10-1-1970

Threat of Organized Crime: Highlighting the Challenging New Frontiers in Criminal Law

Will Wilson

Follow this and additional works at: http://scholarship.law.nd.edu/ndlr

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.nd.edu/ndlr/vol46/iss1/2

This Article is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.
THE THREAT OF ORGANIZED CRIME: HIGHLIGHTING THE CHALLENGING NEW FRONTIERS IN CRIMINAL LAW

Will Wilson*

During the early years of the twentieth century, criminal groups throughout the United States warred among themselves, each group striving for dominance in a particular geographic area and for control of a given criminal activity. In the large cities the common denominator in many of the groups was ethnic or nationalistic origin.

After a period of prosperity enjoyed by these criminal groups during the prohibition era, Charles “Lucky” Luciano succeeded in consolidating the various groups. The heart of Luciano’s organization was fashioned around the unique strength of the Sicilian groups’ family-like structure. His national confederation grew and prospered in relative anonymity until national attention was drawn to it through the Kefauver hearings and then subsequently through the testimony of Joseph Valachi at the Senate investigative subcommittee hearings chaired by Senator John L. McClellan in 1963.1

Today, the heart of organized crime consists of more than twenty groups operating as criminal cartels in the major metropolitan areas of the country. Valachi referred to the major controlling hierarchy as the Mafia, La Cosa Nostra or This Thing of Ours, but it was also commonly known as the Mob, the Syndicate, or the Outfit. The fact of its existence and the nature of its operations and not what it is called is, however, the important consideration.

Today, the twenty-odd organized crime groups, or families, operate primarily in New York, New Jersey, Illinois, Florida, Louisiana, Nevada, Pennsylvania, Missouri, Massachusetts, California, Ohio, Rhode Island, and Michigan.2

The hard, inner core of members constituting each family is composed of a boss or “capo,” an underboss or “sottocapo,” several captains or “caporegina,” and finally “soldiers” or “button men.” At the direction of the boss, the family soldiers operate the various illegal enterprises which employ the street-level personnel of organized crime. The estimated overall strength of these core groups, from boss to soldier (but not including the street-level criminals), is estimated at 5,000, but their non-member associates and employees swell that number by several thousand. Sitting to settle disputes between bosses and to allocate territory on a national basis, is the “Commission.” It is composed of

* Assistant Attorney General of the United States in charge of the Criminal Division. This article is the product of staff work by the Department of Justice and especially the research of Gary Cornwell.
1 For the substance of the information supplied by Joseph Valachi to Senator McClellan’s Permanent Subcommittee on Investigations of the Senate Committee on Government Operations in 1963 and at later times and places, see P. Maas, THE VALACHI PAPERS (1968).
bosses of only the most powerful families, but it exercises control over all families.

The operation of the organized crime syndicate is unique as a criminal undertaking. It is dedicated to illegality as a continuing enterprise, as opposed to the accomplishment of a specific illegal venture. Its expertise reaches all profitable areas of criminality, and it is flexible enough to change its major emphases as conditions of economics or legal attacks upon it change. It effectively allocates territory to prevent inefficient and overlapping operations, and recognizes the advantages of diversification for similar reasons. It has at its disposal impressive legal and financial expertise along with an enormous amount of capital. Internal discipline is rigidly maintained by organization Enforcers; protection from outside interference is accomplished by professional Corruptors acting as political go-betweens in dealing with government personnel. In short, the Syndicate is a criminal conglomerate, dedicated to long-term criminal activity, and equipped with the resources and accumulated know-how to accomplish its goals.

In addition to its sheer record of growth and its present size, Syndicate success may be measured in terms of its annual income and current financial resources. Gross sales of illegal gambling, the primary source of funds for organized crime, are estimated at between $20 billion and $50 billion per year. Based upon the more conservative figure, illegal gambling produces a net income of between $6 and $7 billion annually. In addition, annual profits are estimated at $350 million from loan sharking, $350 million from narcotics, $225 million from prostitution, and $150 million from untaxed liquor.

The economic effect, of course, is not limited to the actual dollars directed into the hands of Syndicate members. A particularly vivid example of the side effects of organized criminal activity is the relation between narcotics sales and thefts undertaken to support the addict's habit. Stolen goods usually bring no greater than one-fourth of their original cost when sold through a "fence." This means that there must be thefts of four times the value of narcotics purchases in order to finance an addict's habit. On the basis of this factor, one may reasonably estimate that in New York City alone approximately $2 billion a year in thefts is the direct product of heroin sales. A large portion of those sales consists of heroin originally smuggled by organized criminals.

The cost to the nation from the operations of organized crime can best be comprehended not by statistics, but in terms of the direct impact upon its

---

3 The Syndicate's current "defense mechanisms" have been described in this way:

The "enforcer's" duty is to maintain organizational integrity by arranging for the maiming and killing of recalcitrant members or potential witnesses against the group....

The "corruptor," on the other hand, seeks to establish relations with those public officials and other influential persons whose assistance is necessary to achieve the organization's overall goals. REPORT at 41.

With reference to the latter characteristic of modern organized crime, it might be noted that "[a]ll available data indicate that organized crime flourishes only where it has corrupted local officials." TFR ON ORGANIZED CRIME 6.

4 The process of estimating organized crime's impact upon our country through the use of statistics is far from an exact science. The figures offered herein for consideration are, as noted, merely estimates. They are based upon information provided by numerous experts, federal agencies and state agencies, but the bulk of the information was obtained from the Internal Revenue Service and the Federal Bureau of Investigation which are most familiar with organized crime activity.
citizens. In his message on organized crime in April of 1969, President Nixon noted:

Organized crime's victims range all across the social spectrum — the middle-class businessman enticed into paying usurious loan rates; the small merchant required to pay protection money; the white suburbanite and the black city dweller destroying themselves with drugs; the elderly pensioner and the young married couple forced to pay higher prices for goods. The most tragic victims, of course, are the poor whose lack of financial resources, education, and acceptable living standards frequently breed the kind of resentment and hopelessness that make illegal gambling and drugs an attractive escape from the bleakness of ghetto life.\(^5\)

Mr. Oliver Lofton, Associate Director of the Community Relations Service, while addressing an L.E.A.A. Organized Crime Training Session in March of 1970, illustrated another aspect of organized crime's impact in today's ghettos:

Who then does the black man emulate? Who are the everyday heroes and idols of the ghetto youth — black and brown? They are the big men on the street. They are well fed, well dressed, big cars, cool pads, members of the ghetto who have it "made" . . . have "status" . . . have cover and concurrence of the law. . . . After all, don't all Americans admire success? Is there any reason to believe that ghetto children are any less American than the rest of us? For all intents and purposes, the resident organized crime operators are living examples — the real live models of the kind of success the ghettos provide.\(^6\)

Mr. Lofton went on to point out that even where emulation is not the result of organized crime's flagrant and open criminal activities, "deep lasting cynicism" is bred into ghetto dwellers concerning the credibility of law enforcement agencies which do nothing to curb those operations.\(^7\) Much of the result is severe social discontent like that which has erupted into ghetto riots in the past. Under such a system it makes little difference whether the cause of ineffective law enforcement is corruption, lack of concern, inadequate resources or poorly conceived laws.

Observations about the demoralizing effect upon citizens confronted with such outstandingly successful criminal operations, of course, is not limited to ghetto dwellers. To whatever extent, and in whatever social stratum of society, criminal actions are allowed to continue without vigorous and successful prosecutions, the integrity of the legal system suffers a setback. Here the loss is perhaps the greatest, for it is in this respect that organized crime has its greatest success, and thereby poses its greatest threat.

In 1967, the President's Commission aptly summed up the history of law enforcement's efforts to deal with organized crime in these words:

Investigation and prosecution of organized criminal groups in the 20th century has seldom proceeded on a continuous, institutionalized basis. Public interest and demands for action have reached high levels sporadically,
but, until recently, spurts of concentrated law enforcement activity have been followed by decreasing interest and application of resources.⁸

Among the more startling measures of the Syndicate's proven ability to evade legal process is the fact that from among its 5,000 members the federal government was able to obtain a total of only 235 indictments (involving 328 defendants) between 1960 and 1969.⁹ Organized crime leaders, moreover, have been notoriously successful in escaping punishment in the relatively few cases in which evidence warranting their indictment has been obtained. Organized criminals have obtained dismissals or acquittals on the charges against them more than twice as often as ordinary defendants (69.7% as compared to 34.8%).¹⁰ In their ability to obtain dismissals or acquittals five or more times, they have proven themselves to be five times as successful as their unaffiliated criminal counterparts.¹¹ Finally, the average criminal career of organized crime members is estimated as being twice as long as that of other offenders.¹²

The reason for organized crime's ability to evade legal sanctions lies within its power as a professional organization. Syndicate corruption of law enforcement officials reinforces existing indifference to produce inadequate investigative efforts. Where investigation is attempted, intimidation, force and fear make evidence gathering an often insurmountable obstacle. If indictments are obtained, inner organization sharing of financial resources and legal expertise enables the waging of protracted litigation. Even after long and successful prosecutions are completed, sentences are too often of such length that only temporary interruptions in organized criminal activities result. Since organized crime began its growth in the 1930's, significant setbacks for the Syndicate have been the exception rather than the rule.

If the direction of success is to be reversed, the approach of law enforcement must become as efficient, as imaginative, as determined and as sustained as the efforts of organized crime have been in the past. The first step, fortunately, has already received considerable attention. By an Executive Order of the President issued in 1968, responsibility for the coordination of crime control was placed with the Attorney General.¹³ This basic concept of uniting the efforts of all the branches of the federal government in the area of crime control under the Department of Justice and coordinating those efforts with state programs, has since that time been further implemented by the establishment of Strike Forces to combat organized crime on a sustained, long-term basis. Each Strike Force is headed by an attorney from the Department of Justice, and includes other attorneys and senior investigators from the Federal Bureau of Investigation.

---

⁸ *Challenge of Crime* at 196. The results of past efforts of law enforcement in dealing with organized crime were summarized by G. Robert Blakey, Chief Counsel to the Senate Subcommittee on Criminal Laws and Procedures, in a memorandum entered in the Congressional Record by Senator McClellan. 115 Cong. Rec. S14429 (daily ed. Nov. 17, 1969).
¹⁰ Id.
¹¹ 17.6% of the 328 organized crime defendants who were indicted by the federal government in the 1960-1969 period were able to obtain acquittals or dismissals of cases against them five or more times each. Id.
¹² Id.
¹³ Exec. Order No. 11,396, 3 C.F.R. 99 (Comp. 1968).
Bureau of Narcotics and Dangerous Drugs, Department of Labor, Post Office
Department, Bureau of Customs, Internal Revenue Service and other branches
of the federal government. To date there are thirteen Strike Forces in opera-
tion and seven more scheduled to begin operation by the end of fiscal 1971.
Finally, additional financing has been added to the new organizational approach.

The nature of the federal government's new commitment was outlined by
President Nixon in his message on organized crime to Congress in April of 1969:

This Administration is urgently aware of the need for extraordinary
action and I have already taken several significant steps aimed at combating
organized crime. I have pledged an unstinting commitment, with an
unprecedented amount of money, manpower and other resources to back
up my promise to attack organized crime. For example — I have author-
ized the Attorney General to engage in the wiretapping of organized
racketeers. I have authorized the Attorney General to establish 20 Federal
racketeering field offices all across the Nation. I have authorized the At-
torney General to establish a unique Federal-State Racket Squad in New
York City. I have asked all Federal agencies to cooperate with the De-
partment of Justice in this effort and to give priority to the organized crime
drive. I have asked the Congress to increase the fiscal 1970 budget by
$25 million, which will roughly double present expenditures for the or-
ganized crime effort.

In addition, I have asked the Congress to approve a $300 million
appropriation in the 1970 budget for the Law Enforcement Assistance
Administration. Most of these funds will go in block grants to help State
and local enforcement programs and a substantial portion of this assistance
money will be utilized to fight organized crime. I have had discussions with
the State Attorneys General and I have authorized the Attorney General to
cooperate fully with the States and local communities in this national effort,
and to extend help to them with every means at his disposal.14

 Already what the President envisioned in that speech has been confirmed.
Great progress has been made in the fight against organized crime through the
unification of federal efforts and the greater allocation and more efficient use of
resources. The Strike Force concept has been most successful. However, it is
equally clear that resource allocation alone will not get the job done.15

15 With reference to future needs and the development of strategy in our fight against
organized crime, President Nixon created by Executive Order on June 4, 1970, a National
Council on Organized Crime. That Order provided:
WHEREAS organized crime is a problem of national scope affecting numerous
cities and states;
WHEREAS the problem of organized crime presents the Nation with a major
challenge calling for coordinated Federal law enforcement efforts of maximum
effectiveness;
WHEREAS it is necessary to formulate a national strategy for the elimination of
organized crime:
NOW, THEREFORE, by virtue of the authority vested in me as President of
the United States, it is ordered as follows:
There is hereby created a National Council on Organized Crime which shall be
composed of the Attorney General, who shall be Chairman; the Secretary of the
Treasury; the Secretary of Labor; the Postmaster General; the Chairman of the
Securities and Exchange Commission; the Assistant Attorney General, Criminal
Division; the Assistant Attorney General, Tax Division; the Assistant Secretary of
the Treasury for Enforcement and Operations; the Assistant Secretary of the Treasury
for Tax Policy; the Administrator of the Law Enforcement Assistance Administra-
It has been determined what types of criminal activities are of the greatest benefit to organized crime. Now the legal machinery and substantive prohibitions to deter those activities more effectively must be developed. An analysis must be made of the legal attacks most often utilized by defendants in organized crime cases. This study must determine whether the procedures being employed are actually essential safeguards in the criminal justice system. If mere loopholes are found, an effort must be made to see if other procedures can be developed to accomplish legitimate objectives with less consumption of legal effort and court time. There is also a need to analyze the prosecution tools which seem most effective in order to determine how those approaches may be strengthened within necessary due process limitations.

This creative legislative approach to changing the criminal justice system is not suggested because it is the easiest approach. Rather, experience has demonstrated that it is the only realistic approach. Within the past fifteen years significant strides have been taken in improving the criminal justice system by extending and preserving individual rights and protecting them from a potentially overreaching and overzealous government. Of course, there is still work to be done in this area; there is no need to advocate any reversal in that trend. The only major shortcoming of that endeavor might be the fact that most progress to date has been limited to the courts. The courts can provide an excellent forum for publicly airing hitherto unrecognized problems, for adjusting competing interests, and for protecting minority and individual rights. However, by their very nature, the work of the courts must be limited largely to a balancing of competing goals. For a court the opposing alternatives of action are largely predetermined. The sole question is where to draw the line so as to preserve the best of both extremes. Given that limitation, progress in improving criminal justice procedure and administration has generally been remarkable.

Within the past eight or ten years, however, it has become increasingly clear that additional changes in the criminal justice system of the United States are needed to insure that minimum level of protection from criminal activity which any society must maintain for its continued survival and to which every citizen in this country is entitled. Very little progress has been made in this latter area.

It is obvious that both aspects of criminal justice are essential. Life under a system where either goal is substantially impaired quickly becomes unbearable for significant segments of the population. The legal system of the United States can justify its existence only as long as it is able to insure personal security and prevent public corruption, while at the same time preserving essential personal liberties and freedoms. The simultaneous promotion of these two goals is therefore of paramount importance.
of the competing demands of crime control and individual rights is difficult. This is especially so when the courtroom is the forum of change and the appellate opinion is the law-making process. What must now be faced is the fact that improvements in the capacity to control crime must not curtail existing civil liberties, nor must future extensions of civil liberties curtail the ability to provide security from criminal activities. To a greater extent the legislative process must be utilized for writing desirable new law. Appellate courts must use more judicial restraint when tempted to legislate in the field of criminal law.

Senate Bill 30, "The Organized Crime Control Act of 1969," has recently passed the U.S. Senate and has been referred to the House of Representatives for consideration. In developing such a bill as S. 30, it might first be noted that in pursuing the objectives in procedural, substantive, or administrative reform, two basic approaches can be utilized. After determining from experience with organized crime which areas of the criminal justice system are weak and warrant improvement, the resulting improvements may be drafted either narrowly or broadly. In other words, legislation may be shaped so that it will tend to affect largely organized, syndicated criminal activities, or, in the alternative, so that it will be sure to apply evenly to all criminal activities. As a shorthand means of discussing these alternatives, one might refer to the first possibility as the “different treatment approach” and to the second as the “broad coverage” approach.

With reference to the different treatment approach, it quickly becomes clear that such an approach is only occasionally feasible or desirable. As a threshold consideration, in order to employ this approach, some judicially manageable standard or criteria upon which to make the segregation must be shaped. For most purposes the term “organized crime” has no precise legal configuration, although some specific attributes of syndicated criminal operations can be accurately defined. Also there must be some reasonable and rational justification for segregation (in terms of the resulting difference in treatment to be applied). The point has not yet been reached where there can be any justification for different treatment when the question is the availability of constitutionally guaranteed rights. Finally, the process of applying the test for segregation (i.e., the procedure for determining whether a given activity, or situation, or defendant falls into the special category) must meet due process standards. This latter requirement might preclude the use of the different treatment approach where it would require that the determination be made prior to an actual trial of the factual situation in each case.

On the other hand, the inability to insure any proposed limitation need not preclude the use of words of limitation in any provision wherein no actual impact upon specific defendants (or other parties) results, as in the cases of segregation for purposes of investigation or for the allocation of limited resources. (See the discussion of titles I and V of S. 30 below.)

After determining the areas in which the scope of applicability of the proposed changes can be feasibly limited it must be decided whether a narrow coverage for the remedial provisions is desirable. Wherever procedural advantages to defendants are discovered which serve not as “safeguards” for the protection
of legitimate rights, but merely as "loopholes" for the evasion of legal accountability, there is no desire to deprive only organized criminals of their use. Remedial legislation would be designed broadly enough to cover all potential defendants.\textsuperscript{16}

With reference to either approach, two general observations are possible. First, within the permissible limits available, how broadly or narrowly any provision is drafted is a matter of degree. Seldom, if ever, would one expect to be able to draft an acceptable provision which would apply \textit{exclusively} to the Syndicate. Certainly no provision in S. 30 purports to be so narrowly limited. The problem is simply how many factors of limitation should be added to any particular provision in approaching that point at which the provision would have its narrowest possible application. The terms "different treatment" or "broad coverage" merely describe the two polar extremes. Most provisions will fall somewhere between these extremes. Second, no matter what coverage is finally adopted, there would still be justification for promoting the suggested improvements by noting that organized crime tactics are responsible for the awareness of the need for the specific changes in question and that special threat intensifies the need for effective, new approaches such as those proposed.

S. 30 did in fact employ varying degrees of limitation, each title being designed in light of the various considerations of reasonableness, feasibility, and desirability mentioned above. Therefore, although it is entitled "The Organized Crime Control Act of 1969," the term "organized crime" indicates primarily the occasion and motivation for its enactment and only in varying degrees the target for its impact.

A brief discussion of some of S. 30's provisions serves to illustrate the various approaches to criminal justice reform which have been mentioned.\textsuperscript{17}

S. 30 is divided into ten main titles and one additional title which contains a severability clause. The first six titles are designed to facilitate the government's task in gathering sufficient evidence to substantiate criminal violations and to preserve that evidence until the time of trial. As noted above, experience over the past ten years has been characterized by comparatively few instances of successful evidence gathering, i.e., there have been very few indictments issued against organized racketeers. The Syndicate's terroristic methods of insuring internal discipline prevent, virtually without exception, voluntary testimony by any of its members. The hierarchical design of their organization effectively shields the leaders in the organization from any connection with specific crimes. When victims of Syndicate activities are found by law enforcement personnel, threats against their lives or the lives of their families often prevent them from becoming willing witnesses for the Government. The tactics which allow such suppression of evidence are not actually unique to the Syndicate. That organization is merely the most proficient at employing them.

\textsuperscript{16} One might recall that at the early common law in England, a murder indictment had to specify the weapon in order that the King might confiscate it. We long ago ceased that type of pleading beneficially could be abolished completely. Such examples serve to remind us that the modification process must be a continual one as the body of our experience grows—that we must remain aware of the potentials for removing unnecessary procedural encumbrances from our criminal justice system when possible.

\textsuperscript{17} A thorough analysis of S.30 was made by the Committee on the Judiciary. \textit{See S. Rep. No. 91-617, 91st Cong., 1st Sess. (1969).} Constitutional problems involved are more directly answered in Senator McClellan's article at page 55, \textit{infra}. 
Over the past several years, the great potential of several tried but inadequately developed investigative approaches and the need for some additional ones have been recognized. In partial response to that recognition, title I increases the independence of the investigative grand jury, and gives it the additional power to issue reports on the status of organized crime activity. Title II consolidates present immunity statutes, thereby establishing uniform procedures for grants of immunity in the form of “use restrictions” in all cases involving violations of federal statutes. Title III mainly consolidates present civil contempt practice, making it applicable in all grand jury and court proceedings, and strengthens it by making the denial of bail mandatory where there is no substantial possibility of reversal. Title IV adds to the present crime of perjury an additional criminal prohibition against the giving of false testimony under oath. Although proof beyond a reasonable doubt is still required, the older restrictions on forms of proof traditionally referred to as the “two witness” and “direct evidence” rules are abolished. Convictions may be based upon material contradictions in testimony (without any need for the Government to prove by independent evidence which of the two statements is in fact false). Title V allows the Attorney General to provide protected housing facilities in organized crime cases for the security of potential Government witnesses and their families. Title VI allows the taking of depositions in criminal cases, and the use of such depositions if the witness should be “unavailable” at the time of trial.

Titles I through VI, then, as a unit were intended to strengthen the Government’s ability to muster evidence from live witnesses. The intended impact of these six provisions illustrates at least two possibilities with respect to coverage. Titles I, V and VI are limited to a narrower class of cases than would appear to have been absolutely necessary, while titles II through IV were fashioned for universal coverage even though a narrower impact would appear permissible. In titles I, V and VI the limitations in the scope of application were based upon the belief that the new machinery provided therein was needed primarily in the development of organized crime cases. The intent that they be so used in the future was therefore expressed in their provisions. It should be emphasized that the limitation was only an expression of legislative intent because adequate definitional and procedural frameworks are not provided to insure that application would be any less than universal.

One can expect that titles I, V and VI will be used more sparingly and more particularly with reference to organized crime cases than titles II through IV, but one need not be alarmed at the possibility that they may have broader applications. They are designed so as to protect essential personal rights of those persons possibly affected by their operation. Their validity does not de-

19 Title I expressed the intent that the special grand jury be used in districts “containing more than four million inhabitants or in which the Attorney General ... certifies ... that in his judgment a special grand jury is necessary because of criminal activity in the district ...” Title V’s protective housing provisions are made applicable only “in legal proceedings against any person alleged to have participated in an organized criminal activity” again the Attorney General is empowered to make the authorization subject, of course, to the witness’ consent in “availing himself of an offer by the Attorney General ...” Title VI contains similar words of limitation, namely “exceptional circumstances.” Report at 2, 13.
pend upon their having something less than universal application. For example, title I is designed with elaborate procedural safeguards in the area of greatest concern: the reporting function. Public officials who may be criticized in such reports for non-criminal conduct are given the right to require the appearance of witnesses before the grand jury to present their side of the story. The right to file an answer to grand jury charges to be published as an appendix to the grand jury report is insured. Named parties can require a court study of the grand jury report to determine whether it is supported by sufficient evidence. They have the right to have the supervising court’s decision subjected to appellate review, and also the right to have all of these opinions published with the grand jury report when it finally becomes public.

Similarly, title VI, although in terms limited to “exceptional cases,” is potentially applicable to a variety of situations in addition to organized crime cases. The chief concern is that defendants must not be deprived of their sixth amendment rights to confrontation and cross-examination. That concern is equally relevant with respect to any defendant whether or not he is a member of organized crime. Elaborate procedures are therefore included in title VI to achieve both objectives: while removing the incentive from organized criminals to silence a witness and thereby destroy essential evidence, additional procedures make possible effective confrontation and cross-examination of such witnesses at the time their depositions are taken.

Finally, title V purports to make protective housing facilities for witnesses available for use in organized crime cases. The determination to use such facilities is made by the Attorney General on the sole strength of an “allegation” that organized crime is involved. The need for procedural safeguards would here seem to be minimal and inadequate to justify any more precise determination, since the only impact of the title is upon witnesses, and that impact never results unless the witness in question is willing to receive the protection.

In contrast to the approach taken in titles I through VI, where no real effort is made to insure any limitation as to the types of cases to which the provisions might apply, titles VIII, IX and X do specifically segregate from the mass of defendants certain groups, and apply to those groups special procedures and penalties. Organized crime, by any of its names, is not, however, the test for segregation, for, as noted above, those terms are not sufficiently precise to serve as judicially manageable standards. The differentiation is made on the basis of specific conduct, clearly spelled out in advance, and for which special treatment is rationally justified. Title VIII sets out new federal substantive prohibitions directed at large-scale gambling activities which are conducted in violation of state law and which affect interstate commerce, and at the bribery and corruption of government officials which obstruct the enforcement of local laws against gambling. The criteria for distinction in both cases is drawn in terms of the number of participants, the time span of activity of the gambling operation and the amount of gross revenue derived from the operation.

The special threat to our country posed by large-scale gambling was outlined by the President in his message on organized crime to Congress on April 23, 1969:
THE THREAT OF ORGANIZED CRIME

This Administration has concluded that the major thrust of its concerted anti-organized crime effort should be directed against gambling activities. While gambling may seem to most Americans to be the least reprehensible of all the activities of organized crime, it is gambling which provides the bulk of the revenues that eventually go into usurious loans, bribes of police and local officials, "campaign contributions" to politicians, the wholesale narcotics traffic, the infiltration of legitimate businesses, and to pay for the large stables of lawyers and accountants and assorted professional men who are in the hire of organized crime.

Gambling income is the life line of organized crime. If we can cut it or constrict it, we will be striking close to its heart.20

The President also noted the following:

For most large-scale illegal gambling enterprises to continue operations over any extended period of time, the cooperation of corrupt police or local officials is necessary. This bribery and corruption of government closest to the people is a deprival of one of a citizen's most basic rights.21

On the basis of the special danger large-scale gambling presents, there is justification for singling out by specific criteria such large-scale gambling operations for federal prohibition and for providing special punishments for those who conduct them. The usual protections inherent in any federal trial are, of course, available to make as accurate a determination as possible in determining whether defendant X fits the special category.

Title IX makes a similar determination of special conduct deserving special federal prohibition. The prohibition here is directed against the investment in legitimate businesses of capital accumulated by a pattern of racketeering activity. Racketeering activity is defined in terms of repeated violations of specific state and federal criminal statutes now commonly violated by members of organized crime. The justification for the special treatment of such activity is widely recognized. The following comment from the Anti-Trust Section of the American Bar Association is illustrative:

The evidence is clear that organized crime, which takes billions of dollars — mostly in cash and mostly untaxed — annually from the American public, has broadened its operations by infiltrating and taking over legitimate businesses.

Organized crime, therefore, is a major threat to the proper functioning of the American economic system, which is grounded in freedom of decision. When organized crime moves into a business, it customarily brings all the techniques of violence and intimidation which it used in its illegal businesses. The effect of competitive or monopoly power attained this way is even more unwholesome than other monopolies because its position does not rest on economic superiority.22

Consider, as an example, public transportation — a taxi company, a cartage

---

21 Id. at 5.
company, or a firm which moves freight through a municipal airport. After it is determined that the particular activity has been acquired or is controlled by defined racketeering methods, it is necessary to utilize remedies that will remove the racketeer influence from the business and simultaneously protect the legitimate interests of innocent parties, employees and the public. Title IX contains such remedies. Criminal penalties in the nature of fine, imprisonment and forfeiture are made available in title IX, and are supplemented by an array of civil remedies now in use in other areas. Examples of the latter provisions include remedies developed in the anti-trust area such as the use of an investigative demand, the use of prohibitory injunctions, and the issuing of orders of divestment or dissolution. The remedies contained in title IX will free the channels of commerce from the stifling influence of predatory activities — an economic goal — and not punish particular individuals. The Department of Justice, in submitting its comments to the proposals contained in title IX, noted the following advantages in the civil approach:

These time tested remedies . . . should enable the Government to intervene in many situations which are not susceptible to proof of a criminal violation. Thus, in contrast to a criminal proceeding, the civil procedure . . . with its lesser standard of proof, non-jury adjudication process, amendment of pleadings, etc., will provide a valuable new method of attacking the evil aimed at in this bill. The relief offered by these equitable remedies would also seem to have a greater potential than that of the penal sanctions for actually removing the criminal figure from a particular organization and enjoining him from engaging in similar activity. Finally, these remedies are flexible, allowing of several alternate courses of action for dealing with a particular type of predatory activity, and they may also be effectively monitored by the Court to insure that its decrees are not violated. 23

Title X increases the discretionary powers of the trial judge in setting the sentence for defendants who have in the past shown themselves to be especially dangerous criminal offenders. Upon motion of the prosecutor, and after notice to the defendant, a hearing with the usual procedural safeguards is held to determine whether the defendant is a habitual, professional, or organized crime offender. The result of the determination is that special dangerous offenders may be sentenced to a maximum term of thirty years. No change in the usual minimum sentence accrues. Restrictions upon the type of evidence admissible at the hearing are relaxed to enable a more complete development of the background of the defendant's activities. Simultaneously, greater rationality, consistency and effectiveness of sentencing will be promoted through the addition of sentencing criteria (where previously there were no set criteria), the requirement that the court state the basis for the imposition of the extended sentence, and the availability of an appeal by the defendant or the government of the sentence set by the trial court.

As noted in the Senate Report on S. 30, title VII has two purposes:

23 Id. at 408 (reprint of a letter from the Deputy Attorney General to Senator McClellan, Chairman of the Subcommittee on Criminal Laws and Procedures).
... (1) to protect legal proceedings against delay, congestion, expense and distraction caused by the unlimited and unrestrained litigation of tenuous allegations that evidence should be suppressed; and (2) to prevent harm to legitimate public and private interests caused by forced disclosure of confidential files clearly unrelated to pending litigation.24

Protracted litigation of pretrial motions is a major cause of the congestion on today's criminal dockets and of the delay in the disposition of criminal cases. In the interest of defendants and the public generally, we must find ways to avoid facilitating such costly litigation wherever it appears to serve no legitimate purpose. Title VII is based upon the belief that significant amounts of costly and unnecessary litigation is currently being conducted over claims that evidence to be offered by the government was unlawfully obtained and should be suppressed. The basis for suppression may be a claim of an illegal search and seizure, an unlawful wiretap or a prior grant of immunity. In any case, where the alleged unlawful act occurred more than five years before the specific event in question, there would appear to be virtually no likelihood that the evidence offered has been obtained by the exploitation of that alleged unlawful act. After the lapse of five years, the problems involved in actually determining whether, in fact, there was any illegality which might justify suppression become exceedingly difficult and extraordinarily time consuming. Title VII would preclude any litigation of such claims where they are too attenuated to warrant litigation, and additionally would provide for the creation of flexible, minimum, threshold criteria in all cases for the disclosure of confidential government material for purposes of determining possible illegality. The concern in shaping these guidelines to the litigation process is that fourth amendment rights must be preserved. The manner of protecting those rights, however, is certainly not inflexible: any procedures which in fact operate to preserve the basic rights should suffice. It is in this respect that the Senate justifiably concluded that the two basic provisions of title VII "should fall upon patently dilatory, harassing, and unfounded suppression motions. Thus, they will neither infringe constitutional or statutory rights of individual defendants nor unduly interfere with the deterrent efficacy of the suppression sanction."25 Title VII, then, would appear to close a loophole — not destroy a safeguard. Not only is the design of such flexible new procedures for the protection of constitutional rights within the province of the legislature, but it is the legislature alone which is functionally capable of initiating such changes.

The special talents of lawyers are in increasing demand in many new developing problem areas of society. There seems today no greater need, and, therefore, no greater challenge for a lawyer than in the realm of the administration of criminal justice. The threat of organized crime — and S. 30, which grew out of the recently acquired awareness of that threat — serve merely as the best current examples of the need for the application of legal talents to the criminal justice area, and of the potential which can be realized when those talents are imaginatively applied.

25 Report at 70.
It is within this context that crime control efforts in the past have been most inadequate. Recently uncovered information about the secret workings of organized criminal syndicates, their enormous success, and their tremendous impact upon our country are more shocking than the previously available evidence of unrelated crimes (however numerous). Surprise is an excellent vehicle for stimulating concern. When the attempt is made to curtail the criminal activity of organized racketeers through the establishment of legal processes which will not simultaneously destroy essential personal rights and freedom, the toughest legal problems are faced. It is at this point that the United States system of criminal justice confronts its greatest test, and lawyers who claim the credit and responsibility for that system find their challenge most clearly focused.

Faced with two objectives which have in the past been made to appear irreconcilably conflicting, but which are both indispensable, we must find new ways to promote both needs. This approach is difficult, but it is essential that it succeed. Fortunately, the special training of lawyers adequately equips them for the task. It is, in fact, for the purpose of finding workable approaches in areas of apparent irreconcilable conflict that the lawyer's skills as advocate, counselor, interpreter, or inquisitor become truly important. It is through the accomplishment of that ultimate goal that lawyers can make their greatest social contribution.