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SOME THINGS THAT MAY BE MORE IMPORTANT TO UNDERSTAND ABOUT ORGANIZED CRIME THAN COSA NOSTRA

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This article analyzes the problems in developing a real definition of organized crime within the context of its use as a starting point for cost-effectiveness analysis. The limitation of conventional definitions are reviewed, with particular attention being given to the significance of understanding Cosa Nostra as a key to understanding organized crime. As an alternative to that approach, some questions are posed that may lead to more useful conclusions about organized crime than the conventional assumptions concerning Cosa Nostra.

THE COST OF ORGANIZED CRIME

Why should anyone be concerned about the notion of organized crime? Various contemporary observers have attempted to answer this question, but the only clear consensus that emerges is that reasons can be advanced to satisfy any reader's predispositions toward anxiety.¹ If one wished to catalogue the "threats" that have been identified, the resulting list would range from economic and social concerns, through political apprehensions, to moral and philosophical dread. The common thread to be observed in all the answers, aside from a concentrated focus on the "bad guys" epitomized by the Crime Commission's references to Italians,² is a high proportion of pejorative exhortation in relation to the amount of objective analysis and factual proof provided to support the conclusions set forth.

There is one concern about organized crime that has not been explored to any great extent: the concern of the taxpayer who looks for assurance that his involuntary contributions to the support of organized crime control have been well spent. The plight of the taxpayer is generally linked to the argument that organized criminals amass illicit fortunes on which no taxes

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1. See THE PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME (1967) [hereinafter cited as CRIME COMMISSION] which lists five separate "dangers" or "threats" of organized crime. See also D. CRESSEY, THEFT OF THE NATION (1969) [hereinafter cited as D. CRESSEY] which lists six.

2. "Today the core of organized crime in the United States consists of 24 groups operating as criminal cartels in large cities across the Nation. Their membership is exclusively men of Italian descent . . ." CRIME COMMISSION, *supra* note 1, at 6.

[1]

are paid, thus increasing the relative burden on the less affluent, honest citizen. This argument, however, is unsupported by even a theoretical model of the economy of an illicit enterprise that would show its relationship to the licit economy. Without such a model we remain at the mercy of "guess-timates" as to the disproportionate share of government support shouldered by the honest taxpayer. Similarly, no effort has been made to compare the potential (or theoretical) loss of revenue through the tax evasion of organized criminals with the loss of revenue resulting from the tax avoidance of legitimate businesses. Some important questions remain to be explored here. For example: Is my disproportionate share of the tax burden made heavier because the men who operate the numbers rackets in New York City are not reporting income and thus avoiding taxes, or because oil companies have depletion allowances written into their tax returns? Of equal importance should be our concern for a return on the taxes we *do* pay for organized crime control.

The problem of organized crime control has not been posed in this fashion before. In the past, attention has been focused on developing a sufficiently persuasive rationale to justify both legislative authorization of certain tactical weapons³ and sufficient funding of programs that will eliminate organized crime. The rationale has been presented largely in military terms: organized crime is an "enemy" and it is to be dealt with through a "war."⁴

This approach has its limits, not the least of them being that conventional military thinking is not attuned to the conceptual approach of cost-effectiveness analysis. An enemy seldom has a price tag. The commanding general is motivated by the objective of inflicting more punishment on the enemy than can be reciprocated, rather than by whether the cost of inflicting the punishment is greater than the ultimate benefit to his side.⁵

3. *E.g.*, wiretapping, revised court rules, limitations on activities of members of organized crime.

4. For one of the earliest treatments of this approach, see R. KENNEDY, *THE ENEMY WITHIN* (1960). A more recent Washington comment referred to the Omnibus Crime Control Act of 1970 as giving the federal government the means "to launch a total war against organized crime, and we will end this war." See *N.Y. Times*, Oct. 16, 1970, at 18, col. 1.

5. A cost-effectiveness analysis would have to investigate both positive and negative values associated with organized crime and its control. This is a difficult undertaking for law enforcement personnel raised on the philosophy that "the good guys wear white hats." To illustrate that difficulty: In the past two years I have asked my seminar students to prepare, on successive weeks, informal essays discussing "The Threats of Organized Crime" and "The Benefits of Organized Crime." The first essay appeared to be relatively easy to prepare, without any need for qualification; but even the thought of the second essay has provoked severe intellectual problems for some students. In 1969 over half the class could not discuss "benefits" without an accompanying disclaimer statement, exhorting the reader to remember that the dangers of organized crime were far worse than any paltry, theoretical benefits. The problem was most noticeable among students who were senior police officers and who had previously been assigned to special vice control squads. The difficulty was apparent even though the "benefits" assignment accompanied assigned reading of Gardiner, *Wincanton: The Politics of Corruption*, in CRIME COMMISSION, *supra* note 1, at 61-79.

Nonetheless, it may be that cost-effectiveness analysis is inappropriate in organized crime control. Many of the concerns associated with that area of enforcement are intangible and objectives of a control program may be impossible to associate with numerical values. Furthermore, although the *process* of criminal justice may be inherently sequential and continuous, it becomes operative through a *system* of criminal justice, which is ordinarily dysfunctional, often bewildering and discordant, and sometimes even irrational.⁶ The law enforcement agency may effectively investigate organized crime and may allocate its resources well for that task; but its efforts may be thwarted by subsequent action based on conflicting objectives of another administrative unit within the criminal justice system. Despite these limitations, the process of undertaking a cost-effectiveness analysis might well be profitable, even if the concept is not adopted as a permanent evaluation tool. The attempt to apply it would require a more concrete specification of the nature of the problem, and of the objectives to be sought in relation to it, than has yet taken place. Clarification of public policy is desirable in any event; in this case, it would undoubtedly improve the law enforcement community's ability to tackle its share of the problem.

If a consensus *were* reached on the desirability of exploring a cost-effectiveness approach to organized crime control, the first task would be to define the problem of organized crime. To the casual reader of popular literature on the subject, this would not seem to be a difficult task. He might well conclude that with so many studies of "the problem" available, including one by a Presidential commission, the nature of organized crime and the directions in which its remedies lie must surely be clear by now.⁷ Unfortunately, this is not the case. Because organized crime has not been well defined, remedies have been proposed that entail considerable law enforcement activity but little hope of resolving the problem. If one looks closely at what has been written about the nature of organized crime, the reasons for the definitional deficiency become clear. In simple terms, the characteristics that have been cited as keys to "understanding" organized crime are not the right keys at all. They open doors that lead down dimly lit paths to cul-de-sacs, while the reality of organized crime continues down the main line, unimpeded. "Understanding" is needed; but of the real phenomena, accurately defined.

THE PROBLEM OF DEFINITION

Assuming that there is a valid category of persons and events that can be called organized crime, it is apparent that there are three ways of approach-

6. For a more detailed discussion of the distinction between "process" and "system," see *The Information Requirements of Criminal Justice Administration*, in NEW YORK STATE IDENTIFICATION AND INTELLIGENCE SYSTEM, A NEW CONCEPT IN INFORMATION-SHARING 13-20 (1967).

7. The CRIME COMMISSION, *supra* note 1, devoted nearly ten pages (1-10) describing the nature of organized crime, and an almost equal amount of space (at 16-24) to suggesting remedies.

ing it: as a social phenomenon, to be analyzed and understood; as an illegally defined act, or state of being, for which a person can be prosecuted; and as a popular concept, to be communicated to the public.

These approaches are interrelated and cannot be considered apart from each other. Nevertheless, an adequate social definition must precede a legal definition if the latter is to have any enforcement value, and similarly, both the social and legal definitions must support the popular concept.⁸

This is not what has happened. Popular notions have been adopted as the basis for attempts at legal definitions. The popular notions are so burdened with stereotypes that it has been virtually impossible to undertake the necessary objective analysis that would produce an adequate social definition.

What are those stereotypes? As a sample, consider the results of an exercise that introduces the seminar on "Organized Crime in America" at the John Jay College of Criminal Justice. Without prior conditioning, students were asked to list the first ten responses evoked by the phrase "organized crime." The composite response of the ten terms most frequently mentioned in the last two years, in the order in which they occurred, was as follows:⁹ Mafia, money, Italian, Cosa Nostra, gambling, narcotics, prostitution, organization, corruption, murder.

When forced to go beyond their immediate reactions, the students suggested other aspects of organized crime. Nonstereotype images such as interlocking businesses, control of industry, profit, affluence, supply, demand, and cross-country travel were mentioned. The trouble with these images, of course, is that they could be used just as well to describe a decent, law-abiding, upperworld, white, Anglo-Saxon member of the legitimate business community. This bothers many who have accepted the popular stereotypes that identify a group of social outcasts who do things for their own benefit to an innocent and unsuspecting public.

A colloquy in New Jersey a year ago demonstrated the unhappiness that emerges in the absence of expected stereotypes. It occurred as the state supreme court heard arguments from lawyers questioning the power of the fledgling State Investigation Commission to compel testimony about organized crime by conferring immunity from prosecution upon witnesses. During the arguments Chief Justice Joseph Weintraub pressed one of the lawyers for an explanation of the Cosa Nostra:¹⁰

8. The interrelationship of social and legal definitions is explored in some detail by D. CRESSEY, *supra* note 1, at 299-305. Unfortunately, he deals separately with the problem of the popular definition and thus misses the interrelationship of all three. *Id.* at 54-71.

9. I obtained 632 responses from the 65 students who participated in this exercise (some found the 9th and 10th responses difficult to articulate). Of this total, 209 were words or concepts expressed only once; the remaining responses were comprised of multiple listings of 80 words or phrases. The 10 listed here were mentioned 212 times, or one-third of the total responses. The order shown was derived by giving a value of 10 to the 1st word listed by each respondent and 1 to the 10th word listed, and by averaging the resulting score by the total listings of the word. By this calculation, "Mafia" (mentioned 37 times) had an average value of 8.8; "murder" (mentioned 11 times) had an average value of 4.6.

10. N.Y. Times, Dec. 16, 1969, at 50, col. 2.

The lawyer denied he had any personal knowledge of organized crime.

But based on "what [he had] heard and studied," he gave this description: "The Cosa Nostra is supposed to be a group of people banded together for selfish purposes to make money any way they can, with the emphasis on illegal means."

"That sounded like General Motors up until the last part," Justice Weintraub replied, drawing laughter from a packed courtroom.

What is organized crime — *really*? The stereotypes that form the concept amount to what Walter Lippman described years ago as "the pictures inside people's heads [of] the world outside."¹¹ If the pictures do not reflect reality, the definitions constructed to categorize them will be misleading.

Are the popular images of Mafia, Italian, and Cosa Nostra the reality of organized crime, or are they, in the imagery of Plato's famous allegory, simply shadows cast on the back wall of a cave by puppets held between our backs and the firelight at the entrance to the cave? Is the reality of organized crime a group of persons working together? Is it the activities they engage in — gambling, narcotics, extortion, murder, prostitution, usury? Is it a corporate-like structure built for illegal activities, but with significant and distinctive characteristics? Is it a series of basically independent social problems in which a particular group of entrepreneurs can be observed? Or is it a social phenomenon, generated by the demands of our society, and extending well beyond the cast of characters and the list of activities normally associated with it? Strikingly different definitions can be written for organized crime, depending on what is considered to be real about it.

Beyond the problem of stereotypes, a second barrier to understanding organized crime is a preoccupation with the criminality of it. Too much emphasis is placed on "crime" and not enough on "organized." While Professors Cressey and Schelling have both attempted to penetrate this barrier, with Schelling's effort being the more successful,¹² the barrier is still there. It encourages an assumption that the law stands in the middle of a large gulf separating legitimate and illegitimate activities. Consequently, no matter what point of departure is chosen, the generally perceived reality of organized crime distinguishes between criminals and law-abiding persons as being somehow inherently different; or between criminal activities as being of a different order from legitimate activities; or between criminal organizations as being different in both structure and operations from legitimate organizations.

Another barrier to a satisfactory definition is the focus on one side of the matter — the persons who commit organized crime. To be sure, there is recognition of the concept of the willing victim and of the distinction between predatory and service crimes. Despite those concepts, mental images are maintained of organized crime that have no relationship to its environ-

11. W. LIPPMAN, PUBLIC OPINION 31 (1922).

12. Perhaps his advantage lies in being an economist rather than a criminologist. See D. CRESSEY, *supra* note 1; Schelling, *Economic Analysis and Organized Crime*, in CRIME COMMISSION, *supra* note 1, at 114.

ment; it appears as a force with its own motive power and an independently contrived *raison d'etre*.

The result of this approach has been the development of a "Mafia mystique," which came forcefully to the surface with the Crime Commission's comments about Italians, but reached its peak with Cressey's statement that "if one understands Cosa Nostra he understands organized crime in the United States."¹³ Coincidentally, Puzo's bestseller,¹⁴ *The Godfather*, provided the basis for a popular notion of Italian dominated syndicate crime that reinforced the official position of the Crime Commission. The cumulative effect on such declarations and fantasies prompted an unprecedented spurt of news articles that reinforced the mystique by reporting on "The Mafia" in relation to law enforcement activities against organized crime.¹⁵ The popular, public inquiry of the press was in high gear until the Attorney General prohibited the use of the terms Mafia and Cosa Nostra by the Justice Department.¹⁶ While his order temporarily affected the frequency of public references to these ethnically-identifiable labels, there is nothing to indicate that official beliefs have changed noticeably. "*Cherchez les Italiens*" still appears to be the principal theme of organized crime control.¹⁷

At the heart of that policy lies Cressey's detailed, though admittedly speculative, elaboration of the structure and functions of syndicated crime in the United States. His opponents, notably Morris and Hawkins, have con-

13. D. CRESSEY, *supra* note 1, at 21.

14. M. PUZO, *THE GODFATHER* (1969).

15. The *New York Times Index* listings under the heading "Mafia" show the name enjoyed some notoriety during the Kefauver hearings (13 listings in 1951) and again at the time of the McClellan hearings and the Appalachian meeting (16 and 13 entries, respectively, in 1958 and 1959). In intervening years, and after 1959, interest in "Mafia" almost disappeared from the newspaper. Since the Valachi revelations, "Mafia" has been a standard reference, with occasional cross-listings to "Cosa Nostra" and "Crime Syndicate." The following table indicates that the number of index listings was increasing arithmetically until the appearance of the Crime Commission report in 1967.

Year	Index Listings Under "Mafia"	Year	Index Listings Under "Mafia"
1963	18	1967	104
1964	17	1968	127
1965	40	1969	285
1966	60	1970, Jan.-June	185
		July-Dec.	85
		1971, Jan.-June	117

16. N.Y. Times, July 24, 1970, at 28, col. 4.

17. "[E]xcept when speaking for quotations, Federal investigators and state law enforcement officers continue to use the terms "Mafia" and "Cosa Nostra." The Federal agents, including those in the F.B.I., believe their position reflects the view of Mr. Hoover . . ." Crutzner, *Dispute over "Mafia,"* N.Y. Times, Sept. 5, 1970, at 24, col. 2. This view may not be held by all law enforcement personnel, however. "Alfred J. Scotti, chief assistant district attorney of Manhattan, took issue with [Bronx District Attorney Burton B. Roberts] use of the word Mafia, saying that in his 23 years in the district attorney's office 'I've never come across any evidence that would indicate that these groups [or] families operate as members of the Mafia.'" See N.Y. Times, Sept. 14, 1970, at 15, col. 1.

tended that his analysis is an over elaboration based more on myth than on justifiable speculation; they conclude that whatever lies behind the events normally categorized as organized crime can be eliminated if we "remove the criminal laws which both stimulate and protect it."¹⁸

While both sides of this argument may be partially correct, neither is a satisfactory approach to the problem of organized crime control. Their primary concern is with establishing, or challenging, Cosa Nostra as the key to understanding organized crime, when in reality it is an intellectual impasse. It is doomed at the outset because its origins are in contemporary stereotypes, a preoccupation with criminality, and a focus on perpetrators alone.

This concern for an accurate definition of organized crime is more than an abstract search for "Truth." A definition of a particular category of behavior will specify what is different about that category, what significant factors are common to a class of actions, and what factors separate the behavior covered by the category from other forms of behavior. If the category being defined is a criminal one, there will be a presumption that the differences have negative connotations. This is the case with organized crime: it is distinguished from other activities by unpopular behavior. But more importantly the activities categorized as organized crime are alleged to be the cause of a moral decay that is of considerable danger to American life.

Three serious problems of analysis appear at this point. First: Is Cosa Nostra so synonymous with organized crime that its elimination would signal the end of the phenomenon? Second: Are the activities identified as organized crime the totality of the causes of the decay in American life so that its elimination would eliminate this decay? Third: Are the activities that should properly be grouped as organized crime the *cause* of the threats identified with it, or merely its *symptoms*? The campaign against organized crime entails significant compromises with the balance between group security and individual privacy that existed even a decade ago; for the risks that organized crime control asks us to take, the underlying categorization and explanation of the phenomena under examination must be unequivocally sound. An inadequate definition process will not assure that soundness.

If this is the case, how should the problem of defining organized crime be approached? Very simply: by not looking for organized crime itself. As a contrived concept, at least in contemporary usage,¹⁹ it does not possess its own logic, but requires interpretation from a variety of viewpoints. The question is not: "What is organized crime?" Rather, the question is: "What insights may be obtained from history, economics, sociology, psychology — even philosophy and theology — that would facilitate efforts to understand

18. N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 235 (1970).

19. There is a considerable difference between contemporary references to organized crime and the conceptual approach intended by John Landesco in his original use of the phrase. See J. Landesco, *Organized Crime in Chicago*, in *ILLINOIS CRIME SURVEY*, pt. 3, at 221 (1929). (Part 3 was reissued in 1968, with a *Foreword* by Mark Haller).

why the phenomena we categorize as organized crime occur, and what forces trigger their occurrence?"

THE "COSA NOSTRA SYNDROME"

It is important to note that the alternative approach just described has been suggested previously, but has not yet been tried. Cressey drew attention to it in the concluding paragraph of his paper for the Crime Commission by saying: "New questions, different from those traditionally raised by police and prosecutors must be asked, and new evidence relating to the answers to those questions must be assembled."²⁰ While *Theft of The Nation*, an outgrowth of his paper, was an attempt to do just that, it has fallen short of the mark. Two noticeable changes in conceptual approach may account for this.

First, the suggestion that "New questions . . . must be asked" was linked to a plea that police intelligence files be opened to social science researchers from outside the law enforcement community. In turn, these suggestions were related to an earlier conclusion that: "What is needed is detailed and precise specification, by social scientists, law enforcement personnel, and legislators working together, of the formal and informal structures of illicit governments and businesses."²¹ Contrast that conclusion with the manner in which it was restated in the book that followed:²²

We propose that social scientists, systems engineers, law-enforcement personnel, and legislators work together, probably in a new agency within the United States Department of Justice, to specify in detail the formal and informal structures of the illicit governments and businesses traditionally lumped together as "organized crime."

The proposal that "New questions . . . be asked" was not restated nor was the idea that intelligence files be made available to researchers. Rather, the explanatory comments immediately following the suggestion of a new agency within the Justice Department appears to have reversed the original intent:²³

Implicit in this proposal is the suggestion that a cadre of policemen be broadly trained for organized-crime work It is high time that some policemen be trained as organized crime specialists, and that their training include general studies of the kind now necessary for military leadership.

In this form, Cressey's suggestion appears to head toward the Crime Commission's comments concerning the development of strategic intelligence;²⁴

20. Cressey, *The Functions and Structure of Criminal Syndicates*, in CRIME COMMISSION, *supra* note 1, at 60.

21. *Id.* at 57.

22. D. CRESSEY, *supra* note 1, at 297.

23. *Id.* at 297-98.

24. CRIME COMMISSION, *supra* note 1, at 15.

but it is difficult to imagine how this approach could facilitate the asking of "New questions, different from those traditionally raised by police . . ." ²⁵

Second, early in his discussion of the nature of organized crime, Cressey considered "[t]he problem of assigning a name to the American confederation of criminals."²⁶ He described the discussions that took place at the 1965 Oyster Bay Conferences on Combating Organized Crime, and the conclusion then reached that "Confederation" was the best term to use. Although not perfectly descriptive, it had the advantage, according to the conferees, of being sufficiently free from local terminology to be usable in the interjurisdictional setting. It did not mean that the conferees rejected any ethnic identification of organized crime; undoubtedly, most of them said "Confederation" but thought "Italian." They had in mind a "loosely knit conspiracy, which is Italian dominated . . ." ²⁷ On the other hand, it is apparent that they wished to leave room for a wider focus on the problem: "Practically all students of organized crime are agreed that this organization does not represent the total or organized crime . . ." ²⁸ In his paper for the Crime Commission, Cressey adopted this approach. Although clearly describing a structure based on existing theories of "Mafia" and "Cosa Nostra," he referred to it throughout his paper as "Confederation."

With the publication of *Theft of the Nation*, however, a change occurred. His earlier description of the Oyster Bay discussion is recapitulated, with some side observations interpolated;²⁹ it is followed immediately, however, by a supplemental comment not in the original paper:³⁰

We are satisfied that "Cosa Nostra" is as good as any other term While Cosa Nostra still tolerates some major operations by criminals of ethnic backgrounds which are not Sicilian or Italian, if one understands Cosa Nostra he understands organized crime in the United States.

In the remaining discussion "Confederation" is replaced throughout by "Cosa Nostra."³¹ This change in name is unfortunate. It restricts Cressey's later analysis—most of which is quite useful in a speculative sense—to

25. Cressey, *supra* note 20, at 60. The development of strategic intelligence resources within the agency responsible for ultimate action is risky. "Intelligence must be close enough to policy, plans, and operations to have the greatest amount of guidance, and must not be so close that it loses its objectivity and integrity of judgment." S. KENT, STRATEGIC INTELLIGENCE 180 (1951).

26. Cressey, *supra* note 20, at 27.

27. *Id.* at 28.

28. *Id.*

29. D. CRESSEY, *supra* note 1, at 16-20.

30. *Id.* at 20-21.

31. With few exceptions the only significant one of which is noted above, (*see* text accompanying notes 21-23 *supra*), the entire paper is incorporated into the remainder of the book, with the addition of supplemental material based largely on now-public material obtained by law enforcement agencies through wiretap or "overhear" devices. The change in name noted here is the only substantive modification of the earlier Crime Commission material not previously noted.

what can be understood about organized crime if one is limited to previously established notions of the law enforcement community. That perspective contains little room for "new questions."

WHAT SHOULD WE UNDERSTAND ABOUT ORGANIZED CRIME?

Since there has not yet been a sustained, systematic search for new understandings about organized crime, no firm assurances can be given that the lines of inquiry suggested here will turn out, in the long run, to have been correct ones to follow. Nevertheless, some promising starting points can be identified and pursued briefly. The ultimate goal in each case is knowledge that will contribute generally to organized crime control.

What Is the Role of Illicit Enterprise in American Life?

The choice of a name other than "organized crime" is a deliberate effort to escape from a concept so overburdened with stereotyped imagery that it cannot meet the basic requirements of a definition — it does not include all the phenomena that are relevant; it does not exclude all the phenomena that are not relevant; and it does not provide a sufficient framework for taxonomic description.³² "Enterprise" is preferable to "activity" because the phenomena in question have objectives that are entrepreneurial in nature. "Illicit" is preferable to "criminal" because, in the present discussion, it establishes a less pejorative base for analysis, and because it can be distinguished in an economic sense from "licit." The antonym of "criminal" is the legal alternative "civil" — a less useful distinction for the purposes of the present analysis.

Implicit in the question being posed is an assumption that social and economic behavior can be depicted as a continuous distribution, "ranging from [the] very saintly to the most sinful."³³ If this be the case, there is no clear distinction between so-called "astute business practices" and illicit practices; the entrepreneur faced with the right mix of competitive stresses and undetectable (or at least low risk) opportunity may shift his behavior toward the "bad" or "sinful" end of the scale.

Conventional descriptions of organized crime appear to operate from a different assumption — that activities such as gambling, loansharking, union racketeering and drug trafficking are distinctive in character from "legitimate business" and operate according to different cultural values. The distinction becomes most apparent when the threat of organized crime is found to be its "infiltration of legitimate business,"³⁴ or its "culture of fraud, corruption, violence, and murder."³⁵

32. See Schelling, *supra* note 12, at 115-17. Schelling attempted such a taxonomic description, to explain "why some underworld business becomes organized and some remains unorganized." *Id.* at 115.

33. L. WILKINS, *SOCIAL DEVIANCE* 46-47 (1965).

34. CRIME COMMISSION *supra* note 1, at 4.

35. D. CRESSEY, *supra* note 1, at 1.

Is the distinction between the upperworld and underworld that clear, or is there one world in fact, in which illicit enterprises, which have clear and often accepted roles, are linked to licit enterprises by functional similarity and by practices that evidence only the subtlest of distinctions? Is loansharking, for example, really a distinctive enterprise, or is it an extension of the banking business beyond legally permissible rates of interest with functionally identical problems of credit review, collection and default, loan conditions, customer satisfaction? Is the loansharking enterprise based on forcing otherwise reluctant customers to deal with it, or on the opportunity for relatively low-risk profit from individuals or enterprises that cannot obtain credit from legal sources? Is the threat of violence the force that inhibits the borrower from defaulting, or is it the potential loss of a credit line that impels repayment?

It may be somewhat unfair to impute as heavy an emphasis on an upper-under world distinction to contemporary organized crime writings as these questions seem to do. Salerno and Tompkins refer often to the functional and operating "correspondence between United States business and organized crime."³⁶ At the same time, a distinction is drawn between organized crime and legitimate business that assumes a sharp demarcation between the two:³⁷

The difference between organized crime and a large corporation is that a company may use sharp, and even unfair, business practices in moving ahead of the competition, but it does not try to capture a share of market with a gun or club. It sells by persuasion, competition, service, and ideas rather than extortion. And many companies' violations of antitrust, labor, tax, food and drug and other laws are inadvertent rather than systematic.³⁸

When the principal frame of reference shifts from a stereotyped cast of persons operating in a separate world of crime to illicit enterprises at one end of a continuous spectrum of business activity, it becomes clear that more is involved than the events and persons conventionally identified as organized crime. Such activities as price-fixing, "blockbusting," fraudulent sales, and contract payoffs — perhaps even "conflicts of interest . . . in connection with the organization and operation of unregistered investment partnerships"³⁹ — are also part of illicit enterprise. To make sense of this larger category, a typology, accompanied by a list of distinguishing characteristics, would be required. For example, while all activities properly identified as illicit enterprise apparently entail conspiracy, do they also require corruption? Is violence a common characteristic? Do they all represent the same dangers to society in terms of illegal accumulation of wealth, neutralization

36. R. SALERNO & J. TOMPKINS, *THE CRIME CONFEDERATION* 101 (1969).

37. *Id.* at 203-04.

38. The distinction insisted upon here is a curious one, considering that only two pages earlier the Chicago jukebox industry is described in terms of politeness, service, and persuasion, as an example of how "the soft sell has taken hold in Chicago, the last stronghold for rampant violence." *Id.* at 200-01.

39. Steiger, *Secret Report on Wall St. Abuses*, N.Y. Post, Dec. 8, 1970, at 4, col. 2.

of law enforcement, and subversion of "the very decency and integrity that are the most cherished attributes of a free society"?⁴⁰ It may well be that within a correct typology of illicit enterprise, conventional organized crime activities remain clustered and, in the final analysis, they may be the largest single grouping within the larger category. However, other and perhaps unexpected companions will also emerge, and an understanding of the category as a whole may provide a clearer and more convincing explanation of the origins and significance of any of its subjects. From the standpoint of law enforcement, it may also have the practical advantage of providing a clearer relationship between the functions of an Organized Crime and Racketeering Division and other regulatory agencies.

This line of inquiry may provide a better explanation for the vexing problem often characterized as the "fabric of society" question. As Salerno and Tompkins put it: "Organized crime . . . is so thoroughly woven into the fabric of our society that we no longer recognize it as special or different, immensely wealthy or powerful."⁴¹ This statement assumes that organized crime was once a separate entity, not inherent in American life (else, why note that "we *no longer* recognize it as special"). As such, the further assumption is that it can be divorced from American life if the right approach is taken. The essence of the ensuing strategy is to eliminate organized crime by eliminating the group of persons who engage in it. If, on the other hand, illicit enterprises, including those activities usually categorized as organized crime, are a natural outgrowth of our economic structure, then the assumption that an attack on its purveyors will lead to its demise is questionable and an entirely different strategy may be called for.

Another potential advantage of this line of inquiry is that it may lead to a successful search for historic parallels and the insights they may provide. The present-day focus on Italian dominated syndicate crime as synonymous with organized crime assumes that the Prohibition Era gave it birth. Salerno and Tompkins note:⁴²

Any list of organized crime's heroes would have to rank Representative Andrew J. Volstead and Benito Mussolini at the top. Unknown to each other, and without conscious intent they set the stage for the organization of crime in the United States.

A second theory, one that never really caught on, traces its history to the early gangs of the 19th century. Tyler enunciated this theory a decade ago:⁴³

40. CRIME COMMISSION, *supra* note 1, at 24.

41. R. SALERNO & J. TOMPKINS, *supra* note 36, at 392.

42. *Id.* at 275. Similarly: "[C]rime first got organized along modern business lines during Prohibition. This development has been clearly documented, although the reasons for it have been somewhat confused." Moynihan, *The Private Government of Crime*, 25 THE REPORTER, July 6, 1961, at 15.

43. G. TYLER, ORGANIZED CRIME IN AMERICA 89 (1962). See also Tyler, *An Interdisciplinary Attack on Organized Crime*, in *Combating Organized Crime*, 347 ANNALS, May 1963, at 107-08 (special issue).

Contrary to popular belief, organized crime did not begin with Prohibition. . . . Nor did "crime incorporated" begin with the highly publicized Mafia. . . . The line of development from buccaneer to businessmen, from fisticuffs to finance parallels the contour of the American economy. The binding tie from past to present is the very accurate word "gangster."

Tyler's preoccupation with gangs⁴⁴ obscured his more penetrating observation concerning parallels in the American economy. Ordinarily, when that possibility is raised, similarities are found in the turn-of-the-century robber barons. Tyler recalls Jay Gould, Daniel Drew, and Commodore Vanderbilt, but only in terms of their relationship (as potential employers) to his gang theory.⁴⁵ If the focus is instead on illicit enterprises in the American economy, not simply on figures from the immediate past whose affairs are characterized by dubious business practices and by the use of violence, perhaps more useful referents will emerge. For example: Is the slave trade one of the earliest examples of organized crime in America?

Originally, slavery was a legitimate business in the American Colonies. As DuBois observed: "That the slave trade was the very life of the colonies had, by 1700, become an almost unquestioned axiom in British practical economics."⁴⁶ By 1774 under a combination of economic, moral, and patriotic arguments the Continental Congress decided to prohibit the slave trade. In the long run, the result of that action was an increase in demand for new slaves and a rise in prices. During the Revolution, "smugglers made fortunes."⁴⁷ Although the trade revived after the Revolutionary War, various states enacted laws against it. The stalemate between Georgia and South Carolina, the only states with a flourishing slave trade,⁴⁸ and the rest of the delegates to the Constitutional Convention of 1787 made a national prohibition of the trade impossible. The compromise adopted was a provision that the importation of slaves could not be prohibited nationally before 1808.⁴⁹

In the intervening period, additional state laws were passed and, beginning in 1794, federal legislation was enacted to restrict American engagement in international slave trade. By 1798 even the states that had previously sanctioned slave trade prohibited it. In 1803, however, South Carolina reopened the traffic. One justification for that action was the state's inability to enforce its law:⁵⁰

44. This preoccupation with gangs is illustrated by stories from New York, Chicago, Denver, and San Francisco in the mid-1800's, as well as the tale of Wyatt Earp's capture of the Thompson Brothers. G. TYLER, *ORGANIZED CRIME IN AMERICA* 96-146 (1962).

45. G. TYLER, *supra* note 43, at 90.

46. W. DUBOIS, *THE SUPPRESSION OF THE AFRICAN SLAVE TRADE TO THE UNITED STATES OF AMERICA 1638-1870*, 4 (1896).

47. *Id.* at 48.

48. The slave trade was also legal in North Carolina, but with a prohibitive duty applied. *Id.* at 69.

49. U. S. CONST. art. V.

50. Speech by Rep. Lowndes of South Carolina, 13 ANNALS OF CONG. 733 (1804); W. DUBOIS, *supra* note 46, at 85-86.

With navigable rivers running into the heart of [the state], it was impossible, with our means, to prevent our Eastern brethren, who, in some parts of the Union, in defiance of the authority of the General Government, have been engaged in this trade, from introducing them into the country. The law was completely evaded, and, for the last year or two, Africans were introduced into the country in numbers little short, I believe, of what they would have been had the trade been a legal one.

The South Carolina action "led . . . to an irresistible demand for a national prohibitory act at the earliest possible moment;"⁵¹ the Act of 1807 resulted. However, the Act was ineffective because no special machinery had been provided for enforcement, and the appeal of profit was too strong for entrepreneur and sympathetic (or venal) enforcement officer alike. Nor was the appeal of illicit enterprise limited to the South:⁵²

When I was young, the slave trade was still carried on, by Connecticut ship masters and Merchant adventurers, for the supply of Southern ports. This trade was carried on by the consent of the Southern States, under the provisions of the Federal Constitution, until 1808, and, after that time, clandestinely. There was a good deal of conversation on the subject, in private circles.

Supplemental acts for tighter enforcement were passed in 1818 and 1820, but traffic in slaves was not successfully eliminated until slavery itself was ended by the Civil War. In the intervening period, smuggling continued with only sporadic and ineffective efforts to suppress it.

This brief review of circumstances suggests that the slave trade, at least from 1808, was an organized criminal activity. It is also clear that the question of legality had little effect on the operation of the enterprise, other than tactical adjustments (such as registration of vessels under foreign flags) to avoid the unlikely possibility of prosecution. But legality aside, the slave trade remained a force in the American economy even after it was outlawed.

What role did the slave trade play in the economic development of America? How was the illicitly derived development capital of the slave traders absorbed into the economy? How were the slavers themselves, as illicit entrepreneurs, eventually absorbed into American life? Did the slavers attempt to control all "legitimate economic and political activities," or to "influence legislation," as Cressey fears today's organized criminals wish to do?⁵³ Such exploration of historic parallels may help illuminate effective strategies for today's needs and, equally importantly, point to deficiencies in ineffective strategies.

One cautionary note. It is easy to draw mistaken parallels from history, especially when only some of the details of past events are known. Thus, before drawing too many inferences from the history of illicit slave trading, the valid-

51. W. DuBois, *supra* note 46, at 72.

52. W. C. Fowler, LOCAL LAW IN MASSACHUSETTS AND CONNECTICUT, HISTORICALLY CONSIDERED 122-26 (1872) (quoted by W. DuBois, *supra* note 46, at 110).

53. D. Cressey, *supra* note 1, at 2-3.

ity of apparent parallels must be considered carefully. Two contradictory conclusions can be drawn. History in this case either demonstrates the futility of prohibitory measures that do not rest on a sufficiently broad public consensus or demonstrates the inexorable threat that immoral but lucrative practices pose to a moral society (the uncompromising stand of the slave traders in the late 1700's did, after all, lay the seeds of the Civil War). Which conclusion should be drawn if the attempted parallel is between the slave trade and gambling? It appears that the slave trade parallel can be used to support either side of the legalized gambling debate.

A focus on illicit enterprise may also justify cross-cultural comparisons. Organized crime is conventionally viewed as an American phenomenon. The growth of gambling casinos in the Bahamas and in Great Britain is generally viewed as an example of American organized criminal activities expanding into overseas ventures.⁵⁴ Illicit enterprise is not culturally circumscribed—all it appears to require is entrepreneurial skill and the willingness to exploit for illicit gain.⁵⁵ An exploration of the distinctions between illicit enterprise in this country and in others might suggest peculiar vulnerabilities of the American economy that could be remedied.

A final advantage of this line of inquiry is the identification of a category of activities wider than the conventional description of organized crime and more nearly inclusive of the modern-day illicit enterprises that do threaten American life. Activities within the conventional spectrum do not hold a monopoly on organized corrupt practices, extortion, black markets, or racketeering. A concept that is inclusive of such activities will be more appropriate as a base for analysis and understanding.

What Is the Nature of the Task Environment of Illicit Enterprise?

Thompson has formulated an approach to organization theory that combines open system and closed system strategies.⁵⁶ He conceives of complex organizations "*as open system, hence indeterminate and faced with uncertainty, but at the same time as subject to criteria of rationality and hence needing determinateness and certainty.*"⁵⁷ Under these circumstances it is advantageous for an organization to protect its technical core by reducing the number of variables operating on it. Thompson speaks of the "task environment" of an organization as those parts in its environment that are "relevant or potentially relevant to goal setting and goal attainment";⁵⁸ its four principal sectors are customers, suppliers, competitors, and regulatory groups. Within the task environment an organization seeks to establish its domain, or the claims that it stakes out for itself in terms of a range of pro-

54. See, e.g., H. MESSICK, *SYNDICATE ABROAD* (1969).

55. An example of non-American organized illicit enterprise is Antonio Moreno who defrauded the French Social Security Administration to the extent of an estimated 30 million francs by registering 3,000 nonexistent children as recipients of family assistance. *Albany-Times-Union*, Dec. 20, 1970, §A at 10, col. 1.

56. J. THOMPSON, *ORGANIZATIONS IN ACTION* (1967).

57. *Id.* at 10.

58. *Id.* at 27.

ducts, the population served, and the services rendered. Most significantly, Thompson points out:⁵⁹

Establishment of domain cannot be an arbitrary, unilateral action. Only if the organization's claims to domain are recognized by those who can provide the necessary support, by the task environment, can a domain be operational. The relationship between an organization and its task environment is essentially one of exchange, and unless the organization is judged by those in contact with it as offering something desirable, it will not receive the inputs necessary for survival The specific categories of exchange vary from one type of organization to another, but in each case . . . exchange agreements rest upon *prior consensus regarding domain*.

The task environment presents numerous constraints and contingencies against which the core technology must be protected. To deal with such exogenous variables, organizations create boundary-spanning components — units with a principal responsibility of relating to the outside world.

There is a great deal more to Thompson's analysis than this brief introduction suggests. While one can readily concede that it applies to General Motors, does it also apply to organized crime and other illicit enterprises? It may say more about the phenomena under study than the prevailing stereotypes, even though at first glance there appear to be problems with events that are more predatory appearing than exchange appearing.⁶⁰ It suggests that there may be more effective routes to the control of organized crime than the "massive attrition" strategy of strike forces. And it raises questions concerning scholarly approaches to the analysis of organized crime that depend too heavily on conventional stereotypes as a starting point.

Is there really a unique position of "corrupter" in the structure of organized crime, or is that simply the name that might be given to a boundary-spanning component that in legitimate businesses would be referred to as a registered lobbyist? The functions are basically similar: to insure that the powers of regulatory groups in the task environment — the legislature, the regulatory agency, and the judiciary — do not interfere unduly with the organization's core technology. The distinctions between them have more to do with the tools of the trade and the circumstances under which they operate than with ultimate objectives. The lobbyist can appeal openly to common values and shared political allegiances, and can offer nonmonetary rewards such as recognition and acceptance in desirable social circles, whereas his counterpart in organized crime apparently must deal surreptitiously and in terms of his only meaningful reward — money.

Recognizing the importance of the consumer in defining the task environment may also be important because it confronts the notion that organized crime is an enterprise that stands by itself. This becomes significant when one considers responses to organized crime. If it were a self-contained, basically

59. *Id.* at 28.

60. See text accompanying note 10 *supra*. It suggested, for example, that Judge Weintraub's perception of the phenomena at issue may be better than he realizes.

alien entity, it could be erased from the contemporary scene as political leaders have promised to do. But is this possible? Would the "elimination" of the individuals presently associated with organized crime also eliminate the demand for gambling or for unsecured loans at excessive interest rates or for narcotics?

In fairness to a good number of law enforcement personnel it should be noted that the challenge here is to a doctrinaire assumption that is seldom held in its pure form. The consumer's role in creating the demand for organized crime is generally recognized in the better police departments and prosecutors' offices as well as in the serious literature. Cressey devotes the major portion of one chapter to supply and demand, discussing the details of gambling, loansharking, drugs, and black market labor.⁶¹ His attention then shifts to a consideration of how the profits of organized crime activities are reinvested in legitimate businesses, and the dangers that entail without resolving the original question of the role of supply and demand in creating opportunities for illicit enterprises.⁶² One can only conclude that prior allegiance to the Mafia Conspiracy theory permitted no interference from contradictory notions that might emerge from a more complete analysis.

What Function Does Violence Perform in Illicit Enterprise, as Distinguished from Its Function in the Economy Generally?

Violence is associated with the conventional view of organized crime, and contemporary literature makes a conspicuous point of it — associating it with extortion, loanshark collection, and the maintenance of order within organized crime groups.⁶³ Pathological violence, while not entirely passed, is certainly less frequent than in the days of Arthur Flegenheimer ("Dutch Schultz")⁶⁴ and indiscriminate violence is not part of the regular organized crime scene.

What is the function of violence? Is the function unique to organized crime, or is it likely to occur in any illicit enterprise? Is there an equivalent function in legitimate business? If there is a functional correspondence, it may suggest new clues as to how violence within illicit enterprises may be met. It would appear that the activities within organized crime that are identified as "violence" might serve three principal functions: maintenance of internal discipline; enforcement of market conditions; and control of competition. The latter function was particularly evident during the 1920's and 1930's, but was largely stabilized by a series of events that culminated in the so-called "Castellammarese War" of 1930-1931.⁶⁵

61. D. CRESSEY, *supra* note 1, at 72-108.

62. *Id.* at 99-107.

63. See generally *id.* for examples of the identification and interpretation of "violence" in the conventional literature of organized crime. See also R. SALERNO & J. TOMPKINS, *supra* note 36.

64. See, e.g., Davis, *Things I Couldn't Tell Till Now*, COLLIERS, July 22, 1939, at 9, quoted by D. CRESSEY, *supra* note 1, at 179 (account of the murder of Jules Martin).

65. D. CRESSEY, *supra* note 1, at 35-49; R. SALERNO & J. TOMPKINS, *supra* note 36, at

Cressey has suggested that one of the positions within the organization structure of organized crime is that of the Enforcer, who "makes arrangements for injuring or killing members and, occasionally, nonmembers."⁶⁶ He has interpreted the function of the Enforcer's violence in political terms. The Enforcer is analogous to the prison official who makes arrangements for imposing the death penalty. The presence of such a position indicates that the code within which Cressey's Cosa Nostra operates "has been designed to minimize the degree of conflict and to maximize the degree of conformity among members."⁶⁷ It also indicates that there are legislative and judicial processes through which "regularized expectations" (to use Cressey's phrase) are set concerning the way conflict will be resolved within the organization. The Crime Commission, on the other hand, suggests that violence has a different purpose: enforcement "is necessary for the maintenance of both internal discipline and the regularity of business transactions."⁶⁸ In their view, the "law" being applied is both criminal and commercial.

If the enforcer function identified by Cressey is viewed within Thompson's task environment concept described earlier,⁶⁹ the business regulation function proposed by the Crime Commission assumes greater importance. If organized crime, as an illicit enterprise, operates by the same rules of organizational dynamics that characterize legitimate enterprises, then its principal internal concern is to protect its technical core from uncertainties in the task environment.⁷⁰ Stability in the market place may thus be a stronger motive for controlling individual behavior than political fealty.

That assumption can be tested by considering the kinds of problems that affect businesses of all kinds, both licit and illicit. Such a study indicates that legitimate businesses do have problems similar to those of organized crime. One of the most direct parallels appears between the bank and the loanshark. The bank is an example of what Thompson calls a mediating technology, or "the linking of clients and customers who are or wish to be interdependent."⁷¹ With both multiple suppliers (depositors) and customers (borrowers), the bank requires a high degree of standardization:⁷²

The commercial bank must find and aggregate deposits from diverse depositors; but however diverse the depositors, the transaction must conform to standard terms and to uniform bookkeeping and accounting procedures. It must also find borrowers; but no matter how varied their needs or desires, loans must be made according to standardized criteria and on terms uniformly applied to the category appropriate

85-87. The principal historical source is Valachi. See P. MAAS, *THE VALACHI PAPERS* 83-112 (1968).

66. D. CRESSEY, *supra* note 1, at 165. The role of "Enforcer" is described at length at 164-67.

67. *Id.* at 166.

68. CRIME COMMISSION, *supra* note 1, at 8 (emphasis added).

69. See text accompanying notes 56-62 *supra*.

70. J. THOMPSON, *supra* note 56, at 19.

71. *Id.* at 16.

72. *Id.* at 16-17.

to the particular borrower. Poor risks who receive favored treatment jeopardize bank solvency.

The bank must be prepared for the borrower who cannot repay a loan. Ultimately, its response will be to claim the collateral posted by the borrower; this may entail foreclosing on personal or business property. The bank's purpose in foreclosing is not simply to recover funds loaned in a particular case, but also to insure that other borrowers will operate within "regularized expectations" of the banking business. The individual defaulter who receives favored treatment is not likely to jeopardize bank solvency by himself; but if his treatment sets an example for other borrowers, solvency might well be endangered. The application of standard criteria for both lending and collecting thus protects the stability of the mediating function (linking lender and borrower) which is the bank's core technology.

The loanshark's task environment is much simpler. For all practical purposes he has only one supplier, either himself or his backer. Since he operates outside banking laws, he has no responsibility to regulatory agencies. His only purpose in maintaining records is to protect the link between his one supplier and multiple customers; he thus avoids the complexities occasioned by the bank's accountability to multiple money suppliers and to the regulators of banking activity. His major problems in protecting his core technology relate to obtaining customers and ensuring loan repayment. The loanshark may foreclose on property, as does a bank; but since he does not have access to judicial authority his methodology is that of becoming a silent partner in a legitimate business.⁷³ Alternatively, or in the absence of other collateral and the unavailability of judicial remedies, he may resort to violence against the borrower.⁷⁴ As with the legitimate banker, his purpose is not simply to recover any particular funds, but to set an example for other borrowers. In this fashion, the long-term stability of the mediating function is protected.

Legitimate businesses and organized crime also have comparable problems in personnel management. Particular parallels concern the overly-ambitious subordinate and the defector. If a legitimate enterprise cannot reach an accommodation with the ambitious subordinate (promotion, transfer, reorganization and reassignment, or even reconciliation to a subordinate role), that individual can be dismissed. He may leave with bitterness sufficiently hostile to push for a public airing of his version of the separation, and his assessment of the company in general.⁷⁵ Resulting publicity may be distasteful to the enterprise, but as long as the employee does not reveal information that would affect the enterprise's competitive position, or does not detail illegal practices, the core technology of the enterprise will not be af-

73. See R. SALERNO & J. TOMPKINS, *supra* note 36, at 235-42.

74. *Id.* at 397-402.

75. The recent litigation between the Hughes Tool Co. and Robert Maheu, former manager of Howard Hughes' Nevada enterprises, while colored by the personal nature of the Hughes' operation, is a case in point.

fect. If necessary, the risks that might accompany such a separation can be anticipated and defensive strategies devised.

A defector poses a more serious problem in a highly competitive industry in which trade secrets lie at the heart of the core technology. Personnel management in such a circumstance may become much more delicate, and individual decisions may reflect the potential vulnerability of the core technology as much as the enterprise's need for a particular individual's competencies. Since stability of the market place (from the standpoint of the enterprise) remains a paramount concern, such an industry may be characterized by active intelligence and counter-intelligence components, aimed in part at reducing dependence of the enterprise on holders of "secrets," and thus minimizing the risks that a defector might pose to its core technology.

The task environment of the illicit enterprise presents different problems. Public revelations by the discharged employee or the defector cannot be tolerated — the enterprise itself would then come under scrutiny by regulatory agencies. Survival of the illicit enterprise may then be at stake in a more critical way than is the case with personnel matters in a legitimate enterprise.

As these examples illustrate, drawing correct comparisons between legitimate businesses and illicit enterprises is a difficult task. The principal barrier lies in the differences in task environments, particularly regarding the relationship between the illicit enterprise and regulatory groups. In the legitimate business, regulating agencies monitor action and assist in applying the "rules of the game" to the remainder of the task environment. To enforce those rules, a range of sanctions exists, many of which are economic in nature. In the illicit enterprise, however, the regulatory agency is unable to maintain the integrity of market activities: enterprises that are proscribed at the outset can hardly be monitored to see that the "rules of the game" are being followed. In these circumstances, the illicit enterprise has limited alternatives.⁷⁶ While the core technology must be protected, the available sanctions are personal, rather than economic. The individual, not his property, may be attacked.

Prevailing theories of organized crime interpret such a possibility as entirely "political," rather than "economic." The borrower who does not repay the loanshark appears to be defying the organization's avowed intention to control personal conduct; the employee who threatens stability is presumed to be a political risk to the invisible government. The foundation of this conclusion is an interpretation of the use of violence to serve the same function of protecting the authority of the illicit organization as criminal sanctions perform in maintaining the authority of the state. As noted at the outset of this discussion, the justification for viewing organized crime as a political activity — as a government as well as a business — lies in the

76. The limited alternatives of an illicit enterprise may be comparable to the options of a vigilante group. For a discussion of those limitations see J. CAUGHEY, *THEIR MAJESTIES THE MOB* 13-17 (1960).

role of the Enforcer being analogous to the prison official, a "political" officer, whose function in turn implies legislative and judicial activity within the organization. On the other hand, if the basic decision being made is protection of the business enterprise, not simply survival of an organization and its feudal chief who enunciates and interprets the organization's code of behavior,⁷⁷ then perhaps the assumption that organized crime is an "invisible government" should be reassessed. In that reassessment, what would be the relationship between the activities associated conventionally with organized crime, and other illicit enterprises? Is the use of violence common to other enterprises, or is the function of maintaining economic stability carried out in some other fashion? Further investigation might indicate varying alternatives in the application of sanctions, just as there are likely to be variations in the spectrum of illicit enterprise.

Further investigation might also reveal that a shift away from violent self-regulation has been occurring since the end of World War II.⁷⁸ If this is the case, it may be useful to consider what has prompted that transition. It may be that violence was necessary in the past because market stability was based on the fear it engendered. Perhaps it is fair to ask today whether illicit enterprises survive because they are feared, or because they are useful, or because they have become necessary. If utility or necessity is replacing fear—and if this change in values is more than just rationalization of a weak power position relative to illicit enterprise—then perhaps grounds exist for a reexamination of the legal distinctions between licit and illicit behavior.

Finally, further investigation might reveal that the so-called position of "Enforcer" has become obsolete. The decrease in violence may be a signal of that. The role of enforcement—monitoring action and assisting in applying the "rules of the game," may be increasingly assumed by law enforcement. Judicial remedies are available to the illicit entrepreneur in at least one significant way—the maintenance of a monopoly position; competitors can be "turned in." One can assume that a law enforcement agency would appreciate information leading to a successful arrest. The continuing competition for the Harlem numbers racket suggests that it may be profitable to eliminate a competitor;⁷⁹ the fact that arrests help regulate the illicit market place is incidental, from the standpoint of the arresting agency, to the fact that action is taken against persons who are violating the law. The fact that both the illicit entrepreneur and the law enforcement officer "benefit" from

77. See D. CRESSEY, *supra* note 1, at 186: "The code of honor and silence which asks every member of Cosa Nostra to be a 'stand-up guy,' and which underlies the entire structure of the criminal cartel and confederation, performs the same important function that the 'rule of law' once performed for absolute monarchs—it protects the personal power of the rulers."

78. See, e.g., note 38 *supra*.

79. Some of the circumstances of this competition are noticed in Grutzver, *Cubans Here Are Ending Mafia's Monopoly on Numbers Racket, with 20% of City Play*. N.Y. Times, Feb. 22, 1970, at 36, col. 2.

such circumstances suggests that a symbiotic relationship between them may be a more accurate analogy than the conventional view of organized crime as a "malignant parasite."⁸⁰

A further exploration of this alternative might reveal that the violence historically associated with the Italian-dominated syndicate crime of the 1920's and the 1930's was not so much an essential attribute of the enterprise being developed as it was a misreading of the real nature of law enforcement in this country by immigrants from a different law enforcement setting. Once the role of law enforcement as a regulator of the black market was better understood, reliance on self-regulation quickly dropped off. By way of comparison, the success of the illicit slave trade a century earlier certainly seems to have had little need for violence as a means of controlling the market place; the violence associated with trading activities (as distinct from the violence of slavery itself) was directed at the problem of inventory control that was peculiar to an enterprise dealing in human beings as objects of trade.

Judicial remedies may also be available indirectly for control of the customer. The power of the narcotics distributor over the addict-pusher is more than just the junkie's dependence on the narcotics; that dependency is also a potential basis for turning the noncooperative pusher over to the police. A less direct, but equally useful, weapon may be present in some loanshark arrangements. The loanshark is interested in maintaining a hold over his debtor. He may not have access to the courts to enforce the express conditions of his loan; but if the customer is engaged in questionable activities those activities can be the basis for "punishing" or penalizing the uncooperative customer.⁸¹

It may also be that other means of enforcement are available beyond that of violence or recourse to the courts. The loanshark may be able to use the fear of exposure without the need for other forms of pressure. That "punishment" also need not be related directly to the circumstances of the entrepreneurial arrangement between borrower and lender; other social or economic conditions not directly related to the loan may create a sufficient position of vulnerability.

What Function Does Corruption Perform in Illicit Enterprise, as Distinguished from its Function in the Economy Generally?

To a greater extent than violence, corruption is considered a hallmark of organized crime. The Crime Commission believed it to be an essential attribute: "All available data indicate that organized crime flourishes only

80. "[Organized crime] is a malignant parasite which fattens on human weakness." OYSTER BAY CONFERENCES ON COMBATTING ORGANIZED CRIME, REPORT, COMBATTING ORGANIZED CRIME 19 (1965).

81. For example, the gambler who needs the services of a loanshark may not be reporting his correct income to tax agencies. Threatening to anonymously supply such information to the Internal Revenue Service may impel prompt payment.

where it has corrupted local officials."⁸² Corruption can occur in any element of criminal justice administration, and at any level, with public officials "whose legitimate exercise of duties would block organized crime and whose illegal exercise of duties helps it."⁸³

Corruption and graft are not exclusive prerogatives of organized crime; consequently, it may be useful to distinguish between organized, sustained, and systematic corruption aimed at creating a favorable climate for illicit enterprise, and individual instances of bribery aimed at obtaining favorable resolution of a particular governmental matter. The latter may have been what Sufirin meant when he wrote that "under some circumstances graft may play a positive role in modifying an administrative structure in line with rationality and, perhaps, even public morality."⁸⁴ He observed that practical levels of behavior — despite "deep moral sentiments of society" — do not always present a clear choice between what is morally right and wrong; and that the differing criteria of the political market vis-à-vis the economic market may well lead to conflicts between desirable political behavior (through administrative rulings and legal enactments) and their intended economic effects. The more complex the bureaucracy, the more complex the transactions and the greater the likelihood of incompatibility. Thus, circumstances may arise in which the only effective way to achieve a desirable economic end is through an act of graft. In such circumstances, the most useful question may be: "What would the government or business have done in the absence of graft?"⁸⁵

In contrast, the focus here is on deliberate and continuous efforts to deflect the application of law to illicit enterprises. Once again, the questions to be asked concern the function of corruption in organized crime, its uniqueness, if any, to that form of enterprise, and the functional parallels that may exist with legitimate business. Generally, the function of corruption is to see that legal sanctions that might otherwise stop the illicit enterprise, or penalize the entrepreneur, are not brought into play. In the discussion that ordinarily follows, a semantics problem emerges that may appear precious, but is important in setting the context within which the significance of organized crime is to be assessed: Should the function of corruption be referred to as an effort to *nullify*, or as an effort to *neutralize* law enforcement and the political process? This question arises because the Crime Commission used both words in describing the activities of organized crime. In its introductory statement, the Commission spoke of *nullification*:⁸⁶

The purpose of organized crime is not competition with visible, legal government but nullification of it. When organized crime places an

82. CRIME COMMISSION, *supra* note 1, at 6.

83. *Id.*

84. Sufirin, *Graft: Grease for the Palm and Grease for the Wheels*, CHALLENGE, Oct. 1964, at 30.

85. *Id.* at 31.

86. CRIME COMMISSION, *supra* note 1, at 2.

official in public office, it nullifies the political process. When it bribes a public official, it nullifies law enforcement.

When it turned to the issue of corruption, the Commission switched its terminology:⁸⁷

Neutralizing local law enforcement is central to organized crime's operations. What can the public do if no one investigates the investigators, and the political figures are neutralized by their alliance with organized crime?

Cressey noted the problem of corruption by suggesting that "any citizen purchasing illicit goods and services from organized criminals contributes to a culture of fraud, corruption, violence, and murder."⁸⁸ His analysis of corruption focused on internal questions of structure and authority, rather than function; consequently, his concern for the Crime Commission centered on identification of the positions of "Corrupter" and "Corruptee" within organized crime. Their function appears to have been of secondary importance, noted simply by the observations that corruption is required to keep illicit businesses in operation, and that "the position of 'Corrupter' is as essential to an illicit business as the position of 'negotiator' is to a labor union."⁸⁹

His subsequent book devoted greater attention to corruption.⁹⁰ His exposition of the problem began with an elaboration of the Crime Commission's original statement:⁹¹

Cosa Nostra functions as an illegal invisible government. However, its political objective is not competition with the established agencies of legitimate government. Unlike the Communist Party, it is not interested in political and economic reform. Its political objective is a negative one: nullification of government.

He further asserted that nullification is directed at both the law enforcement process (bribing a policeman) and the political process (bribing a politician), and that potential harm today is greater than ever before "simply because nullification of government today means nullification of a broader range of regulatory activity."⁹² The method is simple: "Corrupters nullify the law enforcement and political processes primarily by outright bribery and other rationally designed forms of 'influence'"⁹³ In this fashion,

87. *Id.* at 6.

88. D. CRESSEY, *supra* note 1, at 1.

89. Cressey, *The Functions and Structure of Criminal Syndicates*, in CRIME COMMISSION, *supra* note 1, at 59.

90. D. CRESSEY, *supra* note 1, at 248-89.

91. *Id.* at 248. Other observers have taken similar "political" approaches: "[I]n effect organized crime constitutes a private government whose power rivals and often supplants that of elected public government." Moynihan, *supra* note 42, at 15 n.39.

92. D. CRESSEY, *supra* note 1, at 250.

93. *Id.* at 271.

Cressey adopted the Crime Commission's line of thought through the consistent use of *nullify* and abandonment of the idea of *neutralize*.

The difference between them, in careful usage, denotes a difference in context. "Nullification" relates to the reversal or abolition of a legal entity, the most famous use of the concept in American history being John Calhoun's efforts to abolish the tariff of 1828 — the "tariff of abominations." Thus, when the Crime Commission observed that "the purpose of organized crime is . . . nullification" of government, it was suggesting an intention to have government void and inoperative. The concept of "neutralization," on the other hand, refers to modification of a process though which policy is implemented. When the Crime Commission observed that "neutralizing local law enforcement is central to organized crime's operation," it was suggesting a mere desire that the law not be enforced in certain circumstances. These are rather different goals for an enterprise to pursue.

If organized crime is viewed within the context of Thompson's task environment,⁹⁴ it becomes clear that illicit enterprise would be handicapped by an inoperative government. Strong regulatory agencies can be used effectively to protect or increase one's domain at the expense of potential competitors. From the standpoint of the illicit businessman, the regulatory agency has a useful function to perform in helping to maintain stability in the market place of a black market enterprise. As Schelling put it: "Without the law and some degree of enforcement, there is no presumption that the monopoly organization can survive competition."⁹⁵ It may be significant that the major documented efforts to describe organized crime all refer to Commissioner Thom's 1960 testimony before the New York State Investigations Commission:⁹⁶

[T]he syndicates are particularly happy with the consolidation of the nine police departments into the Suffolk County Police Department, as they feel that protection is easier to arrange through one agency than through many. [An intensive anti-gambling campaign] had the astounding side effect of solving the recruitment problems of the syndicate, as our drive successfully stampeded the independents into the arms of the syndicate for protection and the syndicate can now pick and choose those operators they wish to admit.

This observation illustrates how corruption can take place, and how it may be helpful to the illicit enterprise. However, its deeper significance is usually overlooked. The entrepreneur, whether engaged in organized crime or in more conventional enterprise, may wish to *manipulate* or *use* government to his advantage, but he would much prefer to have a government, rather than *no* government.

94. See text accompanying notes 56-62 *supra*.

95. Schelling, *Economic Analysis of Organized Crime*,¹ in CRIME COMMISSION, *supra* note 1, at 123.

96. Thom, Statement Before the New York Commission of Investigation on April 22, 1960, at 2 (mimeographed). See also D. CRESSEY, *supra* note 1, at 76-77; CRIME COMMISSION, *supra* note 1, at 3; R. SALERNO & J. TOMPKINS, *THE CRIME CONFEDERATION* 244 (1969).

If one wishes to gain a better understanding of the functioning of illicit enterprise in contrast to legitimate business (the objective presumably being better control of the former and better protection of the latter), it may be helpful to understand why the discussion of corruption focuses on nullification. On the surface, nullification may be more useful to the advocate wishing to drive home the magnitude of the organized crime threat, since it is a more threatening word than neutralization. Public support for organized crime control might be strengthened by such an escalation in vocabulary. A more important reason, however, may be the need to differentiate clearly between organized crime and other entrepreneurial activities. As Cressey suggested at the beginning of his analysis: "The threat of organized crime in America is similar to the threat any potential monopolizer poses to a small businessman."⁹⁷ This observation poses an immediate question: Why pick on organized crime instead of "potential monopolizers?" Cressey responded by noting two differences: the use of force and the effort to nullify government.⁹⁸ But they turn out, even with attention directed at nullification, not to be real differences at all: "[O]rganized crime uses force and threat of force to obtain monopoly, while legitimate firms do not, *at least not as often . . . organized crime nullifies legitimate government more directly, and to a greater extent, than do other forms of monopoly.*"⁹⁹

The justification for concentrating on eliminating organized crime must rest on a showing that it does undesirable or dangerous things that other enterprises do not. "Nullification" does this in part, by suggesting a level of political competition, rather than simply economic competition. This is the significance of Cressey's reference to the "illegal invisible government;" his assertion that it is only an alternative political approach and not a competitive one (as, he suggests, is the Communist Party) has an appeal that does not hold up under close analysis. If, on the other hand, organized crime is primarily concerned with stabilizing an illicit market place to its advantage, a goal that the neutralization of law enforcement would facilitate, then its character and aspirations are not that different from any other economic enterprise. If its principal motives are more economic than political, the similarities noted earlier between the corrupter and the registered lobbyist may be more useful than the distinctions between them.

When the problem of assessing the basic intent of illicit enterprise vis-à-vis law enforcement is presented in this fashion, a further question emerges as to whether *either* "neutralization" *or* "nullification" is an appropriate view of the matter. In the previous discussion concerning violence in illicit enterprises, it was suggested that the relationship between those enterprises and law enforcement may be symbiotic; if this is correct, the conventional interpretations of corruption may also need to be reassessed. As an indication of the direction that further analysis might take, it may be noted that "co-optation" may be a more useful way to describe the objectives of both

97. D. CRESSEY, *supra* note 1, at 7.

98. *Id.*

99. *Id.* (emphasis added).

law enforcement and the illicit enterprise. One of the implications inherent in this approach is that the initiative for transactions between them—the exchanges of money usually identified as bribery or corruption—may come from either side. The law enforcement officer who proposes or demands a pay-off may be guilty of selfish, venal activity;¹⁰⁰ but there may also be circumstances in which there is a higher social value to be gained by assisting in regulating the illicit market place than could be reached by attempting to suppress that market place entirely. It is this circumstance that Schelling seems to have had in mind when he spoke of “compromising” with organized crime.¹⁰¹

Aside from the approved negotiations by which criminals are induced to testify, to plead guilty, to surrender themselves, and to tip off the police, there is undoubtedly sometimes a degree of accommodation between the police and the criminals—tacit or explicit understandings analogous to what in the military field would be called the limitation of war, the control of armament, and the development of spheres of influence.

The negotiating process need not involve the exchange of money or other items of value. Regardless of the arrangements made, the end result remains a relationship definable as a “corrupt practice.” When one looks at corruption, however, rather than looking solely at organized crime, it appears to have a more general utility than simply maintaining the enterprises of organized crime. Is it an attribute of illicit enterprise generally? Is it a function associated only with governmental activities (obviously, it is not limited to the standard grouping of law enforcement agencies), or is it also useful, as Sufirin suggests graft may be, in the “purely private transaction”?¹⁰² Has the focus of organized crime served, in practical terms, as a diversion from the real issue?¹⁰³ Perhaps most importantly, what remedies can be adopted to reduce corruption? If it is so vital to illicit enterprise, direct attack on the function itself might be more effective than a direct attack on the enterprise.

Curiously enough, serious contemporary publications say much about controlling organized crime, but little about controlling corruption. The discussion of corruption is extensive; but it is more descriptive than reme-

100. “[A]fter a while, the shakedown gets to be part of the everyday budget—going into the mortgage, the car payments, and the dentist bills for the kids—and the greedy few start looking for assignments in those units, like gambling, where they can really rake it in.” Burnham, *How Corruption Is Built into the System—and a Few Ideas for what To Do About It*. NEW YORK, Sept. 21, 1970, at 30.

101. Schelling, *supra* note 95, at 123. D. CRESSEY, *supra* note 1, at 322-24, uses this theme as the basis for his concluding comments. See also Cressey's comments at 260-63 concerning “the issuing and policing of illegal licenses.”

102. Sufirin, *supra* note 84, at 31.

103. Most discussions of this point of view see organized crime as a scapegoat for anger, distress, and anxiety concerning the crime scene. See N. MORRIS & G. HAWKINS, *THE HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* 232-33 (1970). In an earlier vintage, see Bell, *Crime as an American Way of Life*, 13 *THE ANTIOCH REV.* 131, 144 (1953).

dial, and it abounds with case histories, not recommended solutions. For example, the Crime Commission was particularly concerned because it recognized that as governmental regulation expands, the opportunities to corrupt, and corruption's potential effect on the ordinary citizen and the legitimate business, will expand accordingly.¹⁰⁴ The Commission concluded that although the extent of corruption was impossible to measure, it surely existed, and that it needed to be controlled.¹⁰⁵ The problem of corruption was subsequently mentioned only three times in connection with the Commission's twenty-two recommendations, and then almost in passing.¹⁰⁶ It was not mentioned at all in the recommendations emerging from other matters investigated by the Commission. Concerning the formation of organized crime intelligence units in offices of state attorneys general and local police departments, the Commission observed that state-wide agencies might undertake investigation and action in areas "where . . . law enforcement agencies are not adequately combatting organized crime," and that this should be done without local knowledge "if, because of apparent corruption, it is necessary."¹⁰⁷ In connection with the desirability of increased news coverage of organized crime, the Commission recommended that coverage of organized crime activities include reports on "the corruption caused by it"¹⁰⁸ Concerning regular briefings of government officials about organized crime, the Commission noted that "enforcement against organized crime and accompanying public corruption proceeds with required intensity only when the political leaders in Federal, State, and local governments provide aggressive leadership."¹⁰⁹ It noted further that the reporting process should be sensitive to problems of corruption: "[R]eports should be withheld from jurisdictions where corruption is apparent and knowledge by a corrupt official of the information in the report could compromise enforcement efforts."¹¹⁰ Additionally:¹¹¹

Public fears of reporting organized crime conditions to apparently corrupt police and government personnel must also be met directly. If an independent agency for accepting citizen grievances is established, it should be charged with accepting citizen complaints and information about organized crime and corruption.

The Commission's concern for protection of intelligence information is commendable. But if corruption is the *sine qua non* of organized crime, as the Commission asserted at the outset, it is surprising that more direct action against corruption was not suggested. On the other hand, considering the Commission's initial view of organized crime, the absence of recommenda-

104. CRIME COMMISSION, *supra* note 1, at 6.

105. *Id.*

106. *Id.* at 24.

107. *Id.* at 20.

108. *Id.* at 24.

109. *Id.*

110. *Id.*

111. *Id.*

tions against corruption may not be surprising. The Commission began by looking at a specified group of enterprises, a particular group of persons held responsible for them, and the quasi-political organization they had apparently created. The enterprises themselves were not the Commission's concern;¹¹² rather, its focus was on the perpetrators and their organization, which "is dedicated to subverting not only American institutions, but the very decency and integrity that are the most cherished attributes of a free society."¹¹³ Their solution to the problem of organized crime seemed to lie in attacking the organization itself. If the Commission had been concerned instead with illicit enterprise generally, perhaps it would have noted that decency and integrity are under attack from corrupt practices, not simply from organized crime, and that the preservation of American institutions depends on a effective program to control corruption.

If the Commission had not been concerned primarily with the persons who perpetrate organized crime, perhaps the relationship of Corrupter and Corruptee would have been better understood. They require each other, as Cressey pointed out — but at whose initiative? Conventional organized crime theory assumes that organized criminals generally take the initiative in governmental relations; but this may not always be the case. The definition of corruption places initiative on the entrepreneur as destroying integrity, or causing one to be dishonest; with graft, however, attention shifts to the public servant who enriches himself through the abuse of position. In either event, a reciprocal act is undertaken; but conventional strategies of organized crime control emphasize an attack on a limited set of entrepreneurs. One might ask, within the context of the cost-effectiveness approach noted earlier,¹¹⁴ whether organized crime control would have been further advanced at this time if, for example, the energies of the last five years devoted to obtaining legal sanctions for wiretapping had been directed instead at obtaining better controls over corrupt practices.

CONCLUSION

The questions considered in the previous section do not constitute an entire, integrated theory. In testing the approach they identify, and in suggesting alternative ways of remedying the problems they are intended to explain, other areas of investigation may prove helpful. As a sketch, only, of the nature of such other matters, the following questions can be posed:

What are the forces that have shaped illicit enterprise in America?

Are the "dangers" that might be associated with illicit enterprise located in the enterprise itself, or in the consequences of its activities?

112. "It is organized crime's accumulation of money, not the individual transactions by which the money is accumulated, that has a great and threatening impact on America." *Id.* at 2.

113. *Id.* at 24.

114. See text accompanying notes 3-7 *supra*.

What are the characteristics of the entrepreneur who concentrates his activities in the illicit sector of the economy?

What has been the relationship between the development of illicit enterprise and economic development generally?

Are the illicit enterprises conventionally associated with "organized crime" more concerned with making maximum, short-range profits, or with perpetuating a stable market place?

The propositions advanced in this article rest on two fundamental assumptions: that enterprise in this country takes place across a continuous range of behavior, from very saintly to very sinful, and that the concept of a "task environment" is applicable to that entire range of behavior. When the phenomena we conventionally categorize as "organized crime" are viewed against those two assumptions, and apart from the stereotyped references to Italian-dominated syndicate crime, it seems plausible that an alternate theoretical base would have validity: a theory of illicit enterprise. Our attention should be directed toward the development of that theory.