

**PROSECUTING ORGANIZED CRIME:
NEW YORK CITY'S WAR AGAINST THE EARLY GANGSTERS OF GOTHAM**

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Bachelor of Arts, St. John's University, 2011

Juris Doctor, University of Virginia School of Law, *Expected* 2014

A thesis presented to the Graduate Faculty
of the University of Virginia in Candidacy for the Degree of
Master of Arts

Department of History

University of Virginia

May 2014

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INTRODUCTION

In 1932, the film *Scarface* was released to the American public as “an indictment of gang rule in America and of the callous indifference of the government to this constantly increasing menace to our safety and our liberty.”¹ Its charge to the government was: “What are you going to do about it?”² A little less than 40 years later, Congress passed a comprehensive set of statutes to combat crime as an organized enterprise, serving as a long overdue answer to a cross-decade plea for action. President Richard M. Nixon sanctioned these new laws, saying they would allow law enforcement to “launch a total war against organized crime.”³ Up until then, the prosecution of organized crime had been seemingly ineffective: both state and federal law enforcement struggled for dominance, yet neither was able to independently control the problem. While state prosecutors developed innovative trial strategies to combat quickly developing criminal organizations, the federal government gradually passed legislation expanding its jurisdiction into criminal matters. These new laws further expanded federal jurisdiction, giving federal prosecutors the proper tools to attack organized crime head on through their expansive power to regulate interstate commerce.

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¹ SCARFACE (The Caddo Company 1932). The 1983 motion picture “Scarface” starring Al Pacino is a remake of the 1932 satirical film.

² *Id.*

³ President Richard Nixon, Remarks on Signing the Organized Crime Control Act of 1970 346 (Oct. 15, 1970) (transcript available at <http://www.presidency.ucsb.edu/ws/?pid=2720>) October 15, 1970

The passage of the Organized Crime Control Act of 1970 (OCCA) drastically changed the status quo.⁴ OCCA spotlighted federal prosecutors as the front line of defense in America's war against organized crime. Implementing an offensive strategy, OCCA elevated certain state level felonies associated with organized criminal organizations to the status of a federal offense.⁵ "As the hearings and legislative debates reveal, Congress was well aware of the fear that [OCCA] would move large substantive areas formerly totally within the police power of the State into the Federal realm."⁶ Nevertheless, Congress expanded federal jurisdiction to previously state-exclusive matters, with the specific aim to "eradicate[e] organized crime in the United States."⁷ In addition, OCCA supplemented the legal tools available to federal prosecutors during the evidence gathering process and at trial, allowing them to compel witness testimony and grant immunity to co-conspirators willing to cooperate in the investigation and prosecution of criminal organizations. Most importantly, the Racketeer Influenced and Corrupt Organizations Act (RICO), passed as part of OCCA, redefined the lens through which organized crime was both viewed and prosecuted. RICO created enhanced criminal sanctions for involvement in criminal enterprises and created new criminal statutes whereby all leaders and members of a criminal

⁴ Organized Crime Control Act of 1970, Pub.L. 91-452, Oct. 15, 1970, 84 Stat. 922 (1970) (codified at 18 USCA §§ 841 to 848, 1511, 1623, 1955, 1961 to 1968, 3331 to 3334, 3503, 3504, 3661, 3662, 6001 to 6005; 28 USCA § 1826).

⁵ 18 U.S.C. § 1961(1)(A) (1970) defines racketeering activity as " any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is *chargeable under State law* and punishable by imprisonment for more than one year." (emphasis added).

⁶ United States v. Turkette, 452 U.S. 576, 586-87 (1981) citing 116 Cong.Rec. 35217 (1970) (remarks of Rep. Eckhardt), *id.*, at 35205 (remarks of Rep. Mikva); *id.*, at 35213 (comments of the American Civil Liberties Union); Hearings on Organized Crime Control before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess., 329, 370 (1970) (statement of Sheldon H. Eisen on behalf of the Association of the Bar of the City of New York).

⁷ Pub. L. No. 91-452, 84 Stat. 922, 923 (1976) (Statement of Findings and Purpose): It is the purpose of this Act to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime.

enterprise, even those with limited involvement, could be charged under a single indictment for all crimes committed by the enterprise.⁸

The literature suggests that the power conferred to the federal government under OCCA and RICO served as a necessary jurisdictional expansion.⁹ Historians agree that the enactment of the 18th Amendment facilitated “the creation of a national system” of cooperation among criminal organizations, nationalizing the problem of organized crime and ending its confinement within state boundaries.¹⁰ The intervention of the federal government into state-level crime was a practical response to this development, as well as to the inability of state prosecutors to effectively address the issue of organized crime.¹¹ Accordingly, the resulting legislation served as an organic federal response to a problem the states just could not handle.¹² A logical inference resulting from this view is that the states did not meaningfully contribute to OCCA and RICO and that pre-OCCA state efforts were insignificant to the resulting federal statutes.

The actual provisions of the statute tell a slightly different story. The key advancements made by OCCA and RICO were not novel, federally imagined approaches to the legal obstacles

⁸ 18 U.S.C. §§ 1961–1968

⁹ See 78 CONG.REC. 456 (1934), Gerard E. Lynch, *RICO: THE CRIME OF BEING A CRIMINAL, PARTS I & II*, 87 Colum. L. Rev. 661, 685 (1987), Craig M. Bradly, *Racketeering and the Federalization of Crime* 22 Am. Crim. L. Rev. 213,221 (1984) citing *Investigation of So-Called Rackets: Hearings Before a Subcomm. of the Comm. on Commerce, United States Senate*, 73d Cong., 2d Sess. 2 (1933).

See also John C. Jeffries, Jr. and Hon. John Gleeson, *The Federalization of Organized Crime: The Advantages of Federal Prosecution*, 46 Hastings L.J. 1095 (1995) citing William H. Rehnquist, *Welcoming Remarks: National Conference on State-Federal Judicial Relations*, 78 Va. L. Rev. 1657, 1660 (1992) (“[S] imple congressional self-restraint is called for ... in the federalization of crimes”); Civil Versus Criminal Rico and the “Eradication” of La Cosa Nostra, 28 NEW ENG. J. ON CRIM. & CIV. CONFINEMENT 279, 288 (2002)

¹⁰ *Id.*

¹¹ *Id.*

¹² John C. Jeffries, Jr. & Honorable John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1095-97 (1995) (“New federal crimes are proposed and created as responses to problems the states cannot handle. They are opposed and lamented as unwarranted intrusions into the states’ domain... We believe that organized crime (broadly defined) is an especially appropriate target for federal prosecution. As we describe below, federal prosecutors enjoy advantages that their state and local counterparts do not possess. Nowhere can the advantages of federal prosecution be employed more productively than in the attack on criminal gangs and enterprises. In our opinion, the prosecution of organized crime should be largely federalized.”)

presented by the nationalization of organized crime. Rather, the core concepts paramount to these statutes had been implemented and tested by state prosecutors long before federal lawmakers had even defined “racketeering” or considered drafting legislation in response to the problem.¹³ Even though the federal government had created a national problem by expanding its jurisdiction into historically state-level territory, the federal solution it created drew largely on state-level tactics and techniques, adding the ability to prosecute across state lines.

New York specifically served as a “laboratory for experimentation” in the realm of organized crime prosecution.¹⁴ As “the hub” of organized crime for the country, New York was forced to adopt its own crime prevention policies to address the public outcry against highly sophisticated criminal groups that continually threatened business and the community.¹⁵ Facing seemingly insurmountable obstacles to evidence collection (namely, lack of witnesses either willing or able to testify) and the impediments to securing long-term convictions, New York State prosecutors developed innovative techniques to bring these criminals to justice. Targeting organization leaders, indicting multiple members of the same criminal organization in a single indictment and turning co-criminals into cooperating witnesses, were all strategies implemented and tested by New York District Attorneys. These legal tactics were all later incorporated into the federal Organized Crime Control Act of 1970 and are considered among its most successful provisions. Coupling these strategies with the power of the federal government to prosecute across state lines proved to be a winning combination in the war against organized crime. Rather than usurping state rights, under OCCA and RICO the federal government implemented successful state-level techniques with broader range and jurisdiction.

¹³ *Investigation of So-Called Rackets: Hearings Before a Subcomm. of the Comm. on Commerce, United States Senate*, 73d Cong., 2d Sess. 2 (1933)

¹⁴ *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932).

¹⁵ *Supra* note 13.

The unique ground-level, legal experimentation that took place in New York is important to our understanding of both OCCA and RICO. First, it reveals state-level recognition of crime as an enterprise, a conceptual idea that is crucial to the resulting federal statutes. This process of legal experimentation also produced techniques that were effective in securing longer sentences and made prosecution of organized criminals more efficient. These techniques were so successful that they were later incorporated into both OCCA and RICO. This paper examines some of the most important prosecutorial victories against organized criminals in New York both before and after Prohibition. By examining targeted moments in the process of prosecutorial experimentation it seeks to highlight the evolving legal strategies and tactics implemented by New York prosecutors to combat and control crime as an enterprise long before the passage of OCCA and RICO. It identifies the early efforts that were successful and appear in federal Organized Crime Control statutes and illustrates why these strategies were effective and have been successful in the context of federal prosecution of organized crime. Part I will introduce early obstacles to effective prosecution of organized crime and examine the techniques the developed in response as applied in state-level cases. Part II will distinguish those strategies that have been incorporated into federal statutes, specifically OCCA and RICO. This process will reveal that New York played an important role in developing the background strategies that are crucial to OCCA and RICO, an acknowledgement that these statutes were not merely a product of federal discussion and research, but rather were influenced by ground-level experimentation on the state level.

I. GOTHAM CASE FILES: EXAMINING STATE-LEVEL TECHNIQUES

From the mid-1800's until the early 1990's, New York City's criminal landscape was largely defined by organized criminal activity. From the early immigrant gangs of the late 1800's to the business-structured mafia organization of the late 1930's, New York State District Attorneys were continuously challenged by these gangsters of Gotham and, without a timely federal solution, were tasked with developing legal strategies to win back the City from the control of hostile criminal groups. The following cases and techniques reflect targeted moments in prosecutorial experimentation during the most difficult years of New York's war against Organized Crime. They illustrate the problems of early prosecution, namely unreliable and "disappearing" witnesses,¹⁶ organizations structured to protect their leaders, and the insufficiency of the statutory scheme in securing long sentences. In turn, they introduce maverick state-level innovations designed to mitigate these problems and secure meaningful convictions

A. Technique # 1: Targeting Organizational Leaders

The first and most basic prosecutorial technique that developed in New York in response to organized crime was targeting organizational leaders. This technique was catalyzed by the earliest gangsters of Gotham – those who were members of criminal gangs before Prohibition and before the federal government began its jurisdictional expansion into criminal law. As traditional gangsters, these organizations operated solely within state boundaries and had locally known leaders. In the early 1900's, long before organized crime was on the federal radar, New York State prosecutors began to target these leaders seeking to show that even the most powerful organized criminals were not untouchable, sending a message to the rest of the organization that

¹⁶ Witnesses who were either threatened with violence or killed before trial, preventing them from testifying against organized criminals.

they too would be prosecuted if they continued to engage in criminal conduct. This strategy proved successful due to a combination of dedicated political and prosecutorial leadership and will to aggressively address the problem, utilization of high level charges, corroboration using witness testimony, and garnering wide-spread publicity. This campaign led to the conviction of the most notorious and influential gang leaders of the time. Each was sentenced to significant time in jail, causing their organizations to dissolve without an established bench to take over leadership. Although eventually frustrated, these early strategies served as an example for subsequent prosecutions.

State of New York v. Owen Madden began the process in 1915. In response to an increasing amount of gang-related murders in New York City, District Attorney Charles Perkins launched a campaign against gangs. He possessed the most important characteristics of a successful anti-organized crime administration: strong leadership and dedication to the cause. Accordingly, he allocated his office's resources to gang prosecution. Perkins garnered publicity and public attention by targeting and removing organization leaders – weakening the structure of each organization and sending a message to criminal underlings that the costs of organized crime far outweighed the benefits. In *State of New York v. Owen Madden*, Perkins utilized the New York Conspiracy Statute to charge a well-known leader of the Gopher Gang, Owey Madden, with the highest offense available under New York Penal Law, Murder in the First Degree. During the trial Madden was portrayed as a dangerous thug who was equally culpable for a homicide that he ordered his criminal associates to carry out. To solve the problem of lack of physical evidence, a common impediment to organized crime prosecutions, Perkins offered witnesses who participated in the conspiracy immunity from prosecution in exchange for their testimony. Although Madden was convicted of a lesser charge, Manslaughter, he was sentenced

to significant jail time. While Madden and other gang leaders were incarcerated, Perkins' campaign was successful and the gang structure crumbled. However, once resources were no longer allocated and the campaign was abandoned, criminal groups were able to reorganize around new unlawful ventures and continued to serve as a threat to New York. *State v. Madden* represents an early state technique that was used to effectively attack organized crime and holds a prominent place in both OCCA and RICO. By examining the historical background of the case, as well as the impediments to prosecution which the campaign sought to address, we are able to uncover both the development and significance of the strategy, leading to its inclusion in the federal statutes over 50 years later.

1. Framing the Problem

In the early 20th century, gang-rule became a formidable problem for New York City law enforcement.¹⁷ Wide spread poverty and an increasing immigrant population lead to an increase in crime in New York, especially in the Five Points District, the Lower East Side and the Tenderloin District.¹⁸ Between 1910 and 1920 over 2,882 known homicides were committed in New York, most attributable to gang related violence.¹⁹ However, prosecution of gang members proved to be problematic. Evidence gathering, corruption, and witness tampering served as the main impediments to gang prosecution. The New York Police Department (NYPD), founded in the mid-1800's, proved patently inadequate in combatting gang warfare. In addition to widespread corruption, the department was still relatively new and unprofessional. It was also

¹⁷ Gangs developed due to a wave of immigration, crowded urban living and wide-spread poverty. *See* TYLER ANBINDER, FIVE POINTS (2001).

¹⁸ *Id.*

¹⁹ Haven Emerson "Population, Births, Notifiable Diseases, and Deaths, Assembled for New York City, NY 1866-1936 from Official Record" (1936). Emerson obtained his figures from the Department of Health.

woefully understaffed – remaining stagnant in numbers from 1913- 1921- and ill equipped to respond to the “unprecedented demands made upon it.”²⁰

The corruption of Tammany Hall leaked into the NYPD, as well as the criminal court system, and many officers, officials and judges took bribes from gang members or were specifically instructed to protect gang leaders who were politically affiliated.²¹ This problem led to the Lexow Committee investigation into corruption in the NYPD, exposing Tammany influence in local government and law enforcement. As a result, the election following the Lexow Investigation was won by anti-Tammany politicians and for a short time there was reform in the realm of police corruption and gang prosecution in New York.²²

2. A Legal Solution - Perkins Launches Campaign Against Gang Leaders

In November 1914, New York County District Attorney Charles Whitman, an anti-Tammany New York County District Attorney who served from 1910-1914, was elected as Governor of New York State. He won by a plurality of 136,000 votes, a feat that was labeled “a fresh rebuke to Tammany” and indicative of public opposition to corruption and crime.²³ Whitman appointed another anti-Tammany District Attorney as his successor, Charles A. Perkins. District Attorney Perkins began a campaign against New York City gangs in an effort to combat gang warfare. Although many gang leaders had been protected extralegally by corrupt politicians, Perkins sought a legal solution to hold them accountable for their crimes.

²⁰ Annual Report of the New York City Police Department for the Year 1920 (1920) *available at* <http://babel.hathitrust.org/cgi/pt?id=nyp.33433075970065;view=1up;seq=1>

²¹ Annual Report of the New York City Police Department for the Year 1912, Unwarranted Leniency Shown to Criminals, Vicious Favoritism (1912) *available at* <http://catalog.hathitrust.org/Record/008686695>; MARILYNN S JOHNSON, STREET JUSTICE: A HISTORY OF POLITICAL VIOLENCE IN NEW YORK CITY, 12-41 (2003).

²² Report and proceedings of the Senate committee appointed to investigate the police department of the city of New York ...New York (State). Albany: J.B. Lyon, 1895. *available at* <http://name.umdl.umich.edu/AAW4711.0003.001>

²³ *The first Republican Governor of New York since Hughes*. THE INDEPENDENT. Nov. 16, 1914 at 240.

As a trademark of Perkins' administration, Perkins created a dedicated Homicide Bureau focusing solely on gang related murders. Possessing the necessary resources and an aggressive strategy, the campaign was highly successful. On July 12, 1915 the *New York Times* boasted the success of the campaign stating that "Gangs [were] Wiped Out" and their "Leaders Convicted."²⁴ The *New York Times* also reported that from January to July 1915 District Attorney Perkins and his Homicide Bureau obtained the largest number of convictions for any corresponding period—putting a total of 45 murderers behind bars over the course of six months. The semi-annual report by the Chief Clerk's Office proclaimed that "the amount of work done and the importance of the cases involved [were] practically unprecedented."²⁵

One of the campaign's most notable convictions was Owen "Owney the Killer" Madden. Madden, labeled "the most notorious of the west-side gangsters,"²⁶ was a leader of New York's violent Gopher Gang which operated out of Hell's Kitchen, a poor Irish neighborhood on the Westside of Manhattan.²⁷ Throughout the early 1900's Madden committed normal gang-related crimes including robberies, muggings and hired beatings.²⁸ By 1915, he had been arrested forty-four times and had committed at least five murders, but had never served a prison term due to his affiliation with local Tammany Hall politicians.²⁹

One sensational story historians often reference when discussing Owney Madden is his 1910 murder of William Henshaw. Madden followed Henshaw onto a crowded trolley car and shot him dead in front of a dozen passengers. Knowing and fearing both Madden and the Gopher Gang, none of the trolley car passengers would speak to police about the incident and Madden

²⁴ *Gangs Wiped Out; Leaders Convicted: First Half Year Report of District Attorney Perkins Shows Much Accomplished*, N.Y. TIMES, Jul. 12, 1915 at 14.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Information obtained from the "Owen Madden Exhibit" at the Museum of the American Gangster in Manhattan, NY.

²⁸ CARL SIFAKIS, *THE MAFIA ENCYCLOPEDIA*, 285-86 (2005).

²⁹ JOE BRUNO, *MOBSTERS, GANGSTERS, CROOKS AND OTHER CREEPS VOLUME 1 – NEW YORK CITY* (2011)

was never charged.³⁰ This type of bravado and public lawlessness was typical of the early Gotham gang leaders under the Tammany administration – they feared neither police nor prosecutor.³¹ Due to widespread corruption throughout all levels of law enforcement and the ability of gang members to witness tamper to prevent incriminating testimony, punishment was neither “swift nor sure” and gangland prosecutions were largely ineffective.³²

3. State v. Madden – Applying the Technique

This attitude quickly changed following the appointment of District Attorney Perkins. Perkins made gang prosecution the focus of his administration. Not only did he dedicate his office’s time and resources to the cause, he also implemented an innovative new strategy. He extensively utilized the New York conspiracy statute to secure high level criminal convictions with long jail sentences for gang leaders using compound liability. By targeting gang leaders, Perkins sought to show gang members that their demise was imminent: punishment would be both swift and sure and the costs of criminal association outweighed the benefits.

As a gang leader Madden became a main target of District Attorney Perkins’s campaign against gang-rule. On May 24, 1915, when he was 23 years old, Madden was finally caught and charged with murder – ironically for an incident where he did not pull the trigger himself. Madden’s defense attorney, Charles Colligan, was the first to identify the prosecution’s trial strategy. In his summation, Colligan stated that if Madden were convicted “it would be on his record as a gangster and not because of any guilt in this case.”³³ That’s exactly what District

³⁰ *Id.*

³¹ A typical crime of early New York gangs was to kill a police officer and steal his uniform. The gangsters would then wear the uniform around town posing as law enforcement. For more information regarding crimes of early criminal organizations refer to sources provided in notes 12 and 8.

³² *Rufrano Adherent Guilty of Murder: Jury Sustains Prosecutions Theory of a Political Conspiracy to Kill*, NY Times, May 29, 1915 at 9.

³³ *Find Madden Guilty of Manslaughter*, N.Y. TIMES, Jun. 3, 1915 at 20.

Attorney Perkins had intended— the campaign targeted gang leaders in an attempt to bring down the group as a whole.

According to the trial transcript, on November 28, 1914, Madden used his girlfriend, Frieda Horner and her friend Margaret Everdeane to lure Patsy Doyle, another member of the gang, into an Eighth Avenue saloon and ordered fellow Gophers Arthur Bieler and Thomas McArdle to shoot and kill Doyle.³⁴ Police were close to the scene and were able to arrest the two gang members along with Horner and Everdeane. Fearing being implicated in the murder, both Horner and Everdeane cooperated with police.³⁵ Bieler and McArdle were indicted for First Degree Murder. Madden was indicted separately under the New York State Conspiracy Statute even though he was not physically present at the saloon that night. In 1893, the Supreme Court defined conspiracy as “a combination of two or more persons, by concerted action, to accomplish a criminal or unlawful purpose, or some purpose not in itself criminal or unlawful, by criminal or unlawful means.”³⁶ Because Madden gave the order to kill Doyle, he was equally culpable for the murder under the Conspiracy statute and could therefore be prosecuted.

Using witness testimony from the two women, who were aware of the arrangement between Madden and his associates, had served as accomplices and had been promised immunity from prosecution and protection from retaliation from Madden’s gang, Perkins was able to show that although Madden did not pull the trigger of the gun,³⁷ he gave the other two men the order to kill Doyle. Although alibi witnesses were offered placing Madden far from the scene, the prosecution argued that Madden, as the leader of the gang, was a criminal, the mastermind of the

³⁴ Crime in New York 1850-1950, Trial Transcripts Collection, Reels 261 & 265. Transcript of State v. Owen Madden, Case # 2105 (1915).

³⁵ *Swears Prosecutor Made Her Perjurer, Woman Who Convicted Owney Madden Recants and Accuses Walter Duel*, NY TIMES, Oct. 8, 1915.

³⁶ Ethan Brett Gerber, "A Rico You Can't Refuse": New York's Organized Crime Control Act, 53 BROOK. L. REV. 979, 984 (1988) citing Pettibone v. United States, 148 U.S. 197, 203 (1893).

³⁷ *Gangster Madden Stays in Sing Sing, New Trial is Refused and Recanting Woman Witnesses are Held for Perjury*, N.Y. TIMES, Nov. 5, 1915 at 22.

planned homicide because of his position as gang leader, and was the only one with true motive to kill Doyle.

On June 3, 1915 Madden was convicted and sentenced to 20 years in Sing Sing prison. Although Madden was charged with First Degree Murder, he was convicted of the lesser offense of Manslaughter in the First Degree.³⁸ As for Doyle's actual assassins, Bieler pleaded guilty to Manslaughter in the First Degree and received a sentence of 18 years in prison. McArdle was tried and convicted of Manslaughter in the Second Degree and was sentenced to 13 years in jail. Madden received the longest sentence of the three.³⁹ Given that Madden had never shot a bullet at Doyle, and Bieler and McArdle were both convicted of Manslaughter, a conviction of Manslaughter for Madden was a prosecutorial victory for the State. By the time Madden was released from prison, the Gopher gang had been completely disbanded.

Despite the state's victory, the problem of criminal interference with witnesses still existed. After the verdict was rendered, the two female witnesses who had been integral in Madden's conviction recanted their testimony and Madden's legal team sought to have the conviction overturned.⁴⁰ On hearing the retrial motion, Judge Charles Nott found that Horner and Everdeane had been threatened by Madden's affiliates, which caused them to recant. Nevertheless, Judge Nott charged both with perjury and upheld Madden's conviction.⁴¹

4. Other Prosecutions

³⁸The charge for First Degree Murder was: "The killing of a human being, unless it is excusable or justifiable, is Murder in the First Degree, when committed: (1) From a deliberate and premeditated design to effect the death." Manslaughter provided less culpability. "Homicide is Manslaughter in the First Degree unless it is excusable or justifiable when committed without a design to effect death, in the heat of passion, but in a cruel and unusual manner by means of a dangerous weapon."

³⁹ *Supra* note 9.

⁴⁰ *Supra* note 35.

⁴¹ *Supra* note 37.

Perkins similarly targeted the leaders of other gangs, including Benjamin Fein and Joseph "The Greaser" Rosenzweig who headed two of the most powerful gangs in the City. Both were arrested on murder charges, and in exchange for a lesser charge, participated in the investigation of organization members as well as union officials who had also engaged in illegal activities, resulting in a large number of subsequent indictments.⁴² Gang leaders Robert Crosby and Tony Deliss were also arrested and convicted on murder charges.⁴³

By targeting gang leaders with serious offenses and establishing a professional and dedicated Homicide Unit, District Attorney Perkins was able to effectively prosecute large numbers of gang members, weakening the overall structure of each criminal organization. Using the Conspiracy Statute, he was able to charge and convict leaders with murders they had planned but had not personally carried out. This theory of compound liability, focusing on orders given by leaders of criminal organizations, holding them accountable for the resulting crimes and using this strategy as a tool to weaken the organization's structure, was an important development that proved effective. It became central to the advancement of subsequent techniques that developed in response to evolving criminal organizations after Prohibition.

B. Evolving Criminal Organizations

This strategy was effective for Perkins in the short-term and played an important role in the development of future prosecutorial techniques, however the victory was short lived. In 1916, during a special election, Perkins was unable to overcome the Tammany leviathan and lost his bid for reelection to Tammany Hall candidate Edward Swann. Swann abandoned Perkins's

⁴² *Another Gang Head Confesses Murder*, N.Y. TIMES, May 29, 1915, available at <http://query.nytimes.com/mem/archive-free/pdf?res=F60811F8385C13738DDDA00A94DD405B858DF1D3>.

⁴³ *Supra* note 21; Crime in New York 1850-1950, Trial Transcripts Collection, Reels 251. Transcript of Trial # 1999 (1914).

agenda to monitor police corruption and organized crime in furtherance of Tammany corruption.⁴⁴ Additionally, World War I and the passage of the Volstead Act drastically changed the nature of criminal organizations. During this time organizations became more organized and were purposefully structured to protect their leaders. Utilizing the basic conspiracy statute to target criminal leaders was simply not enough to control the problem of organized crime and new techniques developed in response to evolving criminal organizations.

1. World War I

A year after Perkins' defeat, the United States entered World War I and the Police Force "was greatly depleted because of the effects of the Selective Service Draft Law and the voluntary enlistment of many members of the Department... The result was that for the greater part of these two years [1917-1918] the Police Force was short approximately 1,000 men."⁴⁵ There is little in the way of organized crime statistics during World War I, however the 1918 Annual Report of the New York City Police Department does include some useful contextual information. For example, the War marked an increase in gambling, drug addiction and prostitution, the Police Commissioner observed an "unprecedented transient population" in the city as a result of the war effort, and gun control legislation was passed by the New York State Legislature to deprive "the gangster and gunman... of their weapons."⁴⁶ Additionally, an increase in Police training through a program introduced by the new Commissioner Richard Enright was instituted.⁴⁷ More significantly, between 1918 and 1919, the NYPD created both a Gangster Squad as well as an

⁴⁴ *Judge Delehanty Accuses Swann of Fraud on Court, Tells Governor District Attorney Wrongly Sought to Quash Indictments* N.Y. TIMES Dec. 31, 1916 at 1,6.

⁴⁵ *Annual Report of the New York City Police Department for the Year 1918* (1918) available at <http://babel.hathitrust.org/cgi/pt?id=nyp.33433075970057;view=1up;seq=9>

⁴⁶ *Id.* at 40.

⁴⁷ *Id.* at 24-25.

Italian Squad to monitor known criminals in New York City in an effort to control organized crime.⁴⁸

2. The Effect of National Prohibition and Expanding Federalism on Organized Crime

During this time, the Eighteenth Amendment and the National Prohibition Act (Volstead Act) were also passed. The Eighteenth Amendment prohibited the “manufacture, sale, or transportation of intoxicating liquors ... for beverage purposes” in the United States to promote health, workplace effectiveness, “war efficiency,” crime reduction, and the Americanization of new immigrants.⁴⁹ Congress introduced the Volstead Act in October of 1919 to enforce the Eighteenth Amendment. The Volstead Act defined “intoxicating liquors” as consisting of 0.5 percent alcohol, provided penalties for violation of the Act and appointed the Federal Bureau of Internal Revenue to enforce prohibition.

Prohibition is extremely significant to the story of organized crime prosecution because it represents a major shift in federalism, expanding the jurisdiction of the federal government into historically local areas.⁵⁰ Robert Post described prohibition as:

The largest political issue ... since the Civil War... It put enormous strain on the ideals of federalism to which the country was committed in the years before World War I. Most constitutional grants of federal power simply authorize the national government to regulate in a particular domain, such as interstate commerce. But the Eighteenth Amendment was different because, like the

⁴⁸ *Supra* note 41 (gangster squad and Italian squad section of the report).

⁴⁹ U.S. CONST. amend. XVIII.; Robert Post, Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era, 48 WM. & MARY L. REV. 1, 2-7 (2006) citing Henry Smith Williams, Alcohol and the Individual, 31 McClure's Mag. 704, 712 (1908); see Eugene Lyman Fisk, The Relationship of Alcohol to Society and to Citizenship, 109 Annals Am. Acad. Pol. & Soc. Sci. 1, 5 (1923), Edward Alsworth Ross, Prohibition as the Sociologist Sees It, 142 Harper's Mag. 186, 188 (1921), Roy A. Haynes, Says Business Man Upholds Prohibition; Haynes Convinced that Industry Is Won Over by Reason of More Efficiency, N.Y. Times, Aug. 23, 1923, at 17, To Win the War, 90 Independent 486, 487 (1917), Hamilton v. Ky. Distilleries & Warehouse Co., 251 U.S. 146, 157 (1919), George Elliott Howard, Alcohol and Crime: A Study in Social Causation, 24 Am. J. Soc. 61, 79-80 (1918), Richard J. Hopkins, Prohibition and Crime, 222 N. Am. Rev. 40, 41 (1925).

⁵⁰ Robert Post, Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era, 48 WM. & MARY L. REV. 1, 2-4 (2006).

Thirteenth Amendment, it imposed a particular rule of conduct...With the passage of the Volstead Act the federal government suddenly found itself responsible for suppressing all trade and manufacture of liquor in the United States, a task for which it was utterly unprepared⁵¹

The Volstead Act also presented another opportunity for criminal groups to organize, this time around bootlegging. Government experimentation with social reform affecting the personal lives of citizens, as well as the classification of consuming alcohol, a once legal occurrence, as a crime punishable by the federal government, made Volstead wildly unpopular. This resulted in widespread disobedience of the law, creating a demand for bootlegged liquor. This created the opportunity for criminal groups who had previously worked within local boundaries to further organize. Former New York County District Attorney and Mayor William O'Dwyer describes prohibition as the catalyst to national organized crime:

Nation-wide syndication of crime as we know it today[is]...traced to the exigencies of the liquor traffic. Every bootlegger who took a load of liquor from one place to another, was in danger of hijacking by another bootlegger. They organized armed gangs to protect their trucks. Rather than shoot each other up, they soon formed alliances. Necessarily, these were wholly in the hands of law violators... In addition, the bootleggers corrupted the police.

Prohibition “created a need for large-scale distribution networks comprising smugglers, distillers, bottlers, warehouses and trucks as well as numerous retailing outlets (speakeasies).”⁵² Following his release from Sing Sing, Owen Madden himself became a bootlegger and operated one of the most famous speak-easies/jazz clubs in New York’s history, The Cotton Club.

Enforcement of the Volstead Act became increasingly problematic. It marked the first real attempt of the federal government to enforce criminal law. Compliance could be ensured only by:

⁵¹ Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 2-4 (2006).

⁵² *Id.*

an army of enforcement agents far larger than it would be practicable to assemble or obtain an appropriation for... or by securing the closest cooperation between the Federal officers and all other law-enforcing officers-State, county, and municipal⁵³

In a series of committee hearings run by the National Commission on Law Observance and Enforcement, also called the “Wickersham Commission,” the federal government suggested that functional dual sovereignty should be applied to divide the task of enforcing the prohibition laws.⁵⁴“If the National Government were to attend to preventing importation, manufacture and shipment in interstate commerce of intoxicants, the State undertaking the internal police regulations to prevent sale, saloons, speakeasies and so forth, national and State laws might be modified so as to become reasonably enforceable.”⁵⁵ However, in evaluating state enforcement measures, the Supreme Court held that federal and state law enforcement held concurrent jurisdiction and states could not be compelled to enforce the Prohibition laws.⁵⁶ Therefore, due to the widespread opposition towards prohibition, enforcement of Prohibition laws was completely shouldered by federal authorities.

Political corruption, widespread opposition to the terms of the Volstead Act, and bribing both state and federal law enforcement officials allowed bootlegging groups to operate on a grand scale in New York until the repeal of the Volstead Act in 1933, leaving behind large and highly organized criminal groups, as well as a society plagued by increased corruption and crime. The 18th Amendment took a state-level problem and federalized it, creating a criminal species that required both state and national attention.

⁵³ *No Way To Execute Harding Dry Order; Enforcement Officials Declare Army of Agents Is Necessary To Stop Bootlegging*, N.Y.TIMES, Nov. 28, 1922, at 6.

⁵⁴ *Infra* note 49.

⁵⁵ *Id.*

⁵⁶ Gambino, Lanza, Etc. from cited from Robert Post, *Federalism, Positive Law, and the Emergence of the American Administrative State: Prohibition in the Taft Court Era*, 48 WM. & MARY L. REV. 1, 12-16 (2006).

C. Technique # 2: Defining Crime as an Enterprise – A New Use of the Conspiracy Statute

The second technique created during New York's legal experimentation with organized crime developed as a result of Prohibition. Prohibition marked an aggressive change in the legal response to evolving criminal organizations on both the state and federal level. As criminal groups began to become more structured and organized, state and federal prosecutors both sought to secure convictions by any means necessary. The federal government passed legislation once again expanding its jurisdiction into criminal matters. Tactically, federal prosecutors focused on lower level criminal charges, which were easier to prove but resulted in minimal sentences. On the state-level, New York prosecutors passed legislation redefining the conspiracy statute. The "new" New York conspiracy statute focused on a new type of compound liability for criminal activity and allowed all members of a criminal organization to be charged under a single indictment for all crimes committed by the organization, even those which they were not directly involved.⁵⁷ This allowed state prosecutors to target entire criminal organizations and pursue less serious charges with low evidentiary burdens making conviction more probable. In turn, the multiplicity of charges factored into sentencing decisions for each member charged, resulting in long term jail sentences.

By examining the application of this technique in *People of the State of New York v. Charles Luciano*, it is clear that state prosecutors from New York were the first to recognize organized crime as a pyramid structure with different levels of leadership and participation. It also shows that state prosecutors effectively utilized compound liability to charge entire criminal organizations, a main component of RICO, long before federal prosecutors or legislators

⁵⁷ *Lehman Calls on Legislature to Trap Crime Barons*, THE HERALD STATESMAN, Mar. 5, 1936 at 13.

identified it as a possible strategy to combat organized crime. To effectively evaluate this technique, it is useful to further contextualize the problems created by concurrent state and federal jurisdiction in the realm of organized crime during this time and examine how criminal organizations structurally changed after Prohibition.

1. Framing the Problem: National Reform

In 1933, U.S. Senator Copeland of New York led a subcommittee of the Commerce Committee to address the problem of organized crime in the wake of Prohibition – “The Investigation of So-Called Rackets.”⁵⁸ The witnesses included federal and state judges and prosecutors. Following this hearing, the scope of federal jurisdiction was once again expanded to encompass federal regulation of crime in an effort to combat criminal organizations. Copeland pointed out that “in this day of hard surfaced roads and high powered automobiles . . . there are few crimes of organized groups which are not interstate in nature.”⁵⁹ The new bills addressed kidnapping, interference with interstate commerce by threats, force or violence, interstate transportation of stolen property worth more than \$5000, evading prosecution or testimony by fleeing to another jurisdiction, regulation of the sales and shipment of firearms, and assault of a federal officer.⁶⁰ Collectively called the “Anti-Racketeering Statutes,” they were later deemed the “criminal New Deal,” as they greatly expanded the jurisdiction of federal government and marked the greatest number of federal criminal statutes passed collectively up until that point.⁶¹ This expansion raised many of the same issues of concurrent jurisdiction experienced after the

⁵⁸ *Investigation of So-Called Rackets: Hearings Before a Subcomm. of the Comm. on Commerce, United States Senate, 73d Cong., 2d Sess. (1933).*

⁵⁹ 78 CONG.REC. 451-52 (1934).

⁶⁰ *Id.*

⁶¹ Racketeering and the Federalization of Crime

passage of the Volstead Act. State and Federal prosecutors targeted the same criminals and struggled to end organized crime on their own terms.

2. The New Face of Organized Crime – Organized Racketeering/Protecting Leaders

In 1932, following increased police scrutiny,⁶² Owney Madden retired from his life of crime and relocated to Hot Springs, Arkansas where he opened several casinos and hotels. Madden's Hot Springs getaway served as a hideout for many notorious New York City mobsters – including Charles 'Lucky' Luciano. Luciano represented a new-era of the Gotham gangster. Following a tumultuous gang-war, Luciano had become recognized as the "boss" of organized crime in New York City. By the 1930's, organized crime in New York was largely dominated by an influx of Italian immigrants. In response to the Depression and the demise of prohibition, "falling liquor profits forced the gangleaders to find other outlets for the energies of their violent henchmen... [and] [t]hus... began to move into other previously untapped areas such as extortion from legitimate business and labor racketeering."⁶³ Seeking to diminish on-going violence and power plays for control, Luciano began to organize all criminal groups around a common cause, focused on business and racketeering. In response to this new criminal activity in 1932 the New York state legislature criminally codified and defined racketeering as:

An organized conspiracy to commit the crimes of extortion or coercion... obtaining of money or property from another ... induced by the wrongful use of force or fear ... by oral or written threats to do an unlawful injury to the property of the threatened person by means of explosives, fire, or otherwise; and to kill, kidnap, or injure him or a relative of his or some member of his family. Racketeering, from the standpoint of coercion, usually takes the form

⁶² After the repeal of the Volstead Act in the early 1930's, the Seabury Commission, spearheaded by Judge Samuel Seabury, began an intense investigation into New York's magistrate courts and police department. Targeted at ending corruption in the criminal justice system, the Seabury Commission was critical of the police department. Police officers who were found to be corrupt or aiding organized criminals were dismissed from service. Columbia University Oral History Oral Histories, New York State Industrial Commission Under Governor Franklin D. Roosevelt, 1929-33: 930-32 Fiorello H. La Guardia; James J. Walker; The Seabury Investigation at 390.

⁶³ *Id.*

of compelling by use of similar threats to person or property a person to do or abstain from doing an act which such other person has the legal right to do or abstain from doing such as joining a so-called “protective association to protect his right to conduct a business or trade.”⁶⁴

In addition to organizing around racketeering, Luciano separated the Italian gangs in New York City into five different crime families, each with its own hierarchal structure designed to shield its leaders from direct involvement in crime while still collecting enormous profit. This new structure made convicting leaders of the organization almost impossible. Luciano also established a governing “Commission.” The Commission was essentially a Board of Directors for organized criminal activity. It was comprised of criminal representatives from each New York crime family, Philadelphia, Buffalo, Los Angeles, Chicago, Detroit, Kansas City and also included representatives of Irish and Jewish criminal organizations in New York. The Commission decided which groups controlled each territory and settled disputes to curb gang warfare. The Commission marked the creation a cooperative criminal enterprise, a National Crime Syndicate.⁶⁵ Despite his organizational innovations, and attempt to shield himself from prosecution, Luciano was not as “Lucky” as Madden when it came to his arrest and indictment.

3. The Lehman Crime Package and A New Theory of Compound Liability

Luciano’s charges incorporated two new features of New York Law passed as part of Governor Lehman’s New Crime Package, legislation spearheaded by special prosecutor, and future governor of New York, Thomas E. Dewey.⁶⁶ The first statute, enacted on February 24, 1936 repealed a state law requiring the listing of witness names on the indictment. In theory, the

⁶⁴ *Investigation of So-Called Rackets: Hearings Before a Subcomm. of the Comm. on Commerce, United States Senate*, 73d Cong., 2d Sess. 10 (1933).

⁶⁵ SELWYN RABB, *FIVE FAMILIES*, 22-35 (2005).

⁶⁶ *Lehman Calls on Legislature to Trap Crime Barons*, THE HERALD STATESMAN, Mar. 5, 1936 at 13.

change provided safety for witnesses, partially solving the problem of “disappearing” witnesses who were either killed or threatened with violence if they agreed to testify. More significant however was the passage of the new Conspiracy Statute or “Dewey Law” on April 9, 1936. The stated purpose of the new conspiracy statute was to “facilitate the prosecution of criminal higher-ups” of criminal organizations.⁶⁷ At the time New York's criminal procedure required separate trials for each count of an indictment. The new law “made it possible to punish a major criminal by connecting him through various layers of subordinates, to related but separate crimes committed on his behalf” and try all associates in a single trial – something that had never been done on the federal level.⁶⁸ Crimes that were in some way connected or concerned similar offenses could be joined in one indictment and an appropriate sentence, taking into account all of the crimes committed by the organization and each defendant, would be issued. This legislation paved the way for charging Luciano with 90 counts of compulsory prostitution, even though he had never served directly as a pimp.

On May 13, 1936, New York State special prosecutor Dewey delivered his opening statement to a strategically selected jury, beginning one of the most sensational trials in New York’s history.⁶⁹ Dewey himself labeled the Defendant, Charles ‘Lucky’ Luciano, “New York’s Most Powerful Gangster” and cited this prosecution as a major step towards bringing down organized crime in New York.⁷⁰ Luciano’s indictment, however, was not for murder, extortion, gambling, sale of narcotics or any of the myriad of other crimes associated with his name in 1936 – his charge: 90 counts of compulsory prostitution.⁷¹ Dewey’s mentor, U.S Attorney George

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ ELLEN POULSEN, THE CASE AGAINST LUKCY LUCIANO: NEW YORK’S MOST SENSATIONAL VICE TRIAL (2007).

⁷⁰ *Id.* at 98.

⁷¹ Poulsen, *Supra* note 69.

Medalie, had advocated using the full “armory of...powerful weapons” available under the law.⁷² During his time at the U.S. Attorney’s Office, Dewey learned that “from the point of view of the community it makes no difference what statute you use so long as the positive affirmative result of convicting the criminal for a crime which he committed is accomplished.”⁷³

The practice of convicting bootleggers for tax evasion and other unrelated crimes had been implemented on the federal level after the passage of the Volstead Act and the Anti-Racketeering Statutes – allowing federal prosecutors to convict organized criminals quickly and with little evidence. In fact, notorious Chicago gangsters Johnny Torrio and Al Capone, being federal targets for their involvement in organized crime, were both convicted of tax evasion during this era. In 1931, Al Capone was convicted by a federal jury of five counts of tax evasion and sentenced to 10 years in jail, at that time the longest tax evasion term ever sentenced.⁷⁴ By 1939, Capone was released from prison on parole. In 1936, John Torrio pleaded guilty to tax evasion charges and served two years in prison.⁷⁵ As a U.S. Attorney, Dewey had prosecuted Dutch Schultz, a known murderer and major player in the New York criminal underworld, for tax evasion. Although Dewey was able to convict Schultz on tax evasion charges, the ruling was overturned on appeal and Schultz was acquitted in a subsequent trial.⁷⁶ Having failed on the federal level, and recognizing that lower level charges produced inadequate prison terms, Dewey approached state-level prosecution with a new strategy.

⁷² *Supra* note 5, at 73.

⁷³ *Id.*

⁷⁴ LAURENCE BERGREEN, CAPONE: THE MAN AND THE ERA, 484-487 (1994); United States District Court, Southern District of Illinois, Historic Trials, Al Capone, <http://www.ilnd.uscourts.gov/home/CourtHouseVisitors.aspx>

⁷⁵ *Id.*

⁷⁶ SCHULTZ IS FREED; JUDGE EXCORIATES JURY OF FARMERS; ACQUITTAL 'BLOW TO LAW', N.Y. TIMES, Aug. 2, 1935 available at <http://select.nytimes.com/gst/abstract.html?res=F70F14FF345B107A93C0A91783D85F418385F9>

Although lower level charges had been used to secure convictions on the federal level, they had never been used to convict organized criminal leaders for crimes committed by members under their command – a maverick theory of compound liability. As seen in federal cases, choosing a crime with a lower evidentiary showing made conviction of criminals swifter and more probable, eliminating many of the evidentiary issues. It left little room for obstruction of justice by criminal associates. However, Dewey recognized this strategy as a way to target organization leaders by implicating everyone involved in the crime. If leaders could be held accountable for each crime they ordered inferior members to commit by joining each member in a single indictment, they could be convicted of numerous charges simultaneously and would receive a substantial jail sentence, unlike the short sentences assigned to both tax evasion and prohibition violations. Dewey seized this concept, lobbied for state level legislative change and was the first to utilize the new conspiracy statute to target a major criminal leader.

Governor Lehman created a specialized unit to target racketeering in response to public outcry against organized crime as the problem became more visible in the City. As the special prosecutor of rackets,⁷⁷ Dewey had several key advantages over ordinary prosecutors.⁷⁸ He received a huge budget from Governor Lehman to assist in forming a special prosecutorial unit devoted to investigating and charging racketeers. He spent \$250,000 in state funds on the

⁷⁷ The story behind Dewey's appointment to Special Prosecutor is riddled with political conflict. Dewey was not Governor Lehman's first choice for the position. Lehman had selected a group of four of New York's most prominent and publically visible Republic lawyers, however all rebuffed his offer. The four then issued a joint press release demanding Dewey's appointment. Before his appointment, Lehman had never met Dewey, who at the time was thirty three years old and virtually unknown, but had worked for U.S. Attorney George Medalie (one of Lehman's original picks). Originally a part time law student and part time opera singer, Dewey began his legal studies at The University of Michigan before transferring to Columbia University. He was described as a "fair-to-middlin" student and maintained only a B- average. Upon graduation, Dewey received only three job offers. For more information regarding the circumstances surrounding Dewey's appointment *see* MARY STOLBERG, *FIGHTING ORGANIZED CRIME: POLITICS, JUSTICE, AND THE LEGACY OF THOMAS E. DEWEY* (1995).

⁷⁸ *Id.* at 84.

Luciano investigation and trial alone.⁷⁹ Additionally, he received his own office space, freedom from civil service hiring requirements (allowing for a hand-selected staff)⁸⁰, the ability to choose his own cases and a special grand jury devoted to racket cases.⁸¹ Additionally, Judge Phillip J. McCook⁸² was appointed presiding judge over these cases, occupying its own special docket.

4. State v. Luciano: Application of Technique # 2

As Special Prosecutor, Dewey took a personal interest in his case work. In July 1935, he identified one of the largest rackets in New York City- the prostitution racket - and began a major campaign against organized crime.⁸³ He then used the main players of that racket to build a case against one of the most visible gangsters in the City: ‘Lucky Luciano’. Dewey mimicked District Attorney Perkins’s tendency to go after criminals with high-profile personas – knowing it would attract wide media coverage.⁸⁴ Dewey’s message to all gangsters was war: the State of New York would no longer tolerate the rule of “organized gangs of low grade outlaws who either lack the courage or the intelligence to earn an honest living.”⁸⁵ Mayor La Guardia assigned a

⁷⁹ *Supra* note 91 at 155.

⁸⁰ Dewey’s team included a classmate from Columbia and two old colleagues from the U.S. Attorney’s Office. Due to the Depression he was able to be selective in hiring support staff. He received 4,200 applications and hired those who were young “impressionable, full of zeal and anxious to do well.” Dewey’s staff included twenty assistants, ten investigators, four process servers, four clerks, two grand jury reporters, nineteen stenographers, two telephone operators and four messengers. Despite prevalent anti-Semitism in New York, 90% of his staff members were Jewish. Dewey’s salary was \$16,695 – the same as the District Attorney of New York.

⁸¹ Press Release, 28 June 1935, 2 July 1935 and 5 July 1935, Lehman Papers

⁸² McCook was affectionately called “Fergie” and “Puddin-Head” by friends; *See also* ARTHUR MANN, LAGUARDIA COMES TO POWER: 1933, 47, 116 (1981).

⁸³ *Supra* note 91.

⁸⁴ *Supra* note 86, at 88.

⁸⁵ Radio Address, July 30, 1935 over WABC, WOR, and WMCA, Dewey Papers.

squad of 63 police officers to help with the investigation, with whom Dewey worked closely to develop evidence.⁸⁶

The prostitution racket, also called the "prostitution bonding combination," revolved around the New York Women's Court. In the case of an arrest for prostitution, Madams would pay for the charges to be dismissed by corrupt magistrates so that their girls could get back to work without a jail sentence or losing profit.⁸⁷ After the revocation of the Volstead Act, organized criminals seized this system looking for a way to mitigate financial losses resulting from lost bootlegging profits.⁸⁸ Madams were threatened with violence and "forced to accept a middle-man who demanded" weekly payments of \$10 per madam and \$5 per prostitute directly to the criminal organization for the same corrupt services they would have received "under the old system."⁸⁹ Those who refused to "bond" were "beaten, shot at with sniper bullets, or run out of town" until they agreed to make the requested payments.⁹⁰

On the night of February 1, 1936 Dewey's squad, with the help of local law enforcement, simultaneously raided 100 houses of prostitution across Brooklyn and Manhattan. They arrested each madam, prostitute and john present. They then arrested bondsmen known to be involved in the combination (Jesse Jacobs, Meyer Berkman, JoJo Weintraub, and Shylock Benny Spiller) and the organized criminals who made bond collections: Tommy "the Bull" Pennochio, Davie Betillo, Ralph Liquori and Jimmy Fredericks. By 10:00 that night, 110 prisoners were arrested and arraigned by Judge Phillip J. McCook. Bails of up to \$75,000 were set for the gangsters

⁸⁶ Stolberg at 86, 93.

⁸⁷ A madam is essentially a solicitor for prostitutes. She houses prostitutes and then assigns them to patrons, taking a large portion of the profit.

⁸⁸ This information was revealed through wiretapping conducted during the Seabury Commission.

⁸⁹ *Supra* note 86, at 3.

⁹⁰ Ellen Poulsen, *The People v. The Good People: The Luciano Trial Revisited* (2007), available at http://www.americanmafia.com/Feature_Articles_389.html

controlling the combination. A bail of \$10,000 was set for 70 of the prostitutes and they were remanded and held for months at the Women's House of Detention. Threatened with seven year sentences for prostitution and narcotics use, many of the prostitutes agreed to testify against the organized criminals as State evidence. By offering to grant immunity for the narcotics and prostitution charges, Dewey made these witnesses an offer they couldn't refuse. These women, along with booker Pete Harris, became material witnesses in Dewey's case, citing "Charlie Lucky" as the boss of the combination, overseeing the racket and receiving profits from it, but not taking part in its day to day business. These witnesses testified before the grand jury and a formal indictment of Luciano was issued in April 1936.⁹¹

The indictment against Luciano "described a pyramid-like organization, with Luciano at the top far removed from the day to day dealings by layers of middle managers." Even though Luciano was not involved in the combination racket, he was the leader of the organization that ran the racket and therefore collected profits from the crimes. Under the new conspiracy statute he was equally culpable. Although ten other criminals were charged in the indictment, the case was brought as *People of the State of New York v. Charles Luciano*. In the courtroom alongside other known criminals, "Luciano looked like a common thug"⁹² and the association ultimately influenced the jury in evaluating Luciano's involvement in the crimes. The statute allowed for a compilation of charges based on the myriad of crimes committed by Luciano subordinates in the combination racket and seating him next to these known criminals made his connection to them even stronger in the eyes of the jury.

⁹¹ ELLEN POULSEN, THE CASE AGAINST LUCKY LUCIANO: NEW YORK'S MOST SENSATIONAL VICE TRIAL (2007).

⁹² *Id.*

In addition to compiling multiple charges for the same crime, the use of a lesser criminal charge also allowed Dewey to utilize live witness testimony for each separate charge, which, in combination, played an important role in Luciano's ultimate conviction. "After the arrests, ten Dewey assistants labored around the clock seven days a week to process new information that was coming into the office" from the multitude of prostitutes and madams who had been held following the police raid.⁹³ These witnesses were kept safe in local jails and received around the clock surveillance to ensure they would not be tampered with by criminal associates of Luciano. By the time the case was ready for trial Dewey's staff had jailed more than 120 witnesses and had questioned another 300 people. Five different witnesses testified at trial that they knew Luciano to control the Prostitution Racket.

The testimony ultimately convinced the jury who convicted Luciano of 62 counts of compulsory prostitution. The other organized criminals received sentences between 25 and 15 years imprisonment. Luciano received the highest sentence of 30-50 years in jail. Special Prosecutor Thomas Dewey's strategy proved successful. By applying compound liability and joining every crime committed by the organization as a whole in a single indictment, Dewey was able to secure long sentences for each member of the entire racket. Although Luciano was more directly involved in other crimes, Dewey was able to develop overwhelming evidence to support the multiplicity of lower level crimes due to the large number of co-defendants. By using the conspiracy statute, Luciano was also charged with crimes committed by lower level associates which provided enough criminal infractions to ensure a long jail sentence – even longer than most higher level crimes. By targeting an entire racket, Dewey was able to charge and convict its key players – including one of the most prominent bosses in the history of criminal organizations.

⁹³ *Id.*

When Luciano learned of the indictment that would eventually put him behind bars, his response was: “Prostitution? I’d rather be tried for murder.”⁹⁴ Known as a ‘big shot’ and a ‘tough guy’, Luciano had been protected from prosecution for his previous crimes by Tammany Hall, specifically District Leader Al Marinelli.⁹⁵ By 1935, Luciano was described in tabloids as the “boss of the lower east side,” an untouchable “bad man with [a] triumphant name.”⁹⁶ However, by the end of the trial, newspapers immortalized Dewey as heroic and dapper; a leader in the fight against organized crime and labeled Luciano, a “shallow parasite... [who] craves clothes, pleasure and money.”⁹⁷

5. Dewey’s Legacy and Jurisdictional Problems

Thomas Dewey’s aggressive campaign against organized crime was lauded by New Yorkers. In 1937 he was elected Manhattan District Attorney and earned the nickname “gangbuster” for his success in prosecuting organized crime.⁹⁸ In 1942 Dewey was elected as the 47th Governor of New York State and was chosen as the Republican candidate for President in the 1944 and 1948 national elections, losing by slim margins both times.

As successful as Dewey’s new legal strategy was, garnering national attention in the fight against organized crime, it was only applied within New York State. The Luciano established national crime Syndicate remained, despite the removal of its major New York players. New York State prosecutors were still challenged by criminals who attempted to evade prosecution by fleeing to another state and the Syndicate continued its racketeering operations and other criminal endeavors across state lines. Dewey’s theory of compound liability was only later considered

⁹⁴ *Supra* note 91.

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Meyer Berger, *The Great Luciano is at Last in Toils; Dewey Traps Gang Chieftain and Means to Try Him for a Real Crime. Underworld is Worried*, N.Y. TIMES, Apr. 12, 1936 at E10; *Lucanio is Called Shallow Parasite*, N.Y. TIMES, Jun. 19, 1936 at 22.

⁹⁸ RICHARD NORTON SMITH, THOMAS E. DEWEY AND HIS TIMES, 250 (1982).

during the 1950's when the federal government sanctioned a national investigation into organized crime.

In addition to developing the idea of crime as an enterprise and the theory of compound liability that is crucial to both OCCA and RICO, *State of New York v. Charles Luciano* is significant because it builds on the setbacks experienced by Perkins. Dewey adopts the strategy of targeting gangs leaders that is present in *State of New York v. Madden* but embarks on a separate mission: to target not only the leader, but the group as a whole. Dewey targeted the leader of a highly organized, national crime Syndicate, but, instead of building a case around the highest charge available, Dewey chose a charge that he was confident he could prove. By drafting the New York Conspiracy Law, Dewey identified crime as “syndicated and organized” and recognized that it had created a new breed of criminal. This type of criminal leaves “to his hirelings and front-men the actual offenses and rarely commits any overt act himself...the only way in which the major criminal can be punished is by connecting to him, through various layers of subordinates, the related but separate crimes committed on his behalf.”⁹⁹ By using a lower criminal charge and charging all co-conspirators with multiple crimes in a single indictment, Dewey was able to implicate Luciano in a large number of crimes (Luciano is convicted of 62 counts of prostitution) committed by his subordinates. This high concentration of crimes and association with other criminals in a combined indictment results in a substantial prison sentence. Luciano receives a longer sentence for his tangential relation to prostitution than Madden receives for planning murder. The length of this sentence was substantial, and proved more effective than pursuing a higher criminal charge with insufficient evidence. It redefined criminal conspiracy, adopting compound liability for a multitude of crimes and once again sent the

⁹⁹ *Supra* note 66.

message that the potential punishment for association with a criminal organization outweighed the benefits. As will be examined in Part II, this concept becomes essential to both OCCA and RICO.

D. Technique # 3: Using Cooperating Witnesses and a Witness Protection Program

The third and final technique in this series built on Dewey's use of cooperating witnesses. By granting immunity to a co-conspirator in a major murder case, Brooklyn prosecutors were able to obtain information revealing the existence of a multi-state conspiracy to commit gangland murders. The witness provided key evidence and trial testimony, solving fifty unsolved murders and leading to the successful conviction and execution of seven well-known gangsters. While the federal government once again expanded its jurisdiction by passing legislation to combat labor racketeering through the Hobbs Act,¹⁰⁰ by granting immunity to co-conspirators and developing a simple witness protection program, state-level prosecutors developed a technique to ensure the presentation of strong evidence at trial, allowing prosecutors to pursue and support both lower level and major criminal charges. The use of cooperating witnesses, and protecting those witnesses through an established protection program, proved successful and were later incorporated as important legal tools in OCCA.

1. Uncovering a National Syndicate

Another major evolution for organized crime and the national criminal Syndicate established by Luciano was the use of a professional killing squad. "Murder, Inc.," a group of assassins contracted by the Syndicate to commit murders to protect business interests, was

¹⁰⁰ 18 U.S.C. § 195 (1946).

responsible for somewhere between 400 and 1,000 murders in the 1930s.¹⁰¹ They were extremely professional, leaving behind no physical evidence, and could not be linked exclusively to a single criminal group. Ironically, among the sundry murders they committed, Murder, Inc. also managed to save the life of the last man on earth you would expect them to protect – former prosecutor Thomas Dewey. In 1935, Dutch Schultz planned to kill Dewey, but the rest of the criminal Syndicate vehemently opposed the negative attention that it would attract and instructed the members of Murder, Inc. to kill Schultz in the bathroom of a saloon before he could fulfill his plan.¹⁰² Despite carrying out numerous calculated murders, these known gangsters had managed to stay under the radar as a specialized group.

In 1940, ten years before the federal government knew of its existence, Kings County District Attorney, and future Mayor of New York, William O’Dwyer uncovered this national “extermination department” of the Syndicate following a number of unsolved homicides. The list of victims included “a body strangled, ice-picked and left in a stolen car...a hacked-up corpse in a trunk under a bridge,” and a dead body, shot and left in a gutter.¹⁰³ The common theme of all of these murders was the meticulous precision used, leaving no actionable legal evidence or witnesses behind. The anonymity of these assassins was severely compromised when Harry Rudolph, who detectives described as “off his rocker,” came forward and identified one of the bodies as Alex Alpert, a “19 year old small-time hoodlum.”¹⁰⁴ Rudolph told Police that he was present when Alpert was killed and identified Abraham ‘Kid Twist’ Reles, and two other known

¹⁰¹ Wendy Ruderman, *The Ice Pick Seems Antiquated, But It Still Shows Up Occasionally on the Police Blotter*, NY TIMES, Sept. 1, 2012 at A19.

¹⁰² BURTON TURKUS, *THE STORY OF THE SYNDICATE: MURDER, INC.*, 64 (1992). This book was written by an Assistant District Attorney for the Kings County Homicide Bureau who worked directly with District Attorney O’Dwyer. He was present from the Time Reles agreed to be a cooperating witness and had participated in preparing the file against Anastasia.

¹⁰³ *Id.* at 27.

¹⁰⁴ *Id.* at 31.

gangsters from Brownsville, Brooklyn, as his murderers. Rudolph testified in front of a Grand Jury and a formal indictment was issued against Reles and the two other men.

According to his criminal record, by the time of the indictment, Reles had committed at least eleven murders himself, and confessed to being an accomplice in more than fourteen others.¹⁰⁵ Facing the possibility of a death penalty if convicted, Reles, who had a pregnant wife and a six year old son at the time, voluntarily came to the District Attorney's Office and revealed his status as a member of Murder, Inc. He explained the structure of the national criminal Syndicate and of his own involvement in its extermination department. He then offered the District Attorney evidence that would solve fifty other murders, in New York and out of state, and agreed to be a cooperating witness in exchange for immunity from conviction.¹⁰⁶ Having a key witness who could provide meaningful evidence was an important victory for the Kings County District Attorney. While federal prosecutors could rely solely on accomplice testimony to convict a defendant, Section 399 of the Criminal Code of the State of New York forbid state prosecutors from presenting accomplice testimony without further corroborating evidence.¹⁰⁷ The only chance O'Dwyer had at stopping Murder, Inc. was prosecuting its members and the only way to solve these homicides was through evidence provided by someone on the inside.

2. Co-Conspirator Immunity To Bring Down the Organization

Reles became a star witness for the Kings County District Attorney's Office and implicated and testified against fellow Murder, Inc. assassins. These men included Louis Buchalter (who was labeled by J. Edgar Hoover as "the most dangerous criminal in the United

¹⁰⁵ *Id.* at 55.

¹⁰⁶ *Id.* at 64.

¹⁰⁷ See NY Code §399 which reads "a conviction cannot be had upon the testimony of an accomplice, unless he is corroborated by such other evidence as tends to connect the defendant with the commission of the crime."

States”), Harry “Pittsburgh Phil” Strauss, Louis Capone, Mendy Weiss, Harry “Happy” Maione, Frank “The Dasher” Abbando, and Bugsy Goldstein. All of these men were convicted of First Degree Murder for a series of violent homicides they committed years earlier and sentenced to the death penalty. Reles served as the star witness in each case and aided the prosecutorial investigation process by providing other material witnesses.¹⁰⁸

This technique was later applied to witnesses who did not voluntarily choose to cooperate. Witnesses integral to proving organized crime cases were later proactively offered immunity in exchange for their testimony against gang leaders and other members of criminal organizations. Building from Dewey’s use of lower level associates, subsequent District Attorneys began to construct various levels of cooperating witnesses to develop evidence and charge criminal leaders with a variety of lower level and major crimes in a single indictment. However, O’Dwyer soon found that constructing these layers of evidence was not possible without an effective witness protection program.

3. Witness Protection

Following the use of Reles to convict Murder Inc. members, the Kings County District Attorney sought to prosecute mob boss Albert Anastasia. Along with Buchaltar, Anastasia was a leader of Murder, Inc. and later became a boss of the Gambino Crime Family.¹⁰⁹ He had been charged by the District Attorney with two different murders, but each time was released after testifying witnesses mysteriously disappeared before trial. Reles worked with Anastasia in Murder, Inc. for over ten years and could provide prosecutors with enough evidence to convict

¹⁰⁸ Information Obtained from the Official Murder, Inc. Collection at NY Municipal Archives

him of at least two murders. For over a year, Reles and other key witnesses were guarded at the Half Moon Hotel, “a tall brick hostelry on the Coney Island Oceanfront.” Worried that gangsters would attempt to kill these witnesses before they could testify, the District Attorney’s office took over the entire east wing of the sixth floor of the hotel. Guards protected the witnesses around the clock and a steel door had been constructed to block all unauthorized guests. Detectives were stationed at the entrance at all times.

Despite this system of protection, on November 12, 1941, Reles was found dead below the window of his hotel room. While the official investigation states that Reles accidentally died while climbing down to the fifth floor, wrongdoing on Anastasia’s part was suspected.¹¹⁰ O’Dwyer’s case “went out the window with Reles,” and Anastasia was never convicted.¹¹¹ Since Reles was killed before he could ever take the stand against Anastasia, he is commonly referred to as “the Canary who could sing but could not fly.”¹¹²

4. Aftermath – Success of the Campaign

District Attorney O’Dwyer effectively used a cooperating witness to charge and convict seven members of Murder, Inc., one of the most powerful factions of the national Syndicate of organized crime. He was able to see the larger prosecutorial picture clearly: granting lenience to lower level criminals to aid in the evidence gathering process and provoking their testimony against leaders of the organization would eventually break down the criminal organization all together. One weakness in this prosecutorial campaign was establishing an effective witness protection strategy. The concept of a witness protection program had been developed, Reles was

¹¹⁰ Official Report, The Investigation of the Circumstances Surrounding the Death of Abe Reles on November 12, 1941 at the Half Moon Hotel in Coney Island, Brooklyn, NY (Dec. 21, 1951)

¹¹¹ *Inquiry Discredits O’Dwyer for Calling Reles Important*, N.Y. TIMES, Dec. 22, 1951 at 1.

¹¹² EDMUND ELMALEH, *THE CANARY SANG BUT COULDN’T FLY: THE FATAL FALL OF ABE RELES, THE MOBSTER WHO SHATTERED MURDER, INC.’S CODE OF SILENCE* (2009).

protected around the clock, but other protections were necessary to make the system more effective.

5. Importance of Using Cooperating Witnesses

In *People of the State of New York v. Louis Buchalter*, District Attorney William O'Dwyer expanded the strategy of both Perkins and Dewey. By pardoning an accomplice to a crime and granting immunity from prosecution, O'Dwyer was able to secure material witness testimony that was strong enough to seek a higher charge against organization leaders. By using Reles as an informant and a tool in the investigative process, he is able to corroborate Reles's story with outside, credible evidence. Obtaining an overwhelming amount of evidence allowed O'Dwyer to expand upon this initial prosecution and take down an entire wing of the national Syndicate. In the course of his campaign against organized crime, O'Dwyer also set out to solve the problem of criminal interference with witness testimony. By monitoring his witnesses around the clock before and after trial, O'Dwyer implemented an early witness protection program. Although it ultimately failed, the concept of protecting potential witnesses appears to have been a key concern in stages of the Murder, Inc. prosecution.¹¹³

6. Jurisdictional Problems Continue

Although these strategies achieved short term successes by putting leaders of criminal organizations behind bars, the structure of the criminal enterprise remained and the Syndicate continued to be a national menace. As lamented by Assistant District Attorney Burton Turkus,

the national network rooted deep. It has been subject to devastating attack since 1934. The industrial and numbers extortion of the 1930's were throttled by Governor (then prosecutor) Thomas Dewey when he nailed Lucky...In 1940,...

¹¹³ Dewey also implemented a witness protection program, however his plan was heavily criticized as unconstitutional and violative of personal liberty. Most of Dewey's key witnesses were jailed for up to a year before trial and many were innocent of any crime and complained of unlawful imprisonment.

convictions of the murders who made the rackets click eliminated some of the highly ranked operatives. But the organization remained. The blueprint, the method of rackets, the gang killings persisted.¹¹⁴

The effectiveness of these anti-organized crime campaigns was limited to New York. Jurisdictional boundaries prevented New York prosecutors from conducting full investigations and charging organized criminals for interstate crimes. Federal prosecutors possessed this power, but, until the passage of OCCA and RICO, were always a step behind New York prosecutors. New York prosecutors had the advantage of experience – they had been prosecuting criminal organizations since the late 19th century. However, this national problem required a national solution.

II. STRATEGIES THAT HAVE BEEN “MADE”: EARLY PROSECUTORIAL STRATEGIES INCORPORATED INTO RICO & OCCA

In 1950, ten years after these sensational trials took place in New York, the Federal Government began a large scale investigation into national organized crime. It recognized organized crime as a threat to America’s economy and security and sought a nationwide solution. The Kefauver Committee, a special Senate Committee targeted at evaluating and solving the problem of organized crime, traveled to states across America and heard testimony from key witnesses including District Attorneys, law enforcement officials and organized criminals themselves.¹¹⁵ The Committee recognized the shortcomings of state law enforcement efforts, citing jurisdictional limitations and corruption of state law enforcement as its main impediments.

1. The Kefauver Committee in New York

¹¹⁴ *Supra* note 55 at 106.

¹¹⁵ *Supra* note 2.

Notably, the Kefauver Committee hosted eight days of public hearings, as well as three days of private hearings, in New York City in March of 1951. The committee noted the importance of the hearings by including in its final report that:

In contrast to other cities visited by the committee, however, some of the principal law-enforcement officials in New York City were keenly alert to the menace of organized crime...[and] the struggle against organized crime... The New York hearings were vital to the committee for a number of reasons. New York City, because of its size, location, dominance in the country, complexity of its population and governmental problems, is one of the major centers of organized crime.

The committee heard a total of 89 witnesses in addition to interviews and conferences with approximately 500 others. These witnesses included public officials, political leaders, law-enforcement officials, Federal officials, including those of the Bureau of Narcotics, the Bureau of Internal Revenue, the Bureau of Immigration, and others.¹¹⁶ The committee also heard from William O'Dwyer. O'Dwyer's testimony was particularly important. He noted that prohibition created a "disrespect for law" which enabled the creation of modern criminal organizations.¹¹⁷ This new view of the law "made criminals acceptable to many people and, therefore, respectable. The lush living the bootleggers enjoyed as the result of their illicit liquor traffic, made them enviable, especially in the slum districts from which they recruited their helpers."¹¹⁸ O'Dwyer also spoke at length about the 2 1/2 years he spent as Kings County district attorney "tracking down and prosecuting the group of notorious killers known as Murder, Inc."¹¹⁹ He discussed the use of Abe Reles as a cooperating witness and the immunity granted to him to aid in producing evidence and prosecuting key members of Murder, Inc. He also discussed the existence of a

¹¹⁶ Kefauver Committee Interim Report #3, U.S. Senate Special Committee to Investigate Organized Crime in Interstate Commerce, 82nd Cong., Ses. 1 No.307
May 1, 1951 Investigation of organized crime in interstate commerce. Hearings before a Special Committee to Investigate Organized Crime in Interstate Commerce – Final Report

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

national criminal syndicate. “From him [Reles] and other witnesses O’Dwyer’s office learned that there was a clear-cut well-planned criminal organization covering the entire country” as well as a governing “combination” rather than a single group in charge.¹²⁰ O’Dwyer was criticized and accused of corruption for not prosecuting the entirety of Murder Inc. and other criminal leaders known to him at the time and for “negligence, incompetence, and flagrant irresponsibility” in the Anastasia case. The Committee discussed the witness protection plan established for Reles at the Half Moon Hotel and criticized it as a “faulty system” in need of improvement to protect against gang retaliation.¹²¹ The Committee also touched briefly on Dewey’s prosecution of Luciano and the use of compound liability to arrest him under a single indictment.

This testimony and discussion is especially significant because it shows that the ideas implemented on the state-level in New York were shared with the federal representatives tasked with developing a federal solution to organized crime. The techniques examined in Part I were discussed in committee hearings, and although New York has never been credited for these ideas, their inclusion in the resulting statutes suggests that the federal government was in fact listening. This official exchange of ideas, coupled with Dewey’s political campaign based on organized crime and compound liability that garnered national attention, reveals that state-level prosecutorial efforts in New York influenced the federal legislation drafted to control organized crime. It is also important to note that in its final report, the Kefauver committee acknowledged the need for continued state efforts:

Federal agencies cannot be substituted for State and local enforcement in dealing with organized crime, the Federal Government must provide leadership and guidance, establish additional techniques for maximum coordination of law enforcement agencies, take a positive approach in using its power to fight organized crime, and seek legislation when its powers were insufficient.¹²²

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² Senate Committee on Government Operations, 90th Congress Rep. 28 at 13.(1968)

After significant monitoring and investigation of organized crime throughout the 1950's, including investigation by the Senate Select Committee on Improper Activities in the Labor and Management Field ("McClellan Committee"), the Omnibus Crime Control and Safe Streets Act of 1968 was passed "providing a program of Federal aid to local law enforcement and criminal justice systems, both in assistance and financial support."¹²³ Its aim was to combat crime on both the state and federal level and it served as the precursor to the Organized Crime Control Act of 1970.

2. Passage of the Organized Crime Control Act of 1970

In 1970 the Organized Crime Control Act was officially passed, following additional analysis by the President's Commission on Law Enforcement and other special federal task force reports. Its purpose was "to seek the eradication of organized crime in the United States by strengthening the legal tools in the evidence-gathering process, by establishing new penal prohibitions, and by providing enhanced sanctions and new remedies to deal with the unlawful activities of those engaged in organized crime." The OCCA is contained in titles 18 and 28 of the United States Code.

3. New York's Influence on OCCA

Many of OCCA's provisions relate to federal evidence gathering and focus on obtaining information from witnesses, incorporating the strategies applied in New York State throughout the first part of the 20th century. The following are considered the most significant witness provisions of OCCA:

¹²³ *Supra* note 120.

- **18 U.S.C §1826 Recalcitrant Witnesses** which allows a witness to be jailed for refusal to testify. The title provides “whenever a witness in any proceeding ... refuses without just cause shown to comply with an order of the court to testify or provide other information ... the court, upon such refusal ... may summarily order his confinement at a suitable place until such time as the witness is willing to give such testimony or provide such information.”
- **18 U.S.C §6002 Immunity** which grants prosecutorial immunity for accomplices testifying as government witnesses. The Title the provides “whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding... and the person presiding over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order ... but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case.”
- **18 U.S.C §3521 Witness Relocation and Protection** which establishes a federal witness protection program for witnesses and potential witnesses. The Title provides “The Attorney General may provide for the relocation and other protection of a witness or a potential witness for the Federal Government or for a State government in an official proceeding concerning an organized criminal activity or other serious offense, if the Attorney General determines that an offense involving a crime of violence directed at the witness ... is likely to be committed. The Attorney General may also provide for the relocation and other protection of the immediate family of, or a person otherwise closely associated with, such witness or potential witness if the family or person may also be endangered on account of the participation of the witness in the judicial proceeding.”

These provisions adopt many of the same strategies implemented by state District Attorneys in the early 20th Century. The unavailability of witness testimony was a crucial obstacle to issuing indictments against organized criminals. By allowing prosecutors to jail witnesses for refusal to testify, federal prosecutors are able to compel witness testimony. These provisions also address the problem of disappearing witnesses. By implementing a federally funded Witness Protection Program, with relocation and secrecy provisions, federal prosecutors are able to protect witnesses and potential witnesses from criminal retaliation before and after trial. Finally, to supplement the amount of available evidence, OCCA incentivizes live testimony from accomplices by granting

immunity to witnesses who can provide meaningful evidence against other organized criminals. Similar to the success experienced by Thomas Dewey and William O’Dwyer, these factors have enhanced convictions by federal prosecutors by broadening federal prosecutorial power in the evidence gathering process and allowing them to obtain a sufficient evidentiary showing to charge and convict leaders of criminal organizations.

4. RICO and Crime as an Enterprise – A Continuation of Dewey’s Compound Liability

OCCA also provides enhanced sanctions that address organized crime specifically. The RICO Act, contained in title 18 Sections 1961–1968 of the OCCA, holds all members of a criminal organization accountable for any racketeering crime that the organization commits. It classifies criminal organizations as “enterprises” or “any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity.”¹²⁴ It targets “racketeering activity,” which is defined as “any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance.”¹²⁵ RICO makes it a federal crime to profit from racketeering activity “as a principal ... directly or indirectly” or establish, acquire, maintain or operate any enterprise that is involved in racketeering activities that affect interstate commerce or conspire to violate¹²⁶

RICO broadened the scope of available legal remedies to allow leaders of a criminal organization to be prosecuted, based on their involvement in an ongoing criminal enterprise, for

¹²⁴ 18 USC 1961 (c)

¹²⁵ 18 U.S.C 1961(1)(A)

¹²⁶ 18 U.S.C 1962 (a)

crimes which they oversee or order others to commit.¹²⁷ Any tangential relation to the enterprise crimes can result in prosecution.¹²⁸ RICO provides several criminal penalties for racketeering related enterprise crimes. Each RICO violation is punishable by “a fine of not more than \$25,000,” imprisonment of not more than twenty years (or for life if the violation is based on a racketeering activity for which the maximum penalty includes life imprisonment), or both.”¹²⁹

Like the charges brought under Dewey’s conspiracy statute, RICO penalties are compounded based on the number of infractions brought in a single indictment and can result in significant jail sentences. In addition, OCCA provides increased criminal sentences in cases of “dangerous special offenders.”¹³⁰ Courts are permitted to add an additional 20 years to the sentence of an organized criminal deemed to be a “dangerous special offender” based on the defendant’s character and past offenses.¹³¹ This enables federal prosecutors to avoid the problem of recidivism and keeps large numbers of prominent organized criminals behind bars for prolonged periods of time, effectively dismantling the structure of the organization.

Through OCCA and RICO, federal prosecutors are able to “charge and prove patterns of criminal activity and their connection to ongoing enterprises...operated by organized crime” and “apply criminal and civil penalties designed to prevent and eliminate organized crime.”¹³² The evidence gathering and joinder elements of the Organized Crime Control Act have been

¹²⁷ Ethan Brett Gerber, ‘A Rico You Can’t Refuse’: New York’s Organized Crime Control Act, 53 BROOK. L. REV. 979 (1988) *citing* 116 CONG. REC. 602 (1970).

¹²⁸ *See* United States v. Turkette, 452 U.S. 576 (1981) for a discussion regarding RICO’s application to both legitimate businesses and organized criminal organizations. *Turkette* acknowledges Congress’s statutory intent to target entire criminal organizations through the RICO statute, resolving a circuit debate regarding RICO’s application. The sole circuit that believed RICO was not intended to prosecute criminal organization, was overturned.

¹²⁹ 18 U.S.C 1963

¹³⁰ The WITSEC program established under Title V of the Organized Crime Control Act of 1970, which in turn sets out the manner in which the United States Attorney General may provide for the relocation and protection of a witness or potential witness of the federal or state government in an official proceeding concerning organized crime or other serious offenses. *See* 18 U.S.C §3521.

¹³¹ 18 USC 3575. This section of OCCA has since been repealed.

¹³² N.Y. PEN. LAW § 460.00 : NY Code - §460.00: Legislative findings (1986).

overwhelmingly successful. Witness testimony, first-hand evidence and increased sanctions based on crimes committed by subordinates lead to long jail sentences and have proven to be crucial to federal prosecution of many of the most prominent organized criminals in the late 20th century – including the leadership of all five of New York’s Mafia families.¹³³

5. The Continuation of Dual Sovereignty

While these techniques have been effective on the federal level, it is important to acknowledge that they were not discovered by chance by federal legislators in the 1960’s. Rather, these strategies were created by state-level prosecutors and tested throughout the 20th Century before being incorporated into federal statutes. RICO and OCCA acknowledge the continuing importance of state level efforts to combat organized crime. The concurrent jurisdiction theory espoused by the Wickersham Commission has been incorporated into these federal statutes. Under RICO, the states are still able to exercise their police powers “to the fullest constitutional extent in defining and prosecuting crimes within their respective jurisdictions.”¹³⁴ Most states, including New York, have passed their own state RICO statutes modeled after the federal statutes. These statutes allow individual states to police organized crime within their own borders and prosecute state-level organized criminal activity. Concurrent jurisdiction has allowed state and federal prosecutors to launch a dual attack on organized crime. While state-level prosecutors monitor criminal activity on the state level and target and remove members of the organization, federal prosecutors focus on interstate organized crime, targeting and removing those members. This collaborative effort allowed the United States to wage a successful war on organized crime

¹³³ Robert J. McFadden, *The Mafia of the 1980’s: Divided and Under Seige*, N.Y. TIMES, Mar. 11, 1987.

¹³⁴ *United States v. Turkette*, 452 U.S. 576 (1981)

between in the 1970's and 1990's and demonstrates the importance of both state and federal responsiveness to organized crime.

CONCLUSION

Until 1970, prosecuting organized criminals was akin to cutting off the tail of a snake: with each prosecution, one small part of the organization was removed, but the enterprise as a whole carried on. Prosecutors on all levels always seemed to be a step behind a highly organized and quickly evolving criminal enterprise. Due to the limited criminal charges available at that time (aimed at specific criminal acts rather than their relationship to an ongoing pattern of crime), the inability of prosecutors to obtain long jail sentences for organization leaders, unreliable witness testimony and criminal obstruction of evidence-gathering, efforts to halt crime as an enterprise were manifestly unsuccessful.¹³⁵ The passage of the Organized Crime Control Act of 1970 declared a national war against organized crime. It recognized the jurisdictional limitations of state prosecutors, but implemented many of the same strategies state prosecutors had used to combat organized crime in the early 20th century. These legal strategies proved effective on the federal level and by the 1980's, many of America's most prominent organized criminals found themselves behind bars, facing long jail terms, based on the testimony of their subordinates of their involvement in crimes committed by other members of the enterprise.

What makes New York's story unique and worthy of examination is its state level prosecutorial efforts against organized criminals. Throughout the 20th Century New York had the largest number of sophisticated criminal organizations within its borders. It was under more pressure than any other state to respond to the threat of organized crime. In doing so, the state not

only defined racketeering within its statutes before the federal government had even begun to examine racketeering, but framed our modern understanding of organized crime as an enterprise. Through the efforts of state level prosecutors it charged criminal affiliates with crimes committed by the entire enterprise under single indictments and implemented evidence gathering techniques such as qualified immunity and witness protection almost 50 years before either OCCA or RICO were codified. These ideas were clearly discussed and exchanged with Congress in hearings before federal legislation was passed to combat Organized Crime: in the 1930's before the Anti-Racketeering statutes were codified and during the Kefauver committee hearings in the 1950's before the passage of OCCA and RICO.

The lessons learned from New York's experience with organized crime are clear – successful prosecution of organized crime requires cooperation between the state and federal government and the protections and prosecutorial techniques incorporated into RICO, but most importantly it requires strong leadership and constant vigilance. This dedication to the eradication of organized crime does not seem to be on the federal government's agenda any longer.¹³⁶ In June 2013, the number of federal agents assigned to the investigation and prosecution of organized crime in New York was cut, bringing the total remaining to about 36 people.¹³⁷ Those agents are responsible for investigating about 8,000 known members and associates of the remaining 20th century organized criminal enterprises.¹³⁸ A senior F.B.I investigator criticized the cuts and commented:

Just because you put a guy away...they replace him. They make new guys. Unless you stay on top of it, you won't know who those guys are. And if you don't know

¹³⁶ William K. Rasbaum, *F.B.I. Will Fight the Mafia With Fewer Investigators*, June 28, 2013 available at <http://www.nytimes.com/2013/06/29/nyregion/fbi-will-fight-the-mafia-with-fewer-investigators.html>

¹³⁷ *Id.*

¹³⁸ *Id.*

who they are, you can't keep up with what they are doing. [The cuts will also] slow the flow of the informers — the key to most investigations — to a trickle.¹³⁹

While making these cuts, government officials should take note of the experiences of the early New York prosecutors who waged war against the original gangsters of Gotham. Ignoring these criminals is ineffective and will allow them to “find creative ways to penetrate, corrupt and control industries, and thus separate the government, businesses and citizens from their money.”¹⁴⁰ Consistent investigation, strong leadership, ground-level investigation by state level law enforcement, and continued federal prosecution aimed at extinguishing the entire enterprise is necessary to supplement the legal tools incorporated in RICO and OCCA.

¹³⁹ *Id.*

¹⁴⁰ *Id.*