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## Cough Up the Money: A Prescription for Regulating Russian Organized Crime out of U.S. Health Care

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## COMMENT

### COUGH UP THE MONEY: A PRESCRIPTION FOR REGULATING RUSSIAN ORGANIZED CRIME OUT OF U.S. HEALTH CARE

*It's wonderful that the Iron Curtain is gone . . . but it was a shield for the West. Now we've opened the gates, and this is very dangerous for the world. America is getting Russian criminals. . . They'll steal everything. . . . Nobody will have the resources to stop them. You people in the West don't know our mafia yet; you will, you will.*

-Boris Uvarov, Chief Serious Crimes Investigator for the  
Russian Prosecutor-General<sup>1</sup>

*Groups with the ability to coerce- the most significant asset of organized crime- have long found a ready market for their services in legitimate industries.*

-Peter Reuter<sup>2</sup>

#### I. INTRODUCTION

With the end of the Cold War, the Federal Bureau of Investigation (FBI) was forced to find a new battle, and to reassign the tremendous number of agents who had concentrated on U.S.-Soviet relations for over forty years.<sup>3</sup> Their mission turned to a domestic conflict, health

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1. Shoshanah V. Asnis, *Controlling the Russian Mafia: Russian Legal Confusion And U.S. Jurisdictional Power-Play*, 11 CONN J. INT'L L. 299, 307 (1996).

2. PETER REUTER, *RACKETEERING IN LEGITIMATE INDUSTRIES: A STUDY IN THE ECONOMICS OF INTIMIDATION* iii (1987). Reuter's study was proposed by the head of the New York Organized Crime Task Force, which subsequently provided him access to its voluminous data collection of past and ongoing investigations. *See id.*

3. *See* Charles H. Reistacher & Jack Y. Chorowsky, *End of Cold War Frees FBI To Target Health Care Fraud And Abuse*, HEALTHSPAN, June 1993, at 3.

care fraud, that was costing the nation over \$100 billion annually.<sup>4</sup> These agents currently work in conjunction with other special agents from the Department of Health and Human Services, as well as over 100 federal prosecutors, in health care fraud task forces across the country.<sup>5</sup>

Although the Cold War is over, the U.S. is fighting a Russian invasion on a domestic front. It is well documented that the Russian mafia has entered the United States since the break-up of the Soviet Union.<sup>6</sup> Playing on an already existent immigrant structure, these exported criminals have brought their ability to engineer government scams to America. One of the more prevalent and imaginative activities of Russian organized crime is its entry into the field of health care fraud.<sup>7</sup> The Russian mafia's involvement in this lucrative area becomes even more threatening due to the belief that it may be working with other international criminal organizations,<sup>8</sup> as well as sending business back to Russia to ensure that its claim over the criminal element that currently exists in Eastern Europe is preserved.<sup>9</sup>

Louis Freeh, Director of the FBI, stated that drug dealers have changed the focus of their activities from drugs to health care fraud because the business is so lucrative and "the risks of being caught and imprisoned are less."<sup>10</sup> Therefore, if health care fraud has become a law

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4. See Eric Hollreiser, *Pa. Blue Shield Hires Ex-Cop To Fight Fraud*, PHIL. BUS. J., Apr. 19, 1996, at 3B (citing reports from the General Accounting Office). The cost of health care fraud has risen from \$70 billion in 1992. See Reistacher & Chorowsky, *supra* note 3, at 3.

5. See Reistacher & Chorowsky, *supra* note 3, at 3.

6. See generally Asnis, *supra* note 1.

7. See Hollreiser, *supra* note 4, at 3B. The Director of Special Investigations for Pennsylvania Blue Shield Insurance Company stated that the Russian Mafia has demonstrated an affinity for this creative organized criminal practice. See *id.*

8. In Claire Sterling's *THIEVES' WORLD*, the author refers to the relationship between international organized crime groups as the "pax mafiosa" or the "peace among mobs." See CLAIRE STERLING, *THIEVES' WORLD* 117-168 (1994).

9. For example, one commentator states, "If you're a Russian shopowner [in U.S.], you don't go to the local mafia boss to complain anymore, you just call Russia and ask them to send a hitman." See *id.* at 165.

10. FBI Director Freeh stated that the 1500 backlogged health care fraud cases in the FBI could be handled by doubling the size of its 249 agent investigative teams, the approximate cost of which is \$37.6 million. John S. Day, *Medicare Fraud Costing Billions, FBI Chief Says*, BANGOR DAILY NEWS, Mar. 22, 1995, at 1. One of the key reasons that it is difficult to catch these physicians is because the government is currently allowing for full insurance reimbursement for "generally"

enforcement priority, and organized crime is involved, then why don't we fight it with the tools that Congress has specifically created to combat the problem since the rise of organized crime this century? This question is half answered in that the government is using laws like the Racketeering Influenced Corrupt Organization (RICO) statute to prosecute this problem. But it appears that because prosecution is an after-the-fact solution, there must be some way to stop this fraud before it starts.

Preventing this fraud would be nearly impossible. However, because we have had other legitimate businesses which have been infiltrated by organized crime, it would make sense to examine those businesses and compare their regulation patterns to those used in the health care profession. This Comment will examine the licensing procedures for the applicants of these other regulated industries, specifically the casino business in Nevada and the trash cartage profession in New Jersey, and attempt to establish if these techniques may be effective to regulate organized crime out of the health care field. To achieve this, this Comment will explore three areas: (1) a comparison of the professions themselves, (2) a comparison of the licensing procedures utilized in each profession, and (3) the common thread that would make a certain regulatory practice effective in the fight to disassociate the health care field from organized crime.

## II. BACKGROUND

### A. Russian Organized Crime

#### 1. Origins of Organized Crime In the Former Soviet Union

Although "organized crime" has become a criminal catch phrase of the Twentieth Century, its existence has been present for centuries.<sup>11</sup>

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supervised procedures. *See id.* "General supervision means the procedure is furnished under the physician's overall direction and control, but physician presence is not required during the performance of the procedure." *See* 42 C.F.R. § 410.32(b)(3)(i)(1997). These procedures include diagnostic psychological testing, colorectal cancer screenings, mammography, electrocardiograms, ultrasound procedures, magnetic resonance imaging, as well as various forms of x-rays. *See id.* at (b)(2)(i-iv). This leaves open the possibility of forming criminal commercial entities that could complete these screenings and then submit the bills to Medicare.

11. *See* Patricia Rawlinson, *Russian Organized Crime: A Brief History*, 2

There are few cultures in which the factors traditionally associated with organized crime could have been better implemented than in the former Soviet Union. In the early 1800s, Russia ignored the tentative wave of liberal democracy that was taking place in Western Europe and remained affixed to a feudal system which forced the majority of the population to remain as serfs.<sup>12</sup> Although the dissatisfaction with this system led to multiple reforms in the latter part of the Nineteenth Century, which eventually culminated in the Bolshevik Revolution in 1917, there was a more subtle effect of this centralization of power.<sup>13</sup> The emphasis on the autocracy weakened regional efforts to create policy to the point where attempts at criminal enforcement became passive and arbitrary.<sup>14</sup>

This system, inherited by Vladimir Ilyich Lenin and the Bolsheviks, became an important foundation for the autocratic structure they wished to establish. Lenin stated, "We shall not allow the police to be re-established."<sup>15</sup> In its place, Lenin created the feared enforcement arm of the government called the *Komitet Gosudarstvennoj Byezopas*, more commonly known as the KGB. The corruption that had been the stalwart of the tsarist regimes had become essential to the success of Lenin's Soviet vision.<sup>16</sup> The leaders of the movement allowed this to occur so that initial economic confidence would lead to the political success of this new ideology.<sup>17</sup> However, what began as minimal dealings with corrupt entities in the "black market" led to institutionalized reliance,

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TRANSNAT'L ORG. CRIME 29, 32-36 (1996). The accepted components of organized crime include: (1) monetary base for community activity; (2) a definitive hierarchical structure; (3) a clear division of labor; (4) a strict understanding of laws of the subculture; and (5) a strict punishment for insubordination. *See id.*

12. *See id.* at 33.

13. *See id.* Some of these reforms include the "[e]mancipation of Serfs in 1861 and judicial reforms of 1864 which introduced . . . open hearings, the election of judges and the use of jury systems for criminal cases." *Id.*

14. *See id.* In 1905, one Russian attorney stated that "[t]he law is not honored in Russia! Before the eyes of everyone, openly, the law is violated, lawlessness flourishes, and this embarrasses nobody, no-one thinks about it." *Id.*

15. *Id.* at 34. The organization that Lenin created was referred to as the Cheka, or the Extraordinary Commission for Combating Counter-revolution and Sabotage. This group was the predecessor of the *Komitet Gosudarstvennoj Byezopasnosti* (KGB), and was considered to be more violent than any previous tsarist force. *See id.*

16. *See Rawlinson, supra* note 11, at 35.

17. *See id.*

arguably allowing for quasi-government sponsored criminal activity into the latter half of this century.

Although the economic impact of organized criminal activity in Russia was not officially recognized until 1990, its presence was inherent in the seemingly legitimate structures of government.<sup>18</sup> The criminal origin began in the feudal societies and subsequently evolved to the point where, although activity such as the armed banditry of government agencies (banks and post offices) was viewed as criminal by the state, those who participated in it were considered to be "fighters for justice, perhaps even leaders of liberation."<sup>19</sup> However, this criminal activity underwent another transformation when the perpetrators of the crimes began using their resources as a means of support for the Communist movement.<sup>20</sup> In fact, not only was the capital that they generated an effective means by which to strengthen their position, but their knowledge of how "bandits" may take advantage of the system allowed them to quickly eradicate all other rising factions whose activity would be a threat to their underlying goal of government.<sup>21</sup>

Over the next seventy years, communism was to be the rule of law. However, in so much as history repeats itself, a more tightly knit yet unpronounced criminal group began to establish itself in the Soviet Union. This group rejected the beliefs of Communism and formed a secret subculture based on a strict adherence to a criminal code of the "vory v zakone," or "thieves-in-law."<sup>22</sup> It was essential for this underworld to function as its own system so that it could protect itself from the fierce henchmen of Lenin and Joseph Stalin.<sup>23</sup> The risk associated with this existence reestablished the heroic status of criminals in the eyes of the ordinary Russian citizen.<sup>24</sup>

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18. *See id.* at 36. The 1928 Russian Criminal Code defined banditism as "groups having the intention to attack government or public enterprises, institutions, organizations or private individuals, and in like manner, the participants in such gangs and the carrying out of such attacks." *Id.*

19. *Id.*

20. *See id.* at 36-37. The illegal forms of raising Communist party monies came from armed robberies, bank and mail heists, and expropriation of private property. *See id.* One of the leaders of these thieving bands was a bandit by the name of Koba, otherwise known as Joseph Stalin. *See id.*

21. *See* Rawlinson, *supra* note 11, at 37.

22. *Id.*

23. *See id.* at 38.

24. *See id.* at 39.

While this system of organized criminal activity was growing, the Soviet economy became increasingly more unstable. The labor force began to depend on schemes that included fraudulent practices, corruption of public officials, and connections to coercive middlemen just to meet stated quotas.<sup>25</sup> As Patricia Rawlinson points out:

'The truth is that the mass of the population does not look upon theft from the state as real theft.' And yet the idea of stealing from one another was unthinkable. The philosophy behind such practices was based on a logical principle: the people are the state, state-owned property belongs to them, so how can a man steal from himself? But as demand continued to outweigh supply the population had recourse to another source: the growing black market.<sup>26</sup>

This "unofficial economy" of the black market, often referred to as the "shadow economy," employed many sales profiteers and foreign currency dealers.<sup>27</sup> In fact, this practice became such an important part of the legitimate Soviet economy that it is estimated that over fifty percent of the country participated in it, and any attempt to discourage the black market would force the economic collapse of the Soviet Union.<sup>28</sup> Because of this fear and the continuing need for the capital it generated, a direct alliance formed between government officials and the directors of this Soviet subculture, whose relationship was referred to as the "mafija."<sup>29</sup> Any realistic fear that uncorrupted law enforcement would try to rescind these relationships became unwarranted after the legal reforms of 1987, which allowed organized criminals to take advantage of prosperous legitimate businesses.<sup>30</sup> These laws lessened the breadth of state

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25. A typical scheme might involve a gang buying a product illegally from the director of a state store, selling at a retail price, while the director of the store reported this as a theft. See Robert Cullen, *Comrades in Crime*, PLAYBOY, Apr. 1994, at 70, 72. This fraudulent activity materialized into an unofficial dialect among the Russian people. The following terms are commonly used in discussing these practices: *krugovaya poruka* - institutionalized corruption between government officials; *blat* - having the right connections; and *ochkovtiratel'stvo* - pulling the wool over someone's eyes. See Rawlinson, *supra* note 11, at 42.

26. Rawlinson, *supra* note 11, at 42.

27. See *id.* at 42. One official commented, "We were so accustomed to the shadow economy that it was impossible to live a normal life without black market goods and services." *Id.*

28. See *id.*

29. See Asnis, *supra* note 1, 303-04.

30. In the push for privatization during this period, the criminal enterprise was

control, opening opportunities for private ownership and much needed currency from foreign investments. With these new venues, the possibilities for organized criminal activity were greatly enhanced.<sup>31</sup>

Although Americans believe that the collapse of the Soviet Union was a vindication for capitalism, it may have simply been the introduction of a distorted market into a global economy, which has allowed organized crime to pervade legitimate society.<sup>32</sup> In fact, Rawlinson states that “[o]rganized crime cannot operate or develop in a vacuum. Its development is dependent initially on the environment in which it operates, until it has reached a point at which it becomes a cause rather than [an] effect.”<sup>33</sup> These new market differences in the global economy provide new challenges for crime to overcome. Once it has, we are left with smarter criminals.<sup>34</sup>

## 2. Structure of Russian Organized Crime

Although there is little known about the criminal structure of Russian organized crime as compared to *La Cosa Nostra* (the Italian Mafia), recent studies have developed a rough outline of who controls the activity.<sup>35</sup> The Russian equivalent of a *La Cosa Nostra* “godfather,” referred to as “vory v zakone,” lacks much of the authority that exists in the Italian system. The vories are considered to be professional criminals and are believed to have roots in the Stalin era of Soviet control.<sup>36</sup>

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able to enter into various joint ventures and gain access to international banks to launder monies. See Rawlinson, *supra* note 11, at 46.

31. See Asnis, *supra* note 1, at 303. This is best exemplified in the fact that by 1992, the inability for purely legitimate businesses to compete in Russia led to the privatization of over 80% of all business controlled by organized criminals. See *id.*

32. See Rawlinson, *supra* note 11, at 50-51.

33. *Id.*

34. One author has referred to these individuals as “supercapitalists” who have the ability to examine a situation and discover how to “rape it successfully.” Gregory Katz, *Russia's Under World Finds Fertile Ground In America*, DALLAS MORNING NEWS, June 11, 1995 at 1A.

35. “It admires and copies the Sicilian mafia as the highest standard of excellence.” See STERLING, *supra* note 8, at 96.

36. See New York State Organized Crime Task Force, New York State Commission of Investigation & New Jersey State Commission of Investigation, *An Analysis of Russian Émigré Crime in the Tristate Region*, 2 TRANSNAT'L ORG. CRIME 177,197-98 (1996) [hereinafter Tristate Report]. It is estimated that a Moscow-based working group of 10 to 15 of the over 600 “vory” in the former Soviet Union govern the transnational activities. See *id.* Consistent with the Italian model,



Although the "vory" are the most entrenched of the organized criminal syndicates, they are most likely not the most dangerous threat.<sup>37</sup> However, regardless of the extent to which the "vory" are involved in current transnational ventures, the combination of their enduring past and a burgeoning criminal element in search of tutelage will continue to make them a threat to the United States.

The other two groups are referred to as the "young entrepreneurs" and the "thieves in authority." The "young entrepreneurs" are often younger criminals who have little experience in the Soviet system.<sup>38</sup> Because of this inexperience, their network of criminal contacts is limited to "crimes of opportunity" and "get-rich-quick" schemes.<sup>39</sup> The final group, the "thieves in authority," also referred to as "avtoritey," have a more substantial base in Soviet history.<sup>40</sup> These individuals have been in existence since the early days of the Brezhnev era.<sup>41</sup> They are typically well-educated former businessmen and government intelligence agents who possess international connections.<sup>42</sup> These "gangster-bureaucrats" are said to be found at the intersection of "crime, capitalism, and government in the former Soviet Union."<sup>43</sup> These individuals have both the intellectual capacity and the contacts to run these elaborate international schemes, and therefore, are probably the most dangerous to international security.<sup>44</sup>

Although these descriptions may appear to be actual hierarchies, the Russian mafia, with the exception of the "vory," is substantially differ-

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this group is responsible for enforcing a definitive set of rules, primarily practiced in the prison system, where so many of their numbers spent most of their lives. *See id.*

37. *See id.* at 198. This view is based on the fact that the more noticeable crimes currently occurring in the U.S and abroad involve international banking schemes, computer crime and money laundering, which are crimes that are not part of the limited portfolio of the vory. *See id.*

38. *See* James Finkenauer & Elin Waring, *Russian Organized Crime in the United States: Organized Crime or Crime that is Organized?*, 2 TRANSNAT'L ORG. CRIME 139, 147-49 (1996).

39. *See* Tristate Report, *supra* note 36, at 198-99.

40. *See id.* at 199.

41. Brezhnev was Secretary-General for the Soviet Union from 1964 to 1982. *See* ROBERT SERVICE, *A HISTORY OF TWENTIETH CENTURY RUSSIA* 379-428 (1998).

42. *See* Tristate Report, *supra* note 36, at 199.

43. *Id.*

44. *See id.*

ent from the Italian model. An overreaching control of international activity is almost non-existent as the most successful groups are only responsible for one particular scheme.<sup>45</sup> There is very little trust between these groups, and the idea of loyalty is suspect, even with the obvious cultural similarities.<sup>46</sup> These distinct groups utilize each other for specific criminal needs and, once the financial goal is attained, separate to search out new contracts, whether they be from Russian or other organized criminals.<sup>47</sup> This type of activity is foreign to our more common understanding of organized crime in which the criminal acts exist to support the structure.<sup>48</sup> In the Russian model, the structure is venture-oriented, relying on its structure to support the criminal activity.<sup>49</sup>

### 3. *The Russian Mob in the United States*

In the late 1700s, the United States opened its doors to the people of the world. Although this new land did not guarantee a better life for immigrants, it did promise that it would provide an opportunity for those willing to take the chance. The U.S. has created its own ideology of success, so often proclaimed as "the American Dream." This credo may in fact be a license for criminal activity in that immigrants are expected to use any means necessary to achieve that success.<sup>50</sup> Since the mid-1900s, New York has been the point of entry for over 200,000 Russian immigrants, and a haven for those Russian immigrants searching for this dream.<sup>51</sup> It is believed that for a significant number of these individuals, a reliance on their customs of survival in Russia will result in criminal

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45. *See id.* at 199-200.

46. *See id.*

47. *See* Tristate Report, *supra* note 36, at 200.

48. *See id.* at 200.

49. *See id.* This merely refers to the fact that the socioeconomic conditions in Russia have created these criminal groups which represent different groups in society. Therefore, these individuals utilize these skills to take advantage of certain profit-making situations. The other mobs are different because the crime is conceived before the participating individuals are aware they are involved. *See id.*

50. *See* LYDIA ROSNER, *THE SOVIET WAY OF CRIME: BEATING THE SYSTEM IN THE SOVIET UNION AND THE U.S.A.* 61-63 (1983).

51. *See* Katz, *supra* note 34, at 1A; Cullen, *supra* note 25, at 70; *see also* William Kleinknecht, *THE NEW ETHNIC MOBS: THE CHANGING FACE OF ORGANIZED CRIME* 275-76 (1996). Gerald Ford signed the Jackson-Vanik amendment requiring the former Soviet Union to grant visas to Jews to receive trade benefits with the U.S. *See id.* *See generally* Tristate Report, *supra* note 36.

behavior in the United States.<sup>52</sup>

Many of these immigrants eventually settled in Brooklyn, in Brighton Beach which has become known as "Little Odessa By The Sea."<sup>53</sup> The evolution of Russian criminal immigration over the past seven years can be broken down into two distinct waves. The "first team," as they are referred to, is comprised of violent blue-collar criminals who were an extension of the mafia in Russia, conducting typical crimes associated with organized criminals;<sup>54</sup> while the "second team," which has little contact with the "first team," concentrates its criminal activity in the area of white collar crime.<sup>55</sup> Although the two are quite distinctive, their similarities include the need to exist within the support system of a Russian community, as well as the ability to take advantage of the comparatively liberal criminal laws in the United States.<sup>56</sup>

Lydia Rosner, who developed the first study on criminal activity by Russian émigrés in the United States, has further defined these groups into "necessary criminals" and "system beaters."<sup>57</sup> The necessary criminals are those who fall into the sociological structures forced upon them in the former Soviet Union and who merely partook in the "shadow economy"; "system beaters" are those who have learned how to take advantage of the bureaucracies that currently exist in the United States.<sup>58</sup> Thus, it is argued that this combination of an understanding of the U.S. bureaucratic system, along with the Soviet survivalist mentality, establishes the necessary environment for the creation of organized crime.<sup>59</sup>

As it has been demonstrated, Russian émigrés, particularly the "system beaters," have developed a knack for taking advantage of government programs. In fact, it is quite common for a Russian émigré to apply for all state benefits, including welfare, food stamps, and housing assis-

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52. See ROSNER, *supra* note 50, at 85 (demonstrating that immigrants determine what laws to break by how ineffective police officers enforce the law).

53. See Katz, *supra* note 34, at 1A.

54. See Asnis, *supra* note 1, at 307. These crimes include narcotics trafficking, money laundering, extortion of émigré merchants, and prostitution. See *id.*

55. See *id.* These typically include some type of financial fraud scheme. See *id.*

56. See *id.* at 308. See also Cullen, *supra* note 25, at 30. Cullen states that the Russian immigrants believe the United States to be a "candy store without a proprietor." *Id.*

57. See ROSNER, *supra* note 50, at 103-04.

58. See Finkenauer & Waring, *supra* note 38, at 146.

59. See *id.*

tance, whether or not he is entitled to such benefits.<sup>60</sup> The most likely explanation for this is that under the Soviet system, these individuals had an expectation of governmental funding.<sup>61</sup> When asked if she thought that the U.S. government recognized this practice as illegal, one émigré said: "Not really. The government knows that people are doing this and they see it as a way to help people get themselves set up and that eventually they wouldn't need it. So they don't really do anything about it. They have to know about it. They allow it."<sup>62</sup> One of the main reasons why these émigrés feel so free to take these chances is their minimal fear of, or respect for, U.S. law enforcement.<sup>63</sup> The jurisprudence system in the United States caters to the schemes of the Russian émigrés because instead of facing the Soviet standard of "guilty unless proven innocent," they can easily take advantage of the laws that guarantee certain rights to the accused.<sup>64</sup>

Richard Valdemar, an investigator with the Los Angeles County Sheriff's Department equated the West Coast to "Disneyland" for Russian organized criminal groups.<sup>65</sup> Structured criminal groups in California have become active in the areas of extortion, prostitution, drug trafficking, and medical and insurance fraud.<sup>66</sup> There is also documented evidence that there is substantial cooperation between these groups and those more established groups on the East Coast.<sup>67</sup> Although their existence is recognized, it has proven difficult to apprehend these criminals. Not only has their experience in Russia taught them how to find weaknesses in government systems so as to run these successful scams, but their lingering espionage skills from the cooperation of former KGB

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60. See ROSNER, *supra* note 50, at Introduction, xv.

61. See *id.* at 102, 106. It is estimated that 50% of the Russian immigrants involved in criminal activity that are living in Brighton Beach are accepting some illegal entitlement from the government. See *id.*

62. *Id.* "Since enforcement is neither constant or consistent, she says that she assumes the government has made a policy decision to allow it." *Id.*

63. See *id.* at 89. See also Kleinknecht, *supra* note 51, at 272. One Brooklyn detective stated "I had one guy in here for questioning whose leg looked like a pretzel...It was broken in a dozen places in a Soviet prison. He showed it off and said 'you're going to do worse to me.'" *Id.*

64. See ROSNER, *supra* note 50, at 89.

65. See K.L. Billingsley, *Russian Crime Families Reap "Golden West" in California*, WASH. TIMES, Dec. 1, 1996, at A4.

66. See *id.*

67. See *id.*

members makes them difficult to track.<sup>68</sup>

Even with the existence of strict immigration laws, known criminals can still communicate with and direct current Russian émigrés which confirms a belief that these individuals have strong ties to the criminal leadership of the former Soviet Union.<sup>69</sup> As stated earlier, many of the members of these criminal groups live amongst their fellow countrymen in immigrant communities. However, because of the closeness of the relationships and the interdependence among those in these communities, the criminals have the most success victimizing fellow immigrants first.<sup>70</sup> Taking advantage of these people has two immediate benefits. First, many victims will not report these crimes out of fear of retaliation.<sup>71</sup> Second, there is an inherent distrust of the government for anyone from the former Soviet state, making it more difficult to receive cooperation from them in prosecutions.<sup>72</sup> With estimates of the Russian immigrant population increasing by almost 200,000 in California over the next two years, this state has become increasingly attractive to would be criminals.<sup>73</sup>

#### *4. Effect of Russian Organized Crime in the United States*

Russian criminal activity, whether in the former Soviet Union or in the United States, has been successful due to its ability to adapt to new environments.<sup>74</sup> There seems to be two reasons for this ability. In a very short time, these criminals have not only successfully diversified themselves into many of the stereotypical elements of criminal activity, such as prostitution and money laundering, but have also added new schemes including gas tax and health care fraud, which have proven even more lucrative.<sup>75</sup> As this ability to effectively manipulate the government has been demonstrated by certain individuals within the Soviet culture,<sup>76</sup>

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68. *See id.* *See also* Katz, *supra* note 34, at 1A.

69. *See* Bill Wallace, *The Next Red Menace*, S.F. CHRON, Mar. 19, 1995, at 3.

70. *See id.*

71. *See* Asnis, *supra* note 1, at 308.

72. *See* Wallace, *supra* note 69, at 3.

73. *Id.*

74. Patricia Rawlinson has referred to this pension for adaptability as "the Chameleon Syndrome". *See* Rawlinson, *supra* note 11, at 29.

75. *See* Bruce Frankel, *Ruthless Russian "Mafiya"*, USA TODAY, Sept. 14, 1995, at 1A.

76. *See* STERLING, *supra* note 8, at 90 demonstrating that there are fifty words in the Russian language which mean to steal, all of which are used by the mafia.

coupled with the intelligence to create and carry out these new and elaborate schemes,<sup>77</sup> the Russian mafia may have established a “faultless money-making” machine.<sup>78</sup>

The second reason for the rapid growth of the Russian mafia is its non-traditional development in the United States. Because the Soviet émigrés understood how to manipulate a government, there was no need for them to follow the pattern of other burgeoning crime families who focused on extorting money out of their own immigrant neighborhoods.<sup>79</sup> This is not to say that the Russians did not prey on other émigrés,<sup>80</sup> but rather the combination of the substantial income from the simultaneous manipulation of both the émigrés and the government, produced enough exposure for them to be recognized by other more established criminal groups.

The best example of this cooperation with other criminal syndicates is the gas tax scheme. This practice allowed Russian mafia agents to redistribute gas quantities between bogus companies without paying the substantial taxes that were required for interstate transport.<sup>81</sup> The final sale was then sold to unsuspecting dealers at a discount, complete with forged tax receipts.<sup>82</sup> This lucrative activity soon caught the attention of John Gotti, former head of the infamous Gambino family of the Italian mafia.<sup>83</sup> As the Italians reached out to this potential criminal partner, the Russians were able to expand their activity with added security and the custody of corrupted officials provided by their new Italian connection.<sup>84</sup>

Developing these types of relationships with the well established Italian families has led to new opportunities for working capital and protection for Russian mafia driven schemes. This has also given them an unofficial induction into what Claire Sterling refers to as “the plane-

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77. *See id.* at 162. Jim Moody of the FBI stated that “John Gotti doesn’t have college-educated people and trained military officers like the Russian Mafia does.” *Id.*

78. *Id.* at 163.

79. *See Kleinknecht, supra* note 51, at 277.

80. *See id.*

81. *See STERLING, supra* note 8, at 163.

82. *See id.* at 163.

83. *See id.* at 160. Gotti said of this scheme, “I gotta do it right now! Right now I gotta do it.” *Id.*

84. *See id.* at 162. In fact, NBC news broadcaster Tom Brokaw commented on this relationship stating that “[i]t gives a new meaning to détente.” *Id.*

tary crime club.”<sup>85</sup> Although this “club” has no definitive pre-requisites, the amount of money that the Russians’ variety of activities has accumulated for them would place them among the top members.

A substantial portion of these monies, the aggregate product of all schemes set in the United States, are reportedly being sent back to Russia.<sup>86</sup> This in turn expands funding to the previously discussed shadow economy, thereby further dissolving legitimate law enforcement in the new Russia. With continued mafia activity abroad, both U.S. security and economic interests are placed in jeopardy. Therefore, it is crucial that the broad parameters of these schemes be narrowed in order to stop these monies from strengthening the criminal element both at home and abroad.

## B. USE OF LICENSING TO CURB MAFIA ACTIVITY IN THE UNITED STATES

### 1. *The General Need for Licensing*

The licensing of professional activities exists to ensure that incompetent and unethical practitioners are not allowed to harm or defraud the clients with whom they work.<sup>87</sup> This procedure exists for the benefit of both the public and the profession itself. The more important of the two, the public welfare purpose, stems from the state’s police power.<sup>88</sup>

In his book, *Of Foxes and Henhouses*, Stanley Gross outlines three reasons for the licensing model under the public welfare. The first concentrates on the inability of the consumer to determine the competency of the practitioner.<sup>89</sup> He blames this mostly on the fact that due to the evolution of urban society, information about a person’s reputation is not effectively disseminated.<sup>90</sup> A second reason cited by Gross is the third party/epidemic effect, where the harmful effects of the negligent

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85. *See id.* at 164.

86. *See* Frankel, *supra* note 75, at 1A. The Canadian police have found evidence that one billion dollars a month is moving from Russia to North America and then back again. *See id.*

87. *See* STANLEY J. GROSS, *OF FOXES AND HENHOUSES: LICENSING AND THE HEALTH PROFESSIONS* 16 (1984).

88. *See id.* The state has the right to enforce laws, as well as argue supervisory powers when an activity places citizens in immediate peril. *See id.*

89. *See id.* at 17.

90. *See id.*

practitioner may find their way into society as a whole.<sup>91</sup> The third reason focuses on the idea that because people tend to be overly optimistic in their personal evaluations of their own actions, it is better to adhere to a societal standard.<sup>92</sup>

Gross conveys two reasons for the professional purposes of licensing. The first is the need for a positive public perception of a particular industry.<sup>93</sup> The second is the basic right that the individual practitioners have to establish the expertise necessary to work in the particular industry.<sup>94</sup> In fact, an attorney from the California Medical Association justified medical licenses under the idea of career security when he said that “[i]t seems to me in the professions where many years of education and experience is [sic] demanded before one may freely practice, *that the group is justly entitled to governmental protection against encroachment by the untrained and the unskilled.*”<sup>95</sup>

Inherent in both the concern for public welfare and the rights of the professional, is the need to keep “con artists” and “scammers” out of these legitimate businesses. The existence of these individuals goes beyond questionable qualifications, to the point where they utilize various means of violence and coercion to invade the more lucrative components of the profession. This is most often seen in the regulated mafia activity within these legitimate operations. Two of the more famous examples of corruption by these mob affiliations are the casino and cartage industries.

## 2. Licensing of Gambling Casinos

In the mid-1940s, Bugsey Seigel, a recognized member of Italian organized crime, established enough invested capital to build the first major hotel-casino in Las Vegas.<sup>96</sup> Investors in Seigel’s enterprise were paid handsomely for their start-up funds, which created a new source of revenue for the mafia apart from earnings skimmed through racketeering

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91. See *id.* at 17-18.

92. See GROSS, *supra* note 87, at 19.

93. See *id.* at 20. Gross discusses this point in quoting the California Senate Committee on Business and Professions in their witness comment on social work: “Social work has certain . . . reasons for needing regulation. These are: to establish a true and dignified public image of social work to increase public confidence and understanding of social work.” *Id.*

94. See *id.* at 20.

95. *Id.*

96. See REUTER, *supra* note 2, at 63-64.



activity.<sup>97</sup> Because the earnings were in cash, the money was merely diverted to the proper source, and the only income reported for tax purposes was working capital and limited profit.<sup>98</sup>

In the beginning of the 1970s, Nevada changed its laws so as to allow corporate ownership of casinos.<sup>99</sup> This change in the law greatly affected the organized crime agenda because the state agencies would be establishing a foundation for legitimate businesses to enter into this profession.<sup>100</sup> The most effective way to accomplish this was to create a regulatory approval system for everyone through an application for gaming licenses.

The ultimate burden to meet before receiving a gaming license is that the applicant must be a suitable person "having due consideration for the proper protection of the public health, safety, morals, good order and general welfare of the inhabitants of the State of Nevada . . ."<sup>101</sup> The general qualifications for the license include that: (1) the person is of good character; (2) the person's prior activities do not pose a threat to the general public; (3) the individual has adequate business competence; and (4) the applicant's financial disclosures are from a competent source.<sup>102</sup> In addition, those who take on this role are bound by a code of "good moral character," and consequently, will be investigated for compliance with the law.<sup>103</sup> As general as this authority is to grant a license, the Gaming Control Board of Nevada has a similarly broad ability to

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97. *See id.* at 64.

98. *See id.* at 64-65.

99. *See id.* at 64.

100. *See id.*

101. NEV. REV. STAT. ANN. § 463-170 (1994).

102. *See id.* The actual application for a state license requires more specific information. Other requests for a "nonrestricted license"- any business with more than fifteen slot machines - may include reports on family background, military service, marital status, occupational and residential history. *See* JEROME SKOLNICK, HOUSE OF CARDS 175 (1988).

103. The applicant must also include fingerprint cards, a formal affidavit stating that all of the information listed is truthful, bank statements or any bank information requested by the board, and fees to cover the investigation. *See* SKOLNICK, *supra* note 102, at 174-78. If the investigation exceeds the allotted fees, the applicant is required to pay the difference. *See id.* Of all of the various forms to be filed, the most important is the "Invested Capital Questionnaire," which asks for a complete disclosure of assets and liabilities. *See id.* Although this report may show the possibility of criminality, it is traditionally used as an indication of the applicant's ability to handle such a business. *See id.*

revoke a license "for any cause deemed reasonable by the board."<sup>104</sup>

The question here, as is pointed out by Jerome Skolnick in his book, *House of Cards*, is that those who have demonstrated an affinity for the gaming industry have probably learned how to run a successful casino as a former gambler.<sup>105</sup> This poses the problem that much of casino activity, before regulation, was corrupt, and these new casino operators may very well promote their corrupt foundational practices at these casinos.<sup>106</sup> This idea of regulation is also a means by which to more easily exercise law enforcement and auditing, but even with their existence, the introduction of informal employee behavior makes monitoring problematic.<sup>107</sup> Consequently, the regulations rely heavily on the licensing procedure. As Skolnick points out, it is the moral character of the applicants as the operators of the casinos that are key to the control structure.<sup>108</sup>

Following an exhaustive financial investigation,<sup>109</sup> a hearing process begins. The first stage, if necessary, is the investigative hearing, the intention of which is to discuss specific matters of the application.<sup>110</sup> The next stage is the public body hearings. These proceedings often establish whether the applicant is clearly suitable (no connection to organized crime) or clearly unsuitable (substantial connection to organized crime).<sup>111</sup> Although a criminal record will not necessarily require denial of an application, a reputation as an "organized crime figure" may make

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104. *Id.* at 175.

105. *See id.* at 176.

106. *See id.*

107. *See id.* at 178.

108. *See* SKOLNICK, *supra* note 102, at 178.

109. The investigative process begins after the paperwork has been submitted by the applicant. *See id.* at 178. Copies of this information are disseminated to various agencies who in turn verify the appropriate portion of the information listed on the application, either through government records or the five personal references that are required to be listed. *See id.* Financial investigation also includes the investment funds available to the applicant to determine whether any of the funds are possibly corrupt or if that investor may have a determinative voice in the selection of vendor services for items like liquor and credit. *See id.* at 181. Skolnick demonstrates a bank loan scheme example where a \$200,000 bank loan is repaid by an organized crime investment to the applicant's bank account and transfer of title of \$100,000 in real estate. *See id.* at 178-81.

110. *See id.* at 178-82.

111. *See id.*

continued efforts futile.<sup>112</sup>

Although certain policy considerations are considered during the licensing process,<sup>113</sup> the composition of the licensing commission is key to the success of the review process. The approved gaming commission must consist of those who have been citizens of the State of Nevada for at least six months.<sup>114</sup> The chairman must have at least five years of "responsible administrative experience in public or business administration or possess broad management skills."<sup>115</sup> Another member of the board must be a certified public accountant or have comprehensive knowledge of public finance, gaming, or economics.<sup>116</sup> The responsibilities of these individuals includes: (1) inspection of premises where gaming will be conducted; (2) inspection of all gaming equipment and supplies; and (3) seizure and reproduction [in the presence of the investigatee] of all papers and documents pertaining to the gross income of the establishment which is subject to criminal prosecution.<sup>117</sup>

After all material has been received, the board makes its recommendation to the commission, and the commission has the option of remanding for further investigation, granting the license, denying the license, or granting a probationary license.<sup>118</sup> If an individual is approved for a license, and then a complaint is filed, the applicant/casino goes through a hearing/review process by the commission.<sup>119</sup> If the license is rejected, the petitioner may appeal to the commission for acceptance on the record.<sup>120</sup>

However, there may be a due process violation because the Gaming

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112. *See id.*

113. As is prescribed in the licensing statute, the overarching policy considerations of gaming as important to the State of Nevada include: (1) economic vitality; (2) growth of industry dependent on public trust; (3) maintenance of this trust established only by strict regulation; and (4) no absolute right to a license. *See* NEV. REV. STAT. ANN. § 463.0129 (1997).

114. *See id.* § 463.040.

115. *Id.*

116. *See id.*

117. *See id.* § 463.140. An individual's application for licensing may be rejected due to a prior criminal conviction, failure to disclose interest in gaming establishments, and other failed disclosures that would reflect on the veracity of the applicant. *See id.* § 463.151.

118. *See* NEV. REV. STAT. ANN. § 463.220.

119. *See id.* § 463.3133.

120. *See id.* §§ 463.315-.318. Here, the petitioner is required to pay all necessary fees. *See id.*

Commission has both the licensing and adjudicative functions.<sup>121</sup> Under a plan suggested by Skolnick, the commission would not sit as judge, rather, a board of experts would make decisions based on the record established by the commission.<sup>122</sup> Thus, the major problem with the licensing of gambling is the depth to which a commission can explore an applicant's connection to organized crime and the scope of authority it can exercise.

Nevada's approach to gambling appears to be an extremist regulatory response because the overseeing agencies include the Casino Control Commission and the Division of Gaming Enforcement in the Attorney General's Office.<sup>123</sup> Although the gaming commission has been relatively successful in its attempts to remove the organized crime component from the casino business,<sup>124</sup> it seems that there is an inherent discrepancy in the licensing procedure. Although the Board can deny a license for any reason, having that same body try to adjudicate a single license is an inherent denial of the separation of powers on which the government was based.<sup>125</sup> The Skolnick model, which recommends for a

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121. Under the Fourteenth Amendment to the United States Constitution, it has been established that a term of employment may be considered a property right that cannot be taken away absent the due process of the law. *See generally* Board of Regents v. Roth, 408 U.S. 564 (1972). The gambling industry faced this dilemma when Frank Rosenthal, a professional gambler with possible connections to organized crime, petitioned the Nevada Supreme Court under the theory that an applicant for a gaming license in Nevada who has had a work permit for a number of years in that same industry does have a property interest that should be protected by due process. *See* SKOLNICK, *supra* note 102, at 223. The court did not allow this argument holding that licensing was under the commission's discretion. *See id.* at 227.

122. *See* SKOLNICK, *supra* note 102, at 228.

123. Critics argue that overregulation might result from the initial fear of too many banks getting involved in the financing of institutions that were inevitably tied to organized crime. *See* REUTER, *supra* note 2, at 77. Historical research illustrates the validity of this fear at the time, and, subsequently, that it may now be invalid. *See id.*

124. This goal was first publicly stated when Governor Brendan Byrne's commented, while signing the bill approving casino operation in New Jersey, "Organized crime, keep out of here." *Id.* at 77.

125. "There is little question that a doctrine of separation of powers among the legislative, executive and judicial branches of the national government is well established in our constitutional jurisprudence . . . It is derived not from any specific language in the Constitution, but from the general constitutional framework." PAUL G. KAUPER & FRANCIS X. BEYTAGH, CONSTITUTIONAL LAW: CASES AND MATERIALS 342-343 (5th ed. 1980). This applies to gambling in that the decision to

board of experts to review these decisions, provides an engaging compliment to the current procedure.

### 3. *Licensing of the Cartage Industry*

The garbage collection industry has had an extensive tradition of customer allocation schemes that have resulted in numerous restraint of trade suits.<sup>126</sup> In the New York metropolitan area these agreements have been established by union leaders who are often recognized members of the Italian mafia.<sup>127</sup> The private garbage industry consists of regional customers who are often bought and sold by various garbage carters.<sup>128</sup> This process is referred to as "customer allocation."<sup>129</sup> Customers contract directly with the carting service.<sup>130</sup> These contracts are generally not written, but as long as the trash gets picked up, a typical routine is understood.<sup>131</sup> Although these carters usually work regionally, they may establish agreements with companies that have varied sites.<sup>132</sup> However, the contracts are not exclusive because if a company moves to another region, its contract is up for grabs.<sup>133</sup>

This agreement between carters allows one company to sell its interest for a profit while the other carter can raise cartage prices on those individuals serviced. Because this practice was not regulated, there was no price enforcement. The only enforcement that existed was that of organized crime which coerced other carters to either limit their customer regions or honor the agreements giving customers to other carters.<sup>134</sup>

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grant the license is vested in the same body who decides whether they acted unfairly in not granting it. See SKOLNICK, *supra* note 102, at 228.

126. See Peter Reuter, *The Cartage Industry In New York*, 18 CRIME & JUST 149, 158 (1993). Although these suits have often been filed, New Jersey courts usually uphold even the most restrictive agreements of these associations. See *id.*

127. See *id.* at 149.

128. See REUTER, *supra* note 2, at 10.

129. See *id.* Reuter cites that direct evidence of this customer allocation was introduced in hearings before the Department of Consumer Affairs in New York City. See *id.*

130. See *id.* at 10.

131. See *The Cartage Industry In New York*, *supra* note 126, at 153. Reuter points out that this arrangement is most common in the market segment of restaurants and commercial stores because these establishments deal directly with the carters. See *id.*

132. See *id.* at 153. An example of this would be a construction company.

133. See *id.* at 156.

134. See *id.* (citing that unions became the instruments of the mafia "by picket-

Organized crime syndicates then took a percentage of this money as their income.

However, by the late 1970s and early 1980s, the state of New Jersey<sup>135</sup> not only began licensing the carters by the Board of Public Utilities, but also required individually approved rate schedules.<sup>136</sup> Each applicant had to submit data that would allow the particular carter to receive the "allowed rate of return," or a specific tariff that his net income may not exceed based on the number of customers he is carrying.<sup>137</sup> Although this type of regulation was in practice in 1970, it reflected actual prices, which forced labor to file higher tariffs in order to bypass the new applications when these more restrictive conditions were imposed.<sup>138</sup> The result of this practice was fewer applications and less complaints from customers for overcharging of registered tariffs.<sup>139</sup> Because it is so simple for carters to overstate the number of customers they are carrying, it is nearly impossible to ascertain the actual amounts they are charging.<sup>140</sup>

The only licensing prerequisites that exist are the "good character" standard and the data required for the extensive financial application.<sup>141</sup> Unfortunately, the statutory licensing procedures are liberally granted by the New Jersey State legislature.<sup>142</sup> Furthermore, although there have been some related adjudications, the general application of the licensing procedures upholds the authority of municipal regulation.<sup>143</sup>

Although this practice still continues, the Board of Public Utilities, the official licensing body, has been given ample authority in license

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ing customers of firms that broke the agreement").

135. *See id.* at 188. Reuter points out that the New Jersey system was much more elaborate than the one set up in New York. *See id.*

136. *See The Cartage Industry In New York, supra* note 126, at 188. A survey of 41 carters in Bergen County demonstrated that the 12% rate base received in tax revenue was only 4% of actual earnings. *See REUTER, supra* note 2, at 84.

137. *See The Cartage Industry In New York, supra* note 126, at 188.

138. *See id.*

139. *See id.*

140. *See REUTER, supra* note 2, at vi.

141. *See id.* at 185.

142. *See* N.J. STATS. ANN. § 40:52-1 (West 1998). The term "liberally" is cited in the text because Reuter indicates that the licensers made almost no effort to verify financial statements. *See The Cartage Industry In New York, supra* note 126, at 187.

143. *See Marangi Bros. v. Board of Com'rs of Village of Ridgewood*, 33 N.J. Super 294, 110 A.2d 131 (N.J. 1955).

denial.<sup>144</sup> But, it is generally held that these policies have neither induced competition or eliminated the organized crime element.<sup>145</sup> Peter Reuter demonstrates that the occasional prosecutions that are instituted by the agency, in all likelihood, do more to enhance than to remedy the problem because customer fear of retaliation leads to an underreporting of suspected bidrigging.<sup>146</sup> He advocates one system, albeit intrusive and potentially expensive, that may be useful to curb this problem. The essence of his plan is the establishment of a regional district authority which would monitor contract arrangements and bid negotiations so that carting activity would be regulated to operate at a minimum price.<sup>147</sup> Its assessment would be qualified by a separate engineering committee that would validate the cost structure of the proposed bids.<sup>148</sup>

Although this plan does not establish a means by which to remove organized crime from the process, it attempts to reinvent portions of the system which would make the activity more cumbersome and less lucrative to be involved in.<sup>149</sup> Under the old system, racketeered unions would be responsible for regulating these customer allocations. However, under Reuter's proposed plan, any attempt at rigging bids to get contracts in regulated areas would fail.<sup>150</sup> A final distraction for racketeers is that realistic rates would be established by the number of monitored carters, making it more difficult to introduce inflated tariffs.<sup>151</sup> By

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144. See *The Cartage Industry In New York*, *supra* note 126, at 189.

145. See REUTER, *supra* note 2, at 80-84. In fact, Reuter argues that this "conspiracy" is still ongoing because: (1) the practice has become habitual; (2) customers have accepted the behavior due to lack of successful complaints; and (3) new carters are intimidated by the possible aggressive retaliation of others by their entry into the field. See *id.*

146. See *id.* at 85. Reuter points out that "occasional prosecution and investigation usually prominently covered by the press, has . . . added to the reputational asset of the carters. With the customers being passive, regulators have not been able to prevent the various kinds of fraud that undermines price regulation, at least not without large-scale and intrusive inspection efforts." *Id.*

147. See REUTER, *supra* note 2, at 87-89.

148. See *id.* at 85-88. According to Reuter, the engineering review panel would need to examine data from solid waste collection markets, the number of households serviced, employee size, various distinguishing characteristics, the number of houses and hills in a given market, union wages, union benefits, the cost of fuel, insurance mandates, and the cost of disposal. See *id.* at 94.

149. See *id.*

150. See *id.* at 95.

151. See *id.*

curbing the large profit margins by racketeers and their organized criminal cohorts, their time investment in this corrupt activity would offset the cost-benefit margin forcing their eventual exodus from this arena.

### III. PRIOR LAW

#### A. Health Care Fraud and the Government's Case

Abuse under the Medicare Carrier's Manual has been defined as: Incidents or practices, which although not considered fraudulent acts, may directly or indirectly cause financial losses to the Medicare/Medicaid programs or to beneficiaries/recipients. Abuse is those practices wherein providers, physicians, or other suppliers of health care goods or services operate in a manner inconsistent with accepted sound fiscal, business or medical practices in such a way that these practices result in an unnecessary financial loss to the Medicare or Medicaid programs and are not within the concept of reasonable and necessary services as defined in the Medicare or Medicaid laws.<sup>152</sup>

This sets out the general idea behind the federal and corresponding state law against health care fraud in the United States.<sup>153</sup> The statutes further criminalize practices that include improper coding by providers who are paid by a fee-for-service arrangement; and "kickback" programs which include rebates, discounts and profit-sharing activities, as well as self-referrals.<sup>154</sup> These federal regulations are supplemented by the general criminal prohibitions of mail fraud and racketeering, as they are utilized in the larger health care fraud scheme.<sup>155</sup> Working with approximately ninety percent federal funding, these practices are combated by the Department of Justice (DOJ), the Office of the Inspector General of the Department of Health and Human Services, the FBI, as well as

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152. BARRY R. FURROW ET AL., HEALTH LAW 638 n.1 (1995).

153. Although there will be no explicit discussion of state law in this Comment, there are slight variances in state legislation, yet all carry the necessary means by which to prosecute health care fraud. *See id.* at 669-71.

154. *See id.* at 638.

155. *See* 18 U.S.C. § 2 (1994) (Principals), *id.* § 286 (Conspiracy to Defraud the Government with Respect to Claims), *id.* § 287 (False, Fictitious or Fraudulent Claims), *id.* at 371 (Conspiracy), *id.* § 1001 (Statements of Entities, Generally), *id.* § 1341 (Frauds and Swindles), *id.* § 1962 (Racketeering Influenced Corrupt Organizations Act).



state run agencies.<sup>156</sup>

### 1. False Claims

The most common type of fraud, and the most relevant to this discussion, is the abuse associated with overbilling and false claims.<sup>157</sup> A "claim" is "an application for payments for items and services under 'Medicare, Medicaid, or a state health care program'."<sup>158</sup> While the majority of these claims refer to the billing for services never conducted, some cases refer to improper use of the billing codes, where a physician will bill for a more expensive procedure than he actually performed.<sup>159</sup>

Civil remedies are available under the Medicare and Medicaid False Claims Statute.<sup>160</sup> Under this act, a plaintiff may receive up to \$2000 per violation, as well as double claim assessments for federally funded state programs.<sup>161</sup> These actions are guided by a standard where the doctor "knows or should have known" that the procedure was not properly reconciled with the code number provided.<sup>162</sup> The problem for both criminal and civil defendants is that the Supreme Court has found that there is no double jeopardy protection from civil suits in health care fraud scenarios;<sup>163</sup> and ultimately, criminal conviction of a physician registered in

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156. See FURROW ET AL., *supra* note 152, at 639.

157. A General Accounting Office survey analyzed 279 cases between 1984 and 1985 and found that 89% of cases involved submission of false claims. *See id.* at 640 n.1.

158. *Id.* at 640 n.5, (quoting 42 U.S.C.A. 1320a-7a(i)(2)(1994)). Fraudulent uses of a claim include: (1) improper filing; (2) failure to disclose knowledge of the event that caused the need for medical attention to receive payment; (3) submission of claims when actor was not a physician; or (4) false certification of the necessity of certain services. *See* 42 U.S.C. §§ 1320a-7b(a). The filing of a fraudulent claim can be a felony and is punishable by up to five years in prison and a fine up to \$25,000. *See id.*

159. *See* FURROW ET AL., *supra* note 152, at 641 (citing *United States v. Larm*, 824 F.2d 780 (9th Cir.1987), cert. denied, 484 U.S. 1078(1988)). An allergist was convicted on seventeen counts of Medicaid fraud for using a code which referred to "evaluation and or treatment of same illness" versus the proper code which read "minimal service . . . not necessarily requiring the presence of a physician." *Id.*

160. *See* 42 U.S.C. §§ 1320a-7a(a)(1)(A),(B)(1994); FURROW ET AL., *supra* note 152, at 641.

161. *See* FURROW ET AL., *supra* note 152, at 641.

162. *See* Medicare and Medicaid Patient and Program Protection Act, 57 Fed. Reg. 3298, 3324 (1992).

163. *See* *United States v. Halper*, 490 U.S. 435, 452 (1989).

the Medicare/Medicaid program will disqualify his participation in the program for five years.<sup>164</sup>

## 2. *Fraudulent Referrals*

Another important issue is fraudulent referrals. This process occurs where a physician willfully solicits and/or receives payment for his direct or indirect involvement in issuing patients into a Medicaid or Medicare fraud scheme.<sup>165</sup> Although this referral system may be questionable if physicians get a percentage of the payment from a particular test, the courts have generally given a limited interpretation of remuneration that would require an express arrangement where there is an "offering or paying something of value with the intention of causing the recipient to make referrals because of the influence of that remuneration over the recipient's reason or judgment."<sup>166</sup> Specific exemptions cited by Congress include discounts,<sup>167</sup> amounts paid by employers to employees, and rebated group rates.<sup>168</sup>

Fraudulent referrals also include self-referrals, whereby a physician refers patients to an entity in which he holds a fiduciary interest. The Stark Amendment, also known as "the anti-kickback statute," prohibits this practice on the federal level.<sup>169</sup> Furthermore, physicians who enter these schemes so as to circumvent the self-referral statutes can be held civilly liable up to \$100,000.<sup>170</sup> The rule against self-referrals does not apply to physicians in the same practice,<sup>171</sup> and services furnished by

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164. See FURROW ET AL., *supra* note 152, at 643 n.19. Under 42 U.S.C.A. §§ 42 U.S.C. 1320-7(a)(1), "[c]onviction is defined broadly to include nolo contendere pleas or entrance into diversion programs." *Id.*

165. See generally 42 U.S.C. §§ 1320a-7b(b). There are three rationales for this rule: (1) the overtesting of healthy patients; (2) the cost to the government; and (3) the fact that the services will be chosen by physician not on what is most convenient for the individual, but by what is most lucrative to the provider. See FURROW ET AL., *supra* note 152, at 645-46.

166. FURROW ET AL., *supra* note 152, at 647 (citing [1992-1 Transfer Binder] MEDICARE & MEDICAID GUIDE (CCH), 39,566 at 27,747 (Sept. 18, 1991)).

167. These exemptions will be recognized only if these discounted savings are passed on to the government. See *id.* at 647.

168. See *id.*

169. See 42 U.S.C.A. § 1395nn(a)(1)(A)(1994).

170. See *id.* § 1395nn(g)(4).

171. See *id.* § 1395nn(b)(2)(A)(i)(ii). Group practices include partnerships, a professional corporation, a faculty practice plan, or other group where there is a shared working area, services and costs are distributed with regard to a predeter-

prepaid plans, such as HMOs (health maintenance organizations) or CMPs (competitive medical plans).<sup>172</sup>

These statutes have provided a wealth of criminal laws which a government attorney can utilize for prosecution. Although the previously discussed penalties are substantial and quite foreboding, these criminal prosecutions do not solely rely on the existing health care fraud statutes<sup>173</sup> to prosecute these crimes. Rather, prosecutors are incorporating more established statutes which include "conspiracy"<sup>174</sup> elements, namely money-laundering<sup>175</sup> and the Racketeering Influenced Corrupt Organization (RICO) laws.<sup>176</sup> These laws allow for more efficient prosecution because: (1) multiple defendants can be tried under one criminal theory; and (2) the prosecutor is able to obtain traditional injunctive penalties, such as asset forfeiture.<sup>177</sup> Conspiracy-based laws are only one aspect of the arsenal that the Department of Justice plans to unleash on what has become a law enforcement priority for the 1990s.<sup>178</sup>

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mined agreement, and there is no direct correlation between remuneration and number of referrals. *See* FURROW ET AL., *supra* note 152, at 658.

172. *See id.* at 1395nn(b)(3).

173. Existing health care fraud legislation includes: 18 U.S.C. § 287 (1994) (making it a crime to submit false claims to a department of the United States); 42 U.S.C. § 1320a-7b(a)(1)(1994) (making these fraudulent claims specific to Medicare and Medicaid); and the Stark Amendment of the Omnibus Budget Reconciliation Act of 1989, 42 U.S.C. § 1395nn (Supp. V 1993), along with numerous state laws.

174. *See* *United States v. Falcone*, 311 U.S. 205, 210 (1940). In criminal law, a conspiracy is defined as an agreement to do an unlawful act. *See id.*

175. *See* 18 U.S.C. §§ 1956-1957 (1994). Often cited in narcotics cases, money-laundering is an act that allows the criminal to disguise illicit funds as legitimate gains. *See also* PAMELA BUCY, *WHITE COLLAR CRIME: CASES AND MATERIALS* 228 (West 1998).

176. *See* 18 U.S.C. §§ 1961-1968 (1994). "Passed in 1970 as part of a major crime fighting bill, RICO's stated goal is to protect the public from 'parties who conduct organizations affecting interstate commerce through a pattern of criminal activity.'" BUCY, *supra* note 175, at 116.

177. *See* Pamela H. Bucy, *Crimes By Health Care Providers*, 1996 U. ILL. L. REV. 589, 619-30 (1996).

178. *See* Bureau of National Affairs, *Investigations, Prosecutions Up, Recoveries Topple \$274 Million*, HEALTH CARE FRAUD REP., Sept. 10, 1997, at 577. The Department of Justice refers to health care fraud as "the crime of the nineties." *Id.*

### B. Smushkevich Case

One infamous health care fraud scheme was run by suspected Russian organized criminals David and Michael Smushkevich in Southern California.<sup>179</sup> This scheme resulted in a successful criminal prosecution of the two brothers who were the heads of what has been documented as the single largest health care fraud in the history of the United States, netting over \$1 billion.<sup>180</sup> David, a medical doctor in the Soviet Union, immigrated into the U.S. in 1975, and worked his way up to become a well-paid president of Shared Cardiovascular Services, a company which provided hospitals with diagnostic equipment.<sup>181</sup> His brother, Michael, arrived in the U.S. just four years after David, in 1979. Michael began perfecting the pattern of the "telemarketing scam" soon after that, renting equipment for medical exams from his brother.<sup>182</sup> Collectively, these expertise thus set the stage for the billion dollar scam.

The scheme began with the brothers recruiting the help of licensed and unlicensed physicians to give credence to the Medicare and Medicaid documents that they file.<sup>183</sup> The brothers utilized a telemarketing-style approach to establish a patient base<sup>184</sup> with a telephone "pitch," including the promise of free-checkups and costs which would be covered by insurance.<sup>185</sup> When individuals ventured to the mobile labs where the doctors were located, the check-up would turn into a litany of tests that were neither promised nor necessary for the patients.<sup>186</sup> The tests included echocardiograms (EKGs) and expensive cancer related treatments.<sup>187</sup> In some cases, such tests were often not performed at all,

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179. See generally Susan Moffat, *Brothers Face Charges of \$1 Billion Fraud Crime: Two High Living Immigrants From the Former Soviet Union Go On Trial, Accused of Running the Biggest Health Care Scam In U.S. History*, L.A. TIMES, Mar. 16, 1993, at B1.

180. See *id.*

181. See *id.*

182. See *id.*

183. See STERLING, *supra* note 8, at 164.

184. See Moffat, *supra* note 179, at B1.

185. See STERLING, *supra* note 8, at 164. Curiously enough, this particular scam did not include Russian immigrants, rather it focused on people in the community that were either susceptible to health concerns or interested in preventative medicine. See *id.*

186. See Moffat, *supra* note 179, at 2.

187. See *id.* at 3.

but charges for treatment still showed up in billing records.<sup>188</sup>

With hundreds of doctors on the payroll, the Smushkeviches created over five hundred false specialty labs with different post office boxes.<sup>189</sup> These labs were then able to appear as referrals from the original doctors.<sup>190</sup> This practice spread out the extensive revenues<sup>191</sup> that the scam was producing and validated the unnecessary tests that the patients received, thereby making the government none the wiser.<sup>192</sup> In conjunction with these practices, the Smushkeviches also sold discounted receivables to unknowing collection agencies, many of whom were never paid.<sup>193</sup> However, ignorance is not always bliss in that this scheme alone cost the State of California over twice what it spent for indigent medical care in the previous year.<sup>194</sup> Major insurance carriers which felt the effects of this fraud included Blue Cross, Aetna Life, and the Defense Department's Civilian Health and Medical Program, which were hit with a combined \$155 million in fraudulent claims.<sup>195</sup>

Unfortunately for the Smushkeviches, one of the cold-call victims was Dr. William Marr, a medical doctor and health insurance company consultant.<sup>196</sup> Out of curiosity, Marr ventured to the clinic and submitted to numerous unnecessary and improperly conducted tests.<sup>197</sup> His insurance claim forms returned a bill for \$7,500 fraudulently citing "diabetes, heart disease, high blood pressure, a stroke, cancer, allergic conditions, [and] viral infections."<sup>198</sup> Marr suffered from none of these conditions.<sup>199</sup>

This information led to a six year investigation that has achieved sev-

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188. *See id.*

189. Telephone interview with Mark Hardiman, Assistant United States Attorney, Central District of California, (Feb. 9, 1998) [hereinafter Hardiman interview]. Mr. Hardiman was the lead prosecutor on the Smushkevich case.

190. *See id.*

191. It is estimated that the scam brought in between \$8,000 and \$10,000 per person in billings to over 1,400 insurance companies. *See generally* Moffat, *supra* note 179.

192. *See* Hardiman interview, *supra* note 189.

193. *See* Bureau of National Affairs, *U.S. District Court Sentences Rolling Lab Fraud Principals*, HEALTH CARE POL'Y REP., Oct. 3, 1994, at 1690.

194. *See* Moffat, *supra* note 179, at B1.

195. *See* Miles Corwin & Henry Weinstein, *Doctor Gets 20 Years for Health Insurance Scam Fraud*, L.A. TIMES, July 23, 1996, at B1.

196. *See* Moffat, *supra* note 179, at B1.

197. *See id.*

198. *See id.*

199. *See id.*

eral successful prosecutions. For his part, Michael was sentenced to twenty-one years and ten months in prison, as well as \$2.7 million in fines and \$41 million in restitution.<sup>200</sup> But the prosecutions have not stopped there. The U.S. Attorney of the Central District of California, Nora Manella, has sought and received convictions of other participating doctors<sup>201</sup> and lab directors.<sup>202</sup> One commentator noted that the California Medical Board continues to examine the activities of over 150 doctors who may have participated in this scheme.<sup>203</sup>

### C. Physician Licensing

Although fraud in the health care profession appears to be a recent phenomenon, throughout history, states have undertaken the duty to establish guidelines by which applicant-physicians should be judged for licensure. In 1889, the Supreme Court validated the authority of the states to set certain standards controlling the practice of medicine within their borders.<sup>204</sup> Generally, license requirements for physicians entering the field will consist of a required educational curriculum, satisfactory performance on board examinations, and a review of personal history.<sup>205</sup>

The licensing provision under California state law<sup>206</sup> requires that any individual, association of individuals or corporation, who desires a li-

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200. See Corwin & Weinstein, *supra* note 195, at B1.

201. See *id.* at B8. A supervising physician was successfully prosecuted under Medicare Fraud statute and Racketeering Influenced Corrupt Organization laws. His sentence was for 20 years and \$41 million in restitution. See *id.*

202. See *United States v. Yan Kats*, 871 F.2d 105, 106 (9th Cir. 1989). Manella explained that this "sentence shows that those doctors who abuse the trust of their patients for personal financial gain do so at their peril." Corwin & Weinstein, *supra* note 195, at B1.

203. See HEALTH CARE POL'Y REP., *supra* note 193, at 1689.

204. See *Dent v. West Virginia*, 129 U.S. 114, 127 (1889).

205. See FURROW ET AL., *supra* note 152, at 58.

After the states enacted licensure requirements for physicians in the 1870's and 1880's, the American Medical Association began a campaign to establish standards for medical education and to assure that only graduates of medical schools meeting those standards were allowed to sit for state licensing examinations . . . the AMA gained, and has retained, control over accreditation of medical schools and, thus, over the major prerequisite for state licensure examinations.

*Id.*

206. Because this Comment is examining a California case, it will lay out the specific requirements for physician licensure under California state law. Although other states' licensing programs are comparable, the reader is not to assume they are the same.

cense for a clinic must provide the following information to the state department.<sup>207</sup> First, the applicant must establish the reputable character of the individuals applying for licensure.<sup>208</sup> Secondly, if the applicant is a corporation, it must divulge the names and addresses of each officer, director and stockholder owning ten percent or more of stock.<sup>209</sup> Third, the name and address of the clinic must be issued, as well as an affidavit of compliance to the Business and Professions Code of California.<sup>210</sup> Fourth, the applicant must provide the name, address and professional experience of the licentiate responsible for the administrative proceedings of the applicant.<sup>211</sup>

Finally, the State requires the applicant to provide: a specific list of the treatments to be administered; a description of the location of the practice including facilities, equipment, and necessary appliances for successful operation of the clinic; as well as sufficient operational data to determine the class of the clinic and the initial license fee to be charged.<sup>212</sup> The Code establishes that if these elements are complied with, and if the officer chooses to examine the facilities and finds them to be acceptable, then a license can be issued.<sup>213</sup> However, most physicians will require more than a state license to practice medicine. In the absence of a clinic or office, they will need a hospital. To receive these privileges, physicians must go through a credentialing process.<sup>214</sup>

Because these licensing factors are specific to both the state and hospital regulations, in 1920, the Supreme Court found that states could not impose their regulations upon physicians engaged in federal work; and

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207. *See* CAL. HEALTH & SAFETY CODE § 1212 (West 1997).

208. *See id.* § 1212(a).

209. *See id.* § 1212(c).

210. *See id.* § 1212(e).

211. *See id.* § 1212.

212. *See* CAL. HEALTH & SAFETY CODE § 1212(g)-(h).

213. *See id.* § 1353.

214. To understand this, the following is the necessary review at the Georgetown University Hospital Center in Washington, D.C. Initially, the Hospital sends out an application which covers most of what was covered in the California law, except for the inclusion of insurance liability information. Document obtained Nov. 11, 1997 from Office of the General Counsel for Georgetown University Hospital. This process follows with an extensive verification procedure which includes letters of support from the appropriate division chief, department chair, and faculty administrator. *See id.* When these licensing verifications have been received, the applicant goes to an executive staff for final approval. *See* Georgetown University Hospital's "Credentialing For New Appointments." *See id.*

likewise, because no federal licensing format existed, there was no need for a particular state license for the physicians.<sup>215</sup> But, due to the creation of Medicare and Medicaid in the 1960s, twenty-five percent of all federal health care funds went to state support of these programs, thereby giving the federal government a vested interest in, and a need to more closely scrutinize, state practices.<sup>216</sup>

Due to the fact that peer review analysts have established that fear of a lawsuit is the single biggest deterrent to peer review, Congress drafted the Medicare Utilization and Quality Control Peer Review Organization Program (PRO), granting immunity for participating physicians.<sup>217</sup> This program exists as a means by which the federal government can ensure the safety of the beneficiaries, as well as control the costs of Medicare.<sup>218</sup> PROs have developed into police organizations that ensure that patient services are not being undercut so as to allow hospitals to make more profit from the Medicare reimbursements.<sup>219</sup> As of 1994, PROs, based on a system of competitive bids, could become for-profit institutions which were given enhanced sanction and payment denial authority in line with their responsibilities.<sup>220</sup> A study from this same year illustrates that there were forty-two PROs in fifty-three PRO state-wide areas.<sup>221</sup> The majority of the surrounding groups are made up of twenty percent physicians from that geographical practice area or are otherwise composed of ten percent of physicians in the area with the remainder made up of those from the larger state community,<sup>222</sup> and at

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215. See Kathleen L. Blaner, *Physician, Heal Thyself: Because the Cure, The Health Care Quality Improvement Act May Be Worse Than The Disease*, 37 CATH. U.L. REV. 1073, 1087 (1988) (citing *Johnson v. Maryland*, 254 U.S. 51, 57 (1920)).

216. See *id.*

217. See 42 U.S.C. § 1320c-3(a)(1) (1997).

218. See FURROW ET AL., *supra* note 152, at 86. The PRO was preceded by the Professional Standards Review Organization (PSRO), which focused on the business of medicine assuring that questionable reimbursement tactics were not practiced. See *id.*

219. See *id.* at 87. These practices include "premature discharge of patients" and "underservice of hospitalized patients." *Id.*

220. See *id.*

221. See *id.* at 87 n.10.

222. See *id.* (citing HHS OFFICE OF INSPECTOR GENERAL, THE UTILIZATION AND QUALITY CONTROL PEER REVIEW ORGANIZATION (PRO) PROGRAM, AN EXPLANATION OF PROGRAM EFFECTIVENESS 3 (1989)); see also 42 C.F.R. § 462.102 (1985).



least one customer representative.<sup>223</sup> The remaining members of the PROs are typically made up of insurance companies who purportedly have the necessary number of physicians on staff to carry out the review functions.<sup>224</sup>

Although the role of the PRO was initially to review individual cases to make determinations based on indications of inadequate care, their role is changing.<sup>225</sup> Instead of individual record review, under the Health Care Quality Improvement Initiative (HCQII), the federal government will focus more on medical care trends through large data sets.<sup>226</sup>

However, there are credible arguments demonstrating weaknesses in the PRO system. Based on the new data sets, the PROs have extensive files on patients and doctors so as to identify problems for further study.<sup>227</sup> At least one author states that by reporting all information, including incorrect or misinformed data, this system may significantly affect a doctor's reputation and therefore his ability to practice medicine.<sup>228</sup> In effect, such treatment may be a violation of the physicians' Constitutional right to equal protection.<sup>229</sup> The concept of equal protection establishes that the government only acts legitimately when its behavior affects all similarly situated people.<sup>230</sup> Under the current model of the PRO, acceptable state practice may vary. Therefore, a physician's actions in one jurisdiction may be sufficient grounds for termination of his license, while the license of a physician in another state, who acted in the same manner, may not be threatened.<sup>231</sup>

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223. See FURROW ET AL., *supra* note 152, at 87. This customer representative is mandatory under 42 U.S.C. § 1320(c)-2(c)(3).

224. *See id.*

225. *See id.* at 88.

226. This review of health care trends is not as random nor as thorough as individual record examinations as it focuses on trends as opposed to individual activity. The current procedures under the HCQII are as much as 250% slower than the manual approach. *See id.* at 88-89.

227. *See id.*

228. See Blaner, *supra* note 215, at 1099-100.

229. The Equal Protection Clause is guaranteed in the Fourteenth Amendment, and states that the United States shall not "deny any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend XIV, § 1.

230. *See id.*

231. See Blaner, *supra* note 215, at 1100. Blaner argues that an ancillary repercussion of this procedure may be an acknowledgment by the medical community that these procedures are quite harsh, thereby unfairly tainting the reputation of the doctors. *Id.* Therefore, the state will be less likely to take disciplinary procedures

The author also cites the possible due process claim that may arise. She contends that the mere existence of this public report may infringe on a physician's ability to reestablish faith in his credentials if the findings are proven to be erroneous.<sup>232</sup> For example, if an individual attempted to gain license in another state, he would have no right to due process regarding that licensure because he did not have standing as a physician in that particular community. Therefore, he could not claim a hearing on his application even if the computer records were originally false, as long as the peer review organization could establish a viable reason to deny licensure.<sup>233</sup>

Another complaint about the current status of peer review is that the PRO creates a "procedural inertia."<sup>234</sup> This term comes from the multiple procedures that are currently available to challenge payment denials: re-petitioning the PRO, administrative appeals, and judicial review.<sup>235</sup> Given the varied medical diagnoses which may allow for these appeals, the PRO program tends to offer minimal intervention.<sup>236</sup> The intervention that is offered, however, emphasizes correction.<sup>237</sup> The most popular intervention programs include education and deterrence, allowing for sanctions only after all other means of rehabilitation have been exhausted.<sup>238</sup> Professor Timothy Stoltzfus Jost of Ohio State University

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even in cases that require investigation for fear of false allegations. *See id.*

232. *See id.* at 1106. The Due Process Clause is guaranteed in the Fourteenth Amendment, and states that the United States shall not "deprive any person of life, liberty, or property, without due process of the law." U.S. CONST. amend XIV, § 1. Blaner argues that even if a physician is convicted of the criminal act, Congress should make expungement available to the physician if he can prove that this behavior is not likely to occur again. *See Blaner, supra* note 215, at 1106-07.

233. *See Blaner, supra* note 215, at 1108-09.

234. *See Timothy Stoltzfus Jost, Policing Cost Containment: The Medicare Peer Review Organization Program*, 14 U. PUGET SOUND L. REV. 483, 508 (1991). "Procedural inertia" refers to the aggregate effect of the complicated procedures that affect cost containment in health care. *See id.*

235. *See id.*

236. *See id.*

237. *See id.* at 506.

238. *See id.* at 509. Jost states that:

[s]anction cases consume considerable resources, for which the PRO is not wholly compensated. A sanction recommendation that is not ultimately upheld can also cost the PRO dearly in terms of its credibility and support in the physician community. Absent conviction that a sanction is absolutely necessary, the PRO is unlikely to take on this expenditure of resources.

*Id.*

cites two consequences that flow from this practice. First, corrective action is often confidential, while the second is that corrective action focuses on individual effect, as opposed to the far-reaching impact a highly publicized fraud case would have on the physician community.<sup>239</sup>

The current licensing procedures for physicians are comprehensive because the state licensing board and the hospital verification process significantly validate the physician's skills and character. The government has a vested interest in monitoring physician activity. PROs may be a good tool to weed out any corrupt or incompetent physicians. However, with the scenarios that have been cited here, it seems that although the peer review process is necessary to fully understand the conditions under which physicians work, the effectiveness of its role may need to be reevaluated.

#### IV. ANALYSIS: CURRENT LICENSING PROCEDURES

Ultimately when dealing with the control of illegitimate activity in legitimate business, you must balance three factors: costs to the government, costs to the parties involved, and the intrusiveness of the action.<sup>240</sup> Most often, entrance into these fields requires some sort of licensing procedure. Such procedures exist so as to maintain a certain competency level of the particular practitioner, to curb the effects of their incompetence on the general public, and to provide a societal standard to which future practitioners may aspire.<sup>241</sup>

All three fields examined here- health care, casinos, and trash cartage-require a general "good character" element in the competency standard. Inherent in this "good character" requirement is that the applicant will not engage in criminal activity under the guise of the license he may receive. However, it is apparent that receipt of these licenses is by no means a bar to individuals using them in a fraudulent manner. When physicians use the licenses for criminal behavior, they are most often making money for themselves or for a limited number of individuals. The cases in which whole countries are affected by these frauds are few and far between. However, there is one type of criminal who is not only using this license for himself, but for the advancement of a larger organization, generically referred to as "organized crime."

The Department of Justice realizes that health care fraud is an activity

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239. See Jost, *supra* note 234, at 507.

240. See REUTER, *supra* note 2, at 83.

241. See GROSS, *supra* note 87, at 16.

that is not only run by organized criminals, but by unethical physicians as well.<sup>242</sup> To remedy this, DOJ has established the reduction of health care fraud as a national priority with an annual goal of 300 successful prosecutions nationwide.<sup>243</sup> However, in reality, DOJ may take a number of years to achieve such a goal. Therefore, the U.S. is currently facing an organized crime syndicate who will feasibly earn billions of dollars from this practice in the interim.<sup>244</sup> Moreover, the likelihood of prosecution is so low that the potential profit is well worth the risks. The question then becomes, "How do you stop their involvement?" A possible avenue, along with DOJ's fierce prosecutorial effort, is an examination of other legitimate industries that have been affected by the infiltration of organized crime into their activity.

#### A. Comparison of Legitimate Businesses

The three businesses that are being examined here are hardly similar. They run the gamut of what occurs outside your door before you wake up in the morning (cartage industry), to where you take your children after school (doctor's office), to where you may go to enjoy some fun and excitement on a Saturday night (a casino). Although the businesses themselves attract or recruit very different personalities, they nonetheless affect ordinary people every day. And if you are an organized crime figure, these are the people that you want to affect. The average person probably will not understand or expect a complicated fraud scheme, and therefore, will not likely report such a scheme. But the reality is that these schemes exist in all three of these industries and that is where the similarity is the most dangerous.

The first business, health care, is made up of some of the most intelligent and dedicated people in the world. These individuals have an ex-

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242. See Bureau of National Affairs, *Fraud Investigations, Prosecutions Up, Recoveries Topple \$274 million, DOJ Says*, HEALTH CARE FRAUD REP., Sept. 10, 1997, at 28. The most notable case cited in this article was the 1995 Illinois conviction of Caremark, Inc. for paying physician kickbacks for referrals. See *id.*

243. See *id.*

244. See Bureau of National Affairs, *Medicare Claims Show \$23 Billion Spent "Improperly", IG Finds*, HEALTH CARE FRAUD REP., June 18, 1997, at 382. The article cites a Health and Human Services report indicating that the year 1996 alone produced \$23 billion in improper claims. See *id.* Based on this estimate, the amount of expected income to be gained from fraudulent health care claims in the next few years will remain in the billions while law enforcement develops efforts to combat this fraud. See *id.*

pertise from which everyone has benefited at least once in their lives. The business itself attracts a higher quality of candidate due to the academic rigors and financial constraints imposed by the field of study. However, because it is a field that requires such special skills and is an area that all people experience as patients, it is a business that is uniquely foreign, yet necessary to every person in the world.

Although those who practice medicine were once practically guaranteed a significant level of wealth, the introduction of managed care has eroded this expectation. The insurance policies that were once liberal in their payment structure have developed strict guidelines that limit reimbursement.<sup>245</sup> Therefore, some health care providers have turned to health care fraud as a means by which to make up for the losses incurred by minimal insurance payments. Others have used this system as a means by which to defraud the government of monies to which the providers have no right.<sup>246</sup> It has been this trend that has enraged both the government and the public, because physicians, who are so immensely trusted and revered in our society, would betray that trust and take advantage of a system that was established by and for the taxpayers of this country.

Unlike health care, the casino industry does not necessarily recruit the quality of candidates that the medical industry demands. However, casino operators must also have a certain degree of intelligence in their day-to-day operations because they are responsible for dealings involving substantial cash transactions.<sup>247</sup> The ability to be successful in this field eventually exposes individuals to a system of greed and corruption that occurs when one becomes part of the gambling stereotype demonstrated in popular culture. However, it has been demonstrated that this stereotype is essentially valid. The casino industry in Nevada was admittedly created by a member of the Italian mafia, and one can infer that the capital that went into it was "mafia money."<sup>248</sup> Although this business has since been regulated, Skolnick points out that those who are currently receiving the licenses must have had mentors who were taught

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245. See Jost, *supra* note 234, at 488.

246. See generally Bucy, *supra* note 177.

247. See SKOLNICK, *supra* note 102, at 174.

248. See REUTER, *supra* note 2, at 63-64. Reuter draws this conclusion because Bugsey Seigel was the operator of the first casino-hotel, The Flamingo, and he maintained a close connection with the likes of famous East Coast Organized Crime figures Lucky Luciano and Meyer Lansky. See *id.*

under a corrupt system;<sup>249</sup> therefore, the casinos of the future will most likely have elements of this corruption. Ironically, this seems to have been taken for granted and accepted as the way of the establishment, and any means at regulation are merely a thoughtful attempt on the part of the government.

Finally, the cartage industry has not been infiltrated by federal insurance policy, nor has it been glamorized into the pop-culture of America. It has, however, offered another opportunity for organized crime to take advantage of a legitimate business. It is the most unique of the three industries because it does not seem to have begun as an illegitimate business, as was the case in casinos, and there was no sudden injection of the criminal element as in health care.<sup>250</sup> It seems to have been a gradual acceptance by the carters and their customers that has not yet received substantial public complaint.<sup>251</sup> Since the garbage collectors pick up the trash in a timely manner and the tariffs are not excessive, people are unlikely to complain.<sup>252</sup> As the customers are not being adversely affected or successfully hoodwinked, the call for regulation will be minimal.

A layman's comparison to the public perception of these three industries demonstrates that it appears that the level of licensing or regulation that we require is inherent in our feelings towards those individuals who we perceive to be the practitioners of a profession. For example, the sudden push for health care fraud reform may exist because of the intrusion that individuals feel they are receiving from a once trusted class of society. Whereas in casino gambling or the cartage industry, people have either accepted a criminal presence or have become ambivalent to its potential existence.

### *B. Comparison of the Licensing Procedures*

Surprisingly, for the assumed differences within these businesses, their licensing procedures are quite similar. The first of these is the "good character" clause that was mentioned in the state licensing codes

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249. See SKOLNICK, *supra* note 102, at 177.

250. See § 2, Part B (3).

251. See REUTER, *supra* note 2, at 11. Although fear of racketeers may have led to minimal public complaint, the low cost of the industry to begin with and the fact that firms maintained the same level of corruption did not offer a need for customers to bring this practice to the attention of the authorities. See *id.*

252. See *The Cartage Industry In New York*, *supra* note 126, at 153.

in the previous section. The "good character" requirement is important to any of these businesses to prevent corrupt people from entering the profession. The government regulates physician and casino gambling licensing, by a series of inquiries into various references cited in the applicant's background and financial application materials.<sup>253</sup> Although the effectiveness of these licensing committee checks may be questionable, they appear to be thorough in their analysis. In fact, in the case of casino gambling, the licensing committee examines one's prior activity in the profession, but there is an opportunity for a hearing on the record if a license is denied for this reason.<sup>254</sup>

There are also other important considerations that develop when comparing the licensing boards of gambling and the payment structure of the cartage industry to those of the health care field. In casinos, the board has the duty to investigate the facilities to be used, whereas in the health care licensing boards, it is only an option. This would have made a substantial difference in the *Smushkevich* case, because the inspecting individuals would have easily ascertained that there was no legitimate business located there.<sup>255</sup> This would not cover legitimate medical practices that only focus on reimbursements of existing patients, but it would still filter out the convoluted post office box schemes.

In the cartage industry, the payment plan allows for the individuals to work within a tariff plan that provides a glass ceiling, allowing the carters to buy and sell customers at a profit. Then, the new owners of the contracts can make the money back by either charging the same rate or higher, as long as it is under the tariff rate.<sup>256</sup> This is not the way it works in the health care industry. This income determination is different from the procedure in medicine. Although the procedures the patient will receive are within the doctor's discretion, the doctor has no authority regarding how much the procedure should cost, or what percentage of reimbursement he should receive.<sup>257</sup> When corrupt doctors base their

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253. See CAL. HEALTH & SAFETY CODE § 1212 (West 1997); NEV. REV. STAT. ANN. § 463-170 (1994).

254. See NEV. REV. STAT. ANN. § 463.220.

255. See *Smushkevich* discussion, *supra* § III, Part B.

256. See REUTER, *supra* note 2, at 11.

257. The insurance companies set reimbursement costs as industry standards. See Jerome Lutsky, *Is Your Physician Becoming A Teamster: The Rising Trend of Physicians Joining Labor Unions In The Late 1990s*, 2 DEPAUL J. HEALTH CARE L. 55, 57 (1999). Lower reimbursement rates mean cheaper premiums for the insured, guaranteeing more patients for those physicians who accept that insurance carrier.

services on the income they will receive, this practice can be equated to the cartage income determination scheme.

V. COMMENT: THE COMMON THEME & THE NEED FOR AN  
EXPERT PEER REVIEW ORGANIZATION (EPRO)

The reason that these three businesses have not been compared before is because, at first glance, they appear to be dissimilar, but this is, in fact, untrue. Health care has not established itself as an industry that has been continually taken advantage of by organized crime, but the evidence demonstrates that it has at least once - to the tune of one billion dollars.<sup>258</sup> People have either accepted or are ambivalent towards the existence of organized crime in these other fields, but they would rather not accept this as a possibility in the health care profession. Although people may feel more betrayed by these doctors, they have to realize that the businesses are essentially the same in their capacity as server-client relationships; and therefore, may be in need of a comparable regulatory proposal.

Peter Reuter demonstrates that licensing becomes accepted under the fact that practice becomes habitual, customers accept it as such, and, if racketeering elements are present, the customers' fear of intimidation is too great to bring matters to an enforcement organization.<sup>259</sup> Under Skolnick's plan for casino gambling, he would establish a separate board that would sit as a panel of experts to determine the extent to which an individual may have prior connections to organized crime.<sup>260</sup> The expertise of these individuals may identify business nuances of a person's prior dealings which may lead to grounds for denial.<sup>261</sup> Reuter also offers an oversight committee for the cartage industry. The role of this committee would be to monitor contract arrangements and bid negotiations so that carting activity would be regulated to operate at a minimum price.<sup>262</sup> This board would be responsible for a separate engineering component that would validate the cost structure of the proposed bids by individuals who have the expertise to make these decisions.<sup>263</sup>

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*See id.*

258. *See* Smushkevich discussion, *supra* § III, Part B.

259. *See* REUTER, *supra* note 2, at 80.

260. *See* SKOLNICK, *supra* note 102, at 228.

261. *See id.*

262. *See* REUTER, *supra* note 2, at 85.

263. *See id.* at 86-87.



Currently, there is a comparable structure under the health care system in the PRO.<sup>264</sup> Although the PRO acts as a watchdog for health care fraud, it has been demonstrated that as it exists in its current form, it could be highly detrimental to physicians' reputations and subsequent job opportunities. The current focus of the PRO exists as a corrective body where "[i]ncapacitation and deterrence are secondary goals; [and] punishment is of little importance."<sup>265</sup> Although problems do exist, the immunized peer review process for the field of medicine is quite necessary due to the nature of medicine. Therefore, the health care profession should establish a state-sponsored system comparable to the PRO for the licensing/credentialing of doctors.

This board would sit as an expert board to track the performance of doctors at the recommendation of the PRO through various areas of development. The information would be kept on a physician's permanent record under a confidential assigned code and would not be kept on the national database which has arguably given rise to equal protection and due process issues.<sup>266</sup> This expert peer review organization (EPRO) would be comprised of licensed physicians of that state who would serve rotating terms. It would arguably be more effective than the current PRO, made up of mostly non-state licensed physicians and insurance company employees. The mission of the EPRO would be to point out questionable medical behavior, not to make insurance related cost decisions.

The EPRO would be responsible for the practicing physicians in its "region,"<sup>267</sup> and any information regarding possible health care fraud would be examined by the EPRO and, if believed to be fraud, the matter would be referred to the appropriate law enforcement agency.<sup>268</sup> Having been provided with a legitimate allegation by respected members of a medical community, these agencies would be able to establish a more focused investigation which eludes the "procedural inertia" of the current system.<sup>269</sup> This two-level review procedure and current investiga-

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264. See 42 U.S.C. § 1320c-3(a)(1) (1991 & Supp 1998).

265. Jost, *supra* note 234, at 507.

266. See Blaner, *supra* note 215, at 1099-1102.

267. Regions may be established under the current system in which PROs are run.

268. Although this body would be reviewing the records offered by the PRO, it should also have the legal authority to perform both prepayment and retrospective audits of claims.

269. See Jost, *supra* note 234, at 508.

tion requirements by prosecutors would all but guarantee that due process is served. In essence, this would allow doctors to police themselves, and decide if their activity rises to the level of accidental billing error or egregious misconduct. By establishing the latter, law enforcement bodies will be heavily assisted in their prosecutorial charge.

This argument has several drawbacks. The two most obvious are the extent to which it is possible to conduct these reviews on a regular basis, and the common concern of self-regulating doctors protecting their own.<sup>270</sup> Regarding the first, a system could set certain career interval evaluations for doctors beginning at initial licensure. Initially, the board could run random patient inquiries or comparable measures that would offer enough information to confirm the veracity the physician offered at the initial licensing procedure. In order to maintain an appropriate board pool, the state could offer incentive packages to experienced physicians.

The response to the second problem is a sociological one. It is not incorrect to assume that there are unethical practitioners in the health care field or that some physicians may be slow to engage in a substantive colleague review, but one must also realize that one's initial dismay to the health care fraud theory is that patient's trust their physician. That trust is well-founded in most physicians because of their commitment to their patients and to their field. Therefore one should not feel so hesitant to put them in a position to measure the abilities of their colleagues as that would be a great disservice to the standards that the profession clearly holds today.

This proposal is an attempt to enhance the ability of doctors to remove undesirable fraudsters out of health care, a system that some have used to manipulate the lives of those individuals they swore to serve. Some may argue that when corruption is involved, the field of health care is really no different than the casino or cartage industry. Because proposed boards of experts have been recommended by researchers on these topics, it makes sense to establish a state-sponsored medical expert review that has the immunity of the current PRO, but develops a relationship with state and federal law enforcement in order to investigate probabilities of health care fraud.

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270. *See id.* Jost, although recognizing the hazards of self-regulation, argues that too much has been made of it because there is anonymous review under insurance company sponsored review. *See id.*

## VI. CONCLUSION

When doctors become involved in fraudulent billing practices, it sends a signal to America that criminal activity has the ability to infiltrate almost any legitimate business. This has happened in California where one scheme run by the Russian mafia has cost the government one billion dollars.<sup>271</sup> These types of health care fraud schemes are currently being perfected by the Russian mafia and are creating a tremendous amount of revenue. This allows them to establish ties with other international organized criminal syndicates and send capital back to the criminal element in their homeland.<sup>272</sup> If this activity continues, it could contribute to a stronger international criminal establishment that would threaten countries all over the world, including the United States. Although the DOJ has recognized health care fraud prosecution as a national priority,<sup>273</sup> there still needs to be a regulatory approach to fraud.

The current regulatory approach to controlling fraud is a system of licensing and monitoring member activity. Although this would seem to be conceptually effective, health care fraud continues to cost the United States billions of dollars per year. By examining legitimate businesses that organized crime has infiltrated, it is apparent that the most effective "watchdog" is a technical review board intimately familiar with the business. This precise knowledge of the subject's activity would assist law enforcement in establishing the criminal component of the subject's behavior. Because of the intricacies of medical procedures and the various types of fraud that exist in the current system, it makes sense to establish an independent peer review board to evaluate physicians at particular stages in their career to determine if the activities in which they are involved may necessitate criminal prosecution.

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271. See Smushkevich discussion, *supra* § III, Part B of article.

272. See STERLING, *supra* note 8, at 163.

273. See Reistacher & Chorowsky, *supra* note 3, at 3.