include both legitimate and illegitimate enterprises will substantially alter the balance between federal and state enforcement of criminal law. This is particularly true, so the argument goes, since included within the definition of racketeering activity are a significant number of acts made criminal under state law. But even assuming that the more inclusive definition of enterprise will have the effect suggested, the language of the statute and its legislative history indicate that Congress was well aware that it was entering a new domain of federal involvement through the enactment of this measure. Indeed, the very purpose of the Organized Crime Control Act of 1970 was to enable the Federal Government to address a large and seemingly neglected problem. The view was that existing law, state and federal, was not adequate to address the problem, which was of national dimensions. That Congress included within the definition of racketeering activities a number of state crimes strongly indicates that RICO criminalized conduct that was also criminal under state law, at least when the requisite elements of a RICO offense are present. As the hearings and legislative debates reveal, Congress was well aware of the fear that RICO would "mov[e] large substantive areas formerly totally within the police power of the State into the Federal realm." In the face of these objections, Congress nonetheless proceeded to enact the measure, knowing that it would alter somewhat the role of the federal government in the war against organized crime and that the alteration would entail prosecutions involving acts of racketeering that are also crimes under state law. There is no argument that Congress acted beyond its power in so doing. That being the case, the courts are apparently without authority to restrict the application of the statute.

XV. The Future? 93

The Alternative

U.S. DEP’T OF JUSTICE MANUAL, ch. 27, § 9-27.000, et seq., Principles of Federal Prosecution

§ 9-27.001 Preface

These Principles of Federal Prosecution provide to federal prosecutors a statement of sound prosecutorial policies and practices for particularly important areas of their work.

§ 9-27.100 General Provisions

§ 9-27.110 Purpose

A. The principles of federal prosecution set forth herein are intended to promote the reasoned exercise of prosecutorial discretion by attorneys for the government with respect to:

1. Initiating and declining prosecution;
2. Selecting charges;
3. Entering into plea agreements;
4. Opposing offers to plead nolo contendere;
5. Entering into nonprosecution agreements in return for cooperation; and
6. Participating in sentencing.

§ 9-27.200 Initiating and Declining Prosecution

§ 9-27.210 Generally: Probable Cause Requirement

A. If the attorney for the government has probable cause to believe that a person has committed a federal offense within his/her jurisdiction, he/she should consider whether to:

1. Request or conduct further investigation;
2. Commence or recommend prosecution;
3. Decline prosecution and refer the matter for prosecutorial consideration in another jurisdiction;
4. Decline prosecution and initiate or recommend pretrial diversion, or other noncriminal disposition; or
5. Decline prosecution without taking other action.

§ 9-27.220 Grounds for Commencing or Declining Prosecution

A. The attorney for the government should commence or recommend federal prosecution if he/she believes that the person's conduct constitutes a federal offense and that the admissible evidence will probably be sufficient to obtain and sustain a conviction, unless, in his/her judgment, prosecution should be declined because:

1. No substantial federal interest would be served by prosecution;
2. The person is subject to effective prosecution in another jurisdiction; or
3. There exists an adequate noncriminal alternative to prosecution.
§ 9-27.230 Substantial Federal Interest

A. In determining whether prosecution should be declined because no substantial federal interest would be served by prosecution, the attorney for the government should weigh all relevant considerations, including:

1. Federal law enforcement priorities;
2. The nature and seriousness of the offense;
3. The deterrent effect of prosecution;
4. The person's culpability in connection with the offense;
5. The person's history with respect to criminal activity;
6. The person's willingness to cooperate in the investigation or prosecution of others; and
7. The probable sentence or other consequences if the person is convicted.

Federal Law Enforcement Priorities

Federal law enforcement resources and federal judicial resources are not sufficient to permit prosecution of every alleged offense over which federal jurisdiction exists. Accordingly, in the interest of allocating its limited resources to achieve an effective nationwide law enforcement program, from time to time the Department establishes national investigative and prosecutorial priorities. These priorities are designed to focus federal law enforcement efforts on those matters within the federal jurisdiction that are most deserving of federal attention and are most likely to be handled effectively at the federal level. In addition, individual U.S. Attorneys may establish their own priorities, within the national priorities, in order to concentrate their resources on problems of particular local or regional significance. In weighing the federal interest in a particular prosecution, the attorney for the government should give careful consideration to the extent to which prosecution would accord with established priorities.

§ 9-27.240 Prosecution in Another Jurisdiction

A. In determining whether prosecution should be declined because the person is subject to effective prosecution in another jurisdiction, the attorney for the government should weigh all relevant considerations, including:

1. The strength of the other jurisdiction's interest in prosecution;
2. The other jurisdiction's ability and willingness to prosecute effectively; and
3. The probable sentence or other consequences if the person is convicted in the other jurisdiction.