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ORGANIZED CRIME AND PROHIBITION: WHAT DIFFERENCE DOES LEGALIZATION MAKE?

NORA V. DEMLEITNER*

All laws which can be violated without doing any one an injury are laughed at. Nay, so far are they from doing anything to control the desires and passions of men that, on the contrary, they direct and incite men's thoughts the more towards those very objects; for we always strive toward what is forbidden and desire the things we are not allowed to have. And men of leisure are never deficient in the ingenuity needed to enable them to outwit laws formed to regulate things which almost be entirely forbidden He who tries to determine everything by law will foment crime rather than lessen it.

Baruch Spinoza (1632-1677)¹

I. INTRODUCTION

Many of the debates surrounding the so-called War on Drugs² analogize the illegality of drugs to (alcohol) Prohibition, especially when the legalization of narcotics is at issue. The common threat running through both eras is the criminalization of purely personal conduct—drinking and taking of drugs, respectively—which is harmful to the user. Despite the apparent parallels between the prohibition on drugs and on alcohol, many of the references and analogies drawn are

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1. Quoted in EDWARD M. BRECHER, *LICIT & ILLICIT DRUGS* 45 (1972).

2. For the coinage of the term, see, e.g., Steven Wisotsky, *Beyond the War on Drugs*, in *THE DRUG LEGALIZATION DEBATE* 103, 103 (James A. Inciardi ed., 1991).

superficial, irrelevant or misleading. Myths rather than reality dominate the comparisons. This is most blatant in connection with the involvement of organized crime, often called the Mafia or the Mob, in the supply of illicit products.

This paper focuses on the development of organized crime during and after Prohibition and its later involvement in the drug trade. Because policy makers tend to have only a limited knowledge of the illegal market, their decisions and policies reflect the hold myths have over imagination.³ Propaganda and the use of images, such as that of the Mafia, rather than actual knowledge and rational discourse have determined our strategies in the fight against drugs.

Rather than relying on mythical "knowledge," this article presents a functional and developmental analysis of organized crime. Organized crime has developed to fulfill a general need for illegal products and/or services. The structural relationship created between society and organized crime changes in format and endeavor, depending on the type of product supplied and other economic and social variables.⁴ The status of drugs as an illegal commodity causes four types of crimes: (1) the importation or production, distribution, sale, and possession of narcotics; (2) the corruption of the criminal justice system; (3) the corruption of legal commerce, such as money laundering; and (4) violent crime connected to commerce.⁵ It is these crimes which lead to further suppression of illegal but desired products and/or services. Therefore, after the initial decision to outlaw certain products and/or services, illegal distribution networks develop which trigger stricter laws and harsher penalties. A cycle has started that becomes hard to break. The societal problems that narcotics prohibition entails are created not by the failure of proscription but by the fact that "in the process of failing, [these laws] do more harm than good."⁶

This article addresses one facet of the question whether criminal law is appropriate to impose a moral code. The existing laws do not seem to stop the distribution of narcotics, but rather promote the institutionalization of organized crime. The article attempts to contribute

3. PETER REUTER, *DISORGANIZED CRIME—THE ECONOMICS OF THE VISIBLE HAND* 3 (1983).

4. JOSEPH L. ALBINI, *THE AMERICAN MAFIA—GENESIS OF A LEGEND* 22 (1971).

5. Steven Jonas, *Solving the Drug Problem: A Public Health Approach to the Reduction of the Use and Abuse of Both Legal and Illegal Recreational Drugs*, 18 *HOFSTRA L. REV.* 751, 774 (1990).

6. BRECHER, *supra* note 1, at 45.

to the debate of legalizing illicit narcotics by comparing the development of organized crime during Prohibition and its growth afterwards with the present involvement of organized crime in the drug trade. In addition, it seeks to forecast the potential development of organized crime following the legalization of drugs.⁷ Would the legalization of drugs create "more good than harm" by reducing the negative impact of organized crime on society?

Part I provides a short definition of organized crime and its most salient features. The description focuses on the connection between organized crime and the economics of a black market. Part II allows a glimpse at "dry" America during the 1920's and the interplay between organized crime and society during that time. Part III then outlines the development of the narcotics traffic. It attempts to pinpoint the organized groups that satisfy public demand in illegal drugs. Part IV summarizes the differences between organized crime during these two time periods and their impact on the future development of organized crime. It also forecasts possible responses of organized crime to the legalization of drugs.

II. A FUNCTIONAL APPROACH TO ORGANIZED CRIME

A. DEFINING ORGANIZED CRIME

The term "organized crime" triggers images of the Valentine's Day Massacre, Al Capone terrorizing Chicago during Prohibition, and Charles "Lucky" Luciano commanding an international crime conspiracy from Sicily. Popular culture has led us to believe that organized crime is synonymous with Mafia, the Mob, or the later-used term Cosa Nostra. This popular notion has been deeply ingrained in public consciousness by novels such as Morris West's *The Salamander*⁸ and Mario Puzo's *The Godfather*.⁹ And over a time-span of sixty years, the movie industry made this perception immortal in motion pictures such as *Public Enemy*¹⁰ and *GoodFellas*.¹¹

Government agencies and congressional investigatory committees have further perpetuated this image of an invincible organization. In

7. When the term "legalization" of drugs is used in this paper, it implies a development similar to the legalization of alcohol. Although the product itself will eventually become socially acceptable, some restrictions on its supply will continue to exist, such as age limitations and regulation of outlets. For such legalization proposals, see STEVEN B. DUKE & ALBERT C. GROSS, *AMERICA'S LONGEST WAR* 250-74 (1993).

8. MORRIS WEST, *THE SALAMANDER*.

9. MARIO PUZO, *THE GODFATHER* (1969).

10. *PUBLIC ENEMY* (Warner Bros. 1931).

11. *GOODFELLAS* (Warner Bros. 1990).

1967, the President's Commission described organized crime in the following terms:

Organized Crime is a society that seeks to operate outside the control of the American people and their government. It involves thousands of criminals, working within structures as complex as those of any large corporation, subject to laws more rigidly enforced than those of legitimate governments. Its actions are not impulsive but rather the result of intricate conspiracies, carried on over many years and aimed at gaining control over whole fields of activity in order to amass huge profits.¹²

This description is frightening because it implies that organized crime not only constitutes a danger to individuals but also represents a threat to legitimate government. However, it is myth rather than reality that supports this depiction of organized crime.

Rather than perpetuating the myth of the invincible, many-tentacled monster of organized crime,¹³ this article employs a market-based, economic definition of organized crime which views organized crime as a rational response to the demand for illicit goods and/or services. Therefore, this article uses the term "organized crime" to depict an organization of two or more individuals with a social structure, including some form of leadership. Its ultimate purpose is to provide goods and/or services that are illegal, yet for which there is a demand by certain segments of society.¹⁴ Therefore, it often acts like "large-scale continuing firms, with the internal organization of a large enterprise, and with a conscious effort to control the market."¹⁵

B. *A MARKET-BASED ANALYSIS OF ORGANIZED CRIME*

Because any society restricts or even prohibits the supply of certain goods and/or services at times, its legal and social structure determines the prevalent pattern of organized crime. It is the public's need for a particular illegal product and/or service that shapes the precise function and structure of organized crime.¹⁶ Because this demand varies over time and from place to place, organized crime constantly

12. ANNEISE GRAEBNER ANDERSON, *THE BUSINESS OF ORGANIZED CRIME: A COSA NOSTRA FAMILY* 10 (1979) (quoting the President's Commission).

13. This impression was effectively created by the Kefauver Hearings in the early 1950's. Senator Kefauver not only identified a nationwide crime syndicate but also called it "a shadowy, international criminal organization known as the Mafia," headquartered in Sicily. ESTES KEFAUVER, *CRIME IN AMERICA* 14 (1951).

14. Parts of this definition are derived from the one provided by ALBINI, *supra* note 4, at 37, 47.

15. ANDERSON, *supra* note 12, at 12 (quoting Thomas E. Schelling).

16. ALBINI, *supra* note 4, at 173.

evolves rather than stagnates. In this respect, it resembles legitimate market-driven activities.

Legitimate enterprises, such as Chrysler, survive as institutions independent of their management, majority shareholders, and board of directors. The same holds true for organized crime: "No man is indispensable. Organization, or 'structure,' not persons, gives Cosa Nostra its self-perpetuating character."¹⁷ When the CEO of a corporation is fired or the head of a crime family imprisoned, business might be temporarily slowed but it is not permanently destroyed. This structural view explains why any enforcement success against high-ranking crime figures is not tantamount to the destruction of organized crime. Consequently, the distinctive feature of organized crime is not its players but rather the illegal nature of the product and/or service.¹⁸

The character of the product and marketplace economics dictate the future of any illicit enterprise.¹⁹ For example, legalization of a product eliminates organized crime only if the good offered legally is equal or superior to that provided by the criminal organization.²⁰ This was borne out by the developments following the repeal of the Volstead Act.²¹ Once alcohol was again legally available, illicit sources of supply began to lose business, and eventually bootlegging and alcohol smuggling became (almost) extinct.

In many respects organized crime and legal business pursue the same goals. "Like any industry, organized crime is directed by the pursuit of profit along well-defined lines."²² In its pursuit for profit, organized crime is aided by what Herbert Packer calls the "crime tariff." "[W]hen we make it illegal to traffic in commodities for which there is an inelastic demand, the effect is to secure a kind of monopoly profit to the entrepreneur who is willing to break the law."²³ This monopoly profit derives from the hyper-inflated prices for illegal products in the black market. In fact, illegality is equivalent to a per-transaction tax on goods.²⁴

17. ANDERSON, *supra* note 12, at 11 (quoting Cressey).

18. DWIGHT C. SMITH, JR., *THE MAFIA MYSTIQUE* 335 (1975).

19. *Id.* at 323.

20. ALBINI, *supra* note 4, at 328.

21. National Prohibition Act, Pub. L. No. 66-66, 41 Stat. 305 (1919) (repealed).

22. PRESIDENT'S COMMISSION ON ORGANIZED CRIME, *THE IMPACT: ORGANIZED CRIME TODAY* 28 (1986).

23. HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 279 (1968).

24. Robert J. Michaels, *The Market for Heroin Before and After Legalization*, in *DEALING WITH DRUGS: CONSEQUENCES OF GOVERNMENT CONTROL* 289, 297 (Ronald Hamowy ed., 1987).

In spite of identical goals, the structure of illicit supply does not replicate the typical pattern of legal enterprises. Proscription of products and/or services limits competition²⁵ and encourages monopolies. In turn, the monopoly nature of the market increases the profit potential of organized crime. It is precisely the large profit margin which renders organized crime lucrative and increases the threat to community values, such as the work ethic.²⁶ In addition, the need for secrecy makes it necessary to structure illegal organizations in a hierarchical, often military-style way, and to restrict their size.

Because of inefficient limitations on the stages of production and distribution, typical "organized crime" consists of organizations that are small relative to the size of legal organizations in similar lines of business.²⁷ This was true for bootleggers as compared to large beer brewers and alcohol distilling companies, and holds true now for illegal narcotics suppliers in comparison with international pharmaceutical companies.

In addition, organized crime is characterized by "the use of force, intimidation, or threats of such, . . . and [the] provi[sion of] legal and political forms of protection that assure its operation."²⁸ Although to a certain extent both features might occur in legal enterprises, organized crime displays them to a larger degree.

First, the use of force and intimidation is an integral part of the supply of illicit goods. It is crucial to develop a tight, reliable organization to assure against the danger of law enforcement with the attendant risks of arrest and imprisonment and the concomitant peril of the seizure of the asset of the operation, the illegal good. In addition, because contracts involving illicit goods are unenforceable in a court of law, only the threat of brute force can ensure the fulfillment of a contractual bargain.²⁹ Often the mere reputation for violence is sufficient to guarantee adherence to deals.³⁰ Second, illegal enterprises must rely on protection by law enforcement personnel and political clout to decrease the occupational risks of punishment and seizure of

25. This is true because many of the regularly available methods for promoting a commodity are not open to suppliers of illegal products. For example, the suppliers of illicit goods cannot advertise their products to make them and their organization more widely known.

26. SMITH, *supra* note 18, at 342; see also STEVEN WISOTSKY, *BEYOND THE WAR ON DRUGS* 145 (1990).

27. Michaels, *supra* note 24, at 29.

28. ALBINI, *supra* note 4, at 126.

29. REUTER, *supra* note 3, at 114.

30. *Id.* at 135, 158. The so-called Mafia built its reputation for carrying out violent threats during Prohibition; it is now sufficient to guarantee compliance with Mafia rules. *Id.*

assets. The often large profit margins in the supply of illicit goods and/or services facilitate the corruption of public officials and law enforcement officers.

The financial incentives provided by traffickers in illegal goods and/or services tend to present a moral dilemma for underpaid officers. Frequently, they assuage their doubts about accepting bribes by arguing that only a minority of the population advocated the prohibition of a certain product and/or service for moral (or other) reasons. Since a large portion of the population circumvents such a prohibition, it will prove unenforceable. So why should individual officers not share in the wealth offered to them since society has chosen to disregard its laws in any event? In addition, these officers might argue that in a market society any demand should be satisfied.

Corruption is not limited to individual officers but extends to the entire criminal justice system. To a large extent, the enforcement of laws against so-called victimless crimes depends on informants or undercover police agents. Thus, established smugglers might take advantage of this feature and work with law enforcement officers to retain their monopoly. They might be able to corrupt the system so as "to keep out new competitors and thus to buttress the existing . . . distribution system and its price-fixing effectiveness."³¹

Third, corruption extends also to legitimate banks and businesses as they become involved in aiding and abetting the drug trade. This is mainly done in the form of "fronting" and "money laundering."³²

The market-based analysis of organized crime has the advantage that it does not need to rely on unproven and often fallacious myths surrounding organized crime which have helped to create the image of organized crime as a worldwide, monolithic, all-powerful entity. The belief in the existence of such an invincible organization has also determined our policies in fighting the supply of illicit goods and/or services. The market analysis allows us to see organized crime less as an organization but rather as "a method of executing a criminal enterprise."³³

This approach indicates that organized crime is often a response to economic, social, political, and legal developments. Actions outside

31. BRECHER, *supra* note 1, at 93.

32. Steven Jonas, *The U.S. Drug Problem and the U.S. Drug Culture: A Public Health Solution*, in *THE DRUG LEGALIZATION DEBATE* 161, 169 (James A. Inciardi ed., 1991).

33. ALBINI, *supra* note 4, at 126. This perception of organized crime leads Albinì to substitute the term "syndicated crime" for organized crime. This author prefers to employ the more established and more frequently used term although it carries the connotation that organized crime is monolithic in nature.

of the rather narrowly defined field of law enforcement will impact organized crime decisively. To use a blatant example, it was not the increased enforcement of the Volstead Act during the late 1920's but rather its repeal a few years later that caused a radical restructuring of criminal enterprises. Therefore, the market-based view allows us to see society rather than organized crime as the actor influencing criminal enterprises. Society does not merely respond to developments within the organized crime scene but helps to shape them.

C. AN EXAMPLE OF A BLACK MARKET AND RESULTING CRIME

The first time the entire nation was involved in a black market was during World War II when numerous price and rationing controls were in place.³⁴ Although the Office of War Information attempted to create the impression that shady or gangster elements created the black market,³⁵ most American consumers participated in it, many of them without knowledge or volition.³⁶ As Senator Tobey put it, "[i]t takes two to make a black market. What is lacking in this matter is a moral fiber on the part of the American people to be outraged at those men and agencies who make the paltry and dirty dollar, crucify the law and bring stigma upon the administration."³⁷

The shortages caused by the war triggered the development of a black market. However, the black market was merely a symptom of social disorganization and its underlying cause was the lack of consensus about values.³⁸ The materialistic aspirations among businessmen could not even be lessened by the importance of the war effort and the morale necessary for it.³⁹ Despite the presence of a national emergency which required the cooperation of the entire nation, the government could not curb the individualist and materialistic striving for war profit.⁴⁰ Possibly Prohibition had contributed to the destruction of the law-abiding American ethos and contributed to the feeling that fulfillment of any materialistic desire is not a crime but rather an economic

34. MARSHALL B. CLINARD, *THE BLACK MARKET: A STUDY OF WHITE COLLAR CRIME* 48 (1952). Prohibition runs a close second. However, it can be assumed that during World War II an even larger portion of the population engaged, wittingly or unwittingly, in black market activities.

35. *Id.* at 293.

36. *Id.* at 94.

37. *Id.* at 342-43.

38. *Id.* at 330.

39. CLINARD, *supra* note 34, at 341.

40. *Id.* at 342-43.

reality. The courts reenforced this attitude. In contrast to Prohibition, where the three branches of government viewed the black market in terms of a criminal conspiracy, during World War II the judiciary considered black market offenders to be white collar criminals and sentenced them leniently, mainly because most of them did not have a criminal record.⁴¹

This lawlessness and its lenient treatment are even more surprising in view of the necessity of price and rationing controls at that time and the allegedly great popular support they enjoyed. Whereas Prohibition was a peacetime law, directed at personal behavior which was not vital to the country's welfare, the regulations during World War II were essential wartime measures, strongly promoted by the government.⁴² In view of the repeated violation of crucial restrictions in times of emergency, it cannot come as a surprise that Prohibition had failed and that the War on Drugs is faltering. The values at stake are too uncertain for a national consensus, and mere enforcement cannot serve as a substitute for its absence.

III. PROHIBITION

For the first time in American history the supply of an illegal product became a major business during Prohibition. Prohibition contributed not only to the myth surrounding organized crime but its legacy also included the original structure of organized crime.⁴³

With the end of Prohibition, organized crime moved back into its original lines of business including prostitution, drugs, and gambling. However, the money it had earned during Prohibition allowed it to invest more capital in these activities, which was borne out by the development of Las Vegas during the 1950's. In addition, organized crime also responded to other societal developments and expanded into new areas, such as labor racketeering.

A. *ITS ORIGINS*

Prohibition originated in the Progressive Movement. Domestically a striving for a more moral society dominated the first two decades of the twentieth century. The prohibitionists viewed alcohol

41. *Id.* at 233, 243.

42. *Id.* at 350.

43. Although "organized" crime existed before Prohibition, the structure required for large-scale smuggling and the large profits involved turned it, for the first time, into incipient organizations.

as a major obstacle to this goal because it contributed to crime, pauperism, and insanity.⁴⁴ Especially during World War I they engaged in the battle against alcohol on the homefront, whose renunciation seemed only a small sacrifice compared to the deprivations the soldiers suffered on the battlefields of Europe. After having conquered numerous state legislatures, in 1917 the prohibitionists finally succeeded nationally with Congress ratifying the Eighteenth Amendment to the United States Constitution, which by 1919 was accepted by forty-six out of forty-eight states. Prohibition was to start officially on January 16, 1920. With almost one year to prepare for a dry country, many individuals and organizations, including educational institutions, such as Yale University, stockpiled alcoholic beverages.

Prohibition truly satisfied three popular passions: "the passion of the prohibitionists for law, the passion of the drinking classes for drink, and the passion of the largest and best-organized smuggling trade that has ever existed for money."⁴⁵ Although a majority of Americans might theoretically have shared Prohibition's goal of abolishing alcohol by statute, reality was different. Because a large percentage of the population demanded alcohol, the passage of the Eighteenth Amendment had created the paradigm of a black market. Initially, the prescription of medicinal alcohol skyrocketed and private, small-scale bootlegging flourished. The longer Prohibition lasted, however, the easier it became for legislatures and law enforcement officials to plug these holes. This created an incentive for other, more organized groups to enter into, what appeared to be, a lucrative market.

B. *THE DEVELOPMENT OF ORGANIZED CRIME*

Prohibition changed the structure of organized crime and America's attitude towards it.⁴⁶ Loosely organized groups turned into well-organized and structured enterprises. During Prohibition most

44. Richard J. Bonnie & Charles H. Whitebread II, *The Forbidden Fruit and the Tree of Knowledge: An Inquiry into the Legal History of American Marijuana Prohibition*, 56 VA. L. REV. 971, 976 (1970).

45. SEAN DENNIS CASHMAN, PROHIBITION—THE LIE OF THE LAND 29 (1981).

46. Some commentators have argued that Prohibition did not "create" an "underworld." It always existed but became publicized and romanticized during this time period with the national crime wave during Prohibition being merely a journalistic invention. J.C. Burnham, *New Perspective on the Prohibition "Experiment" of the 1920's*, 2 J. SOC. HIST. 51, 61 (1968). I do not necessarily quarrel with this thesis since I do not claim that Prohibition constituted the origin of organized crime. However, I do argue that the development of the huge black market created by the passage of the Eighteenth Amendment heavily impacted the form and structure of organized crime.

gangs were organized along kinship ties and ethnic lines with the most prominent being Italian, Irish, and Jewish. These groups had traditionally had strong family networks; they were unable to assimilate into American society; and they were poor. Bootlegging gangs supplied the hierarchical structure and required the family loyalty which had been disrupted by the attempted acculturation into American society.⁴⁷ This might have been particularly true for Italian-Americans. In addition, smuggling alcohol was the sole avenue to status and money for many immigrants.

In the course of the 1920's many of these ethnic groups were forced to collaborate to transport alcohol across state lines. They split supply territories geographically to avoid competition and unnecessary diminution of their profits. Because of these economic necessities, regional organizations developed. Their development was helped by a new, important source of contacts, the prison system.⁴⁸

Because of the heavy involvement of ethnic groups in the bootlegging business, Congress believed in a conspiracy by aliens against the fabric of American society. Therefore, much of the legislative effort during that time was directed at the deportation of aliens.⁴⁹ However, although these ethnic gangs engaged in criminal behavior, they acted in accord with the best American tradition, the striving for economic success. Despite the threats of arrest and punishment, the suppliers could not be deterred from selling alcohol.

During the twenties the public also considered the gangster to be all-American—an outgrowth of the belief on the part of many Americans that liquor-related activity was not essentially criminal.⁵⁰ The new breed of gangster was considered the equivalent of a businessman who succeeded in building a stable and affluent organization.⁵¹ “[T]he Volstead Act gave the underworld the best market and the best public relations it ever enjoyed.”⁵² As a result, for organized criminals, bootlegging was not only an avenue to accumulate huge profits but also a

47. CASHMAN, *supra* note 45, at 111-12.

48. REUTER, *supra* note 3, at 158.

49. CASHMAN, *supra* note 45, at 144.

50. Eventually, it was the prohibitionist rather than the bootlegger who became the scapegoat because the gangster was needed to supply a highly demanded good. SMITH, *supra* note 18, at 88.

51. *Id.* at 65.

52. Gus Tyler, *The Sociodynamics of Organized Crime*, in *THE CRIME SOCIETY—ORGANIZED CRIME AND CORRUPTION IN AMERICA* 126 (Francis A. Ianni & Elizabeth Reuss-Ianni eds., 1976).

way to gain respectability, status and power. This was also borne out in the relationship between organized crime and politics.

During the nineteenth century, organized crime had been subservient to the political machine. However, the capital and influence it accumulated during Prohibition reversed the balance. No longer did politicians employ organized crime to get elected but organized crime either financially supported desirable candidates⁵³ or promoted candidates it had previously selected. This development was another indication of the evolution of true criminal organizations, the increased cooperation among them, and the syndication of organized crime.⁵⁴

C. THE DOWNSIDE OF PROHIBITION

Prohibition exacted a heavy toll on America. First, Prohibition "led to a breakdown of law and order with the connivance of those in authority. The remedy was worse than the disease."⁵⁵ By craving an outlawed drug, almost the entire country engaged in illicit behavior. Whereas during Prohibition the death rate from alcohol due to alcoholism and liver cirrhosis declined,⁵⁶ it rose for deaths from alcohol poisoning.⁵⁷ Although Prohibition succeeded in closing the much maligned saloon, the growing number of speakeasies presented a greater enforcement problem. Not only did they stay open twenty-four hours a day but they also attracted a more varied clientele, including an increasing number of women (a group that had never frequented saloons). Prohibition also created an incentive for liquor consumers to shift to other stimulants, especially marijuana. In addition, Prohibition changed the market from relatively bulky, bland substances, such as beer, to more potent and hazardous concentrates in the form of hard liquor because the latter were more readily marketable and easier to smuggle.⁵⁸ Therefore, seizures became more difficult.

53. Peter A. Lupsha, *Organized Crime in the United States*, in ORGANIZED CRIME: A GLOBAL PERSPECTIVE 33 (Robert J. Kelly ed., 1986). Al Capone, for example, helped finance the campaign of Big Bill Thompson for mayor of Chicago. CASHMAN, *supra* note 4, at 59.

54. Lupsha, *supra* note 53, at 52.

55. CASHMAN, *supra* note 45, at 2.

56. Mark H. Moore, *Actually, Prohibition was a Success*, N.Y. TIMES, Oct. 16, 1989, at A21. The decline in the death rate due to liver cirrhosis and alcoholism might have been entirely unrelated to Prohibition. First, even before Prohibition both figures decreased. Second, the death rate due to these factors also declined in Great Britain during the 1920's although the United Kingdom did not outlaw alcohol during that decade.

57. CASHMAN, *supra* note 45, at 255.

58. BRECHER, *supra* note 1, at 522. After 1933, with the repeal of Prohibition, the consumption of hard liquor decreased by two-thirds, and the movement towards diluted alcoholic drinks grew stronger.

Ultimately, the public broke the law in such large numbers that society became more homogeneous, united in a single pursuit, the drink.⁵⁹

The obvious problems faced by law enforcement agencies included "the diversion of industrial alcohol; congestion in the courts; police lassitude; unwillingness of states to share enforcement with the federal government; governmental corruption; insufficient funds; political hypocrisy. The law led to seizures of property, violence, and even killings by those whose task was to supervise it and those whose intention was to subvert it."⁶⁰ These problems were exacerbated by the limited budget with which these agencies had to operate. "By keeping the costs of enforcement down [prohibitionists] kept taxation at the same level and thus anticipated a potential cause of public resentment."⁶¹ Although the enforcement budget had grown steadily every year during the early 1920's, it was not until the last few years of Prohibition that Congress appropriated a substantial amount of revenue to it. However, the dries continued to fear public resentment triggered by increasing taxes. So, when in 1929 the wets proposed to increase the law enforcement budget from \$13.5 million to \$269.5 million, the dries vetoed the legislation.⁶² Consequently, the enforcement of the Volstead Act never turned into an all-out war against alcohol.

Second, escalating violence, often in the form of lethal gang warfare, accompanied the growth of the organized gangs that were engaged in the large-scale smuggling of alcohol. Ida M. Tarbell, a progressive journalist, wrote in the summer of 1929, "There have been weeks in recent months when the outline of a day's news read like a war communique."⁶³ Despite the gang warfare during Prohibition, which culminated in the Valentine's Day Massacre of 1929, the lure of alcohol remained undiminished throughout the twenties.

Nevertheless, the rising crime rate and the increased violation of the Volstead Act led to ever harsher penalties, especially during the three years immediately preceding the repeal of the Eighteenth Amendment. For example, the Michigan Habitual Criminal Act imposed a life sentence for four convictions under the state prohibition law which rendered possession of liquor a felony.⁶⁴ In addition, the Volstead Act extended federal authority in law enforcement to an

59. CASHMAN, *supra* note 45, at 123.

60. *Id.* at 29.

61. *Id.* at 161.

62. *Id.* at 202.

63. *Id.* at 205.

64. CASHMAN, *supra* note 45, at 205.

unprecedented degree. The Jones Act, passed in 1929, increased penalties for a simple violation of the Volstead Act to five years imprisonment and/or a fine of \$10,000.⁶⁵ The combined effect of expanded federal authority and increased penalties caused an—until then—unknown congestion of federal courts. In addition, jail and prison space proved insufficient because long-term prison sentences had become commonplace between 1928 and 1931.⁶⁶

The situation can be summarized as follows, “prohibition cases clogged the courts, impeded true justice, and brought the performance of law into disrepute.”⁶⁷ As a consequence, Prohibition imposed greater and longer-term costs than those immediately apparent. “A general tolerance of the bootlegger and a disrespect for federal law were translated into a widespread contempt for the processes and duties of democracy.”⁶⁸

D. THE REPEAL OF THE VOLSTEAD ACT

Organized crime was not unprepared for the repeal of the Eighteenth Amendment⁶⁹ and had investigated new lucrative areas of business. The large amounts of money that had come into the hands of successful bootleggers during Prohibition had turned gangs into empires with the opportunity to participate in further illicit enterprises.⁷⁰ Therefore, with the end of Prohibition organized crime turned to gambling, including horse racing and betting,⁷¹ and focused its attention again on prostitution.⁷² It was also in the 1930's when a new breed of Italian gangsters allegedly began to disregard the traditional Mafia code of honor which had prohibited narcotics trafficking.⁷³ According to Senator Kefauver, narcotics were profitable at that point but presented only limited national appeal. Therefore, they did not become the immediate center of organized crime's business.⁷⁴ Because only the most successful old bootleggers survived in the new

65. *Id.* at 200-01.

66. *Id.* at 154-55, 211.

67. *Id.* at 154.

68. HOWARD ABADINSKY, *ORGANIZED CRIME* 90 (2d ed. 1985) (quoting Andrew Sinclair).

69. The thirty-sixth state ratified the Twenty-first Amendment on December 5, 1933. Bonnie & Whitebread, *supra* note 44, at 981.

70. ALBINI, *supra* note 4, at 204.

71. Lupsha, *supra* note 53, at 49.

72. See DUKE & GROSS, *supra* note 7, at 93-94.

73. ALFRED W. MCCOY, *THE POLITICS OF HEROIN: CIA COMPLICITY IN THE GLOBAL DRUG TRADE* 28 (1991).

74. KEFAUVER, *supra* note 13, at 35.

economic atmosphere, competition declined in the aftermath of Prohibition, and with it violent crimes and property offenses decreased dramatically.⁷⁵

Finally, political connections, wealth, and notoriety allowed organized criminal groups to move into other, legitimate business enterprises after the repeal of Prohibition. For example, once they realized the advantages that could be gained from the control of the strengthened labor unions they became involved in labor racketeering. With the corruption of law enforcement and the expansion of the criminal structure beyond gambling, prostitution and alcohol into the legitimate world, crime became a serious business.⁷⁶

E. THE INTERMEDIATE YEARS

The Kefauver Committee hearings on organized crime, conducted in the early 1950's, seemed to indicate that the organized gangs that had survived Prohibition had secured a monopoly in interstate prostitution, narcotics, and gambling.⁷⁷ After those hearings the term, "Mafia" had become synonymous with "organized crime." The Mafia appeared as a national criminal organization, controlled by Italian-Americans who were in charge of the entire vice business in the United States.⁷⁸ This view was reinforced in 1958 by the news of the meeting of reputed "mafiosos" in the Appalachian Mountains.

It was during the Kennedy and Johnson Administrations that law-enforcement officers attempted to purge the country of organized crime. This became of increasing importance with the rumors of the alleged participation of the Mob in the assassination of President John F. Kennedy and the 1963-64 testimony of Joe Valachi, a minor "mafioso," before Senator John McClellan's Senate Permanent Subcommittee on Investigation, who stated that the principal activities of the Mafia were gambling and drugs.

During that time, the single most frequently asked question with respect to the Mafia concerned the extent to which it was involved in the drug trade. In effect, the alleged rejection of mafia involvement in the drug trade by the old league was often used to bolster the claim of

75. Mark Thornton, *Prohibition Was a Triumph for Minority Rule*, N.Y. TIMES, Nov. 4, 1989, (letter to the editor) at A24.

76. Robert J. Kelly, *The Nature of Organized Crime and Its Operations*, in U.S. DEP'T OF JUSTICE, MAJOR ISSUES IN ORGANIZED CRIME CONTROL; SYMPOSIUM PROCEEDINGS 16-17 (Herbert Edelhertz ed., 1987).

77. SMITH, *supra* note 18, at 131.

78. *Id.* at 142.

the dangerousness of drugs.⁷⁹ It was the single-minded focus of law enforcement officers on the Mafia, or La Cosa Nostra as it was called after Valachi's testimony, that caused their failure to closely monitor other organized groups that began to enter the drug trade from the 1960's onward.

IV. THE WAR ON DRUGS

A. *ITS ORIGIN*

Quite contrary to popular belief, the War on Drugs did not start in the early 1980's but at the beginning of our century. While the virtues of drugs for medical and other purposes had been extolled during the late nineteenth century,⁸⁰ their negative side effects became increasingly publicized during the early years of the twentieth century.

The same groups that promoted the Volstead Act also headed the movement against drugs.⁸¹ The motives for the drive to control narcotics were manifold. International politics, paternalism, self-protection and pharmacological ignorance played as much a role as racial fear and hostility.⁸² In addition, physicians and pharmacists lobbied heavily for a legal monopoly over the distribution of drugs.⁸³ Nevertheless, narcotics legislation was never a matter of vigorous public debate, but rather ad hoc legislation designed to anticipate an incipient social problem.⁸⁴

The Progressive Movement, which scored its greatest victory with the Eighteenth Amendment, had succeeded a few years earlier in its battle against narcotics with the passage of the Harrison Narcotics Act of 1914. It was originally designed as a taxing measure, which required registration and payment of an occupational tax by all persons who imported, produced, dealt in, sold or gave away opium, cocaine or their derivatives. Any transfer by an illegitimate seller called for penalties of up to \$2,000 in fines, more than five years imprisonment, or both.⁸⁵

79. If some part of organized crime declined any involvement in the drug trade, this is most likely due to market factors. Drug trafficking might have posed too high a risk for established gangsters.

80. Sigmund Freud, for example, was among the early advocates of cocaine. DAVID F. MUSTO, *THE AMERICAN DISEASE* 7 (expanded 1987).

81. WISOTSKY, *supra* note 26, at 179.

82. *Id.* at 180-81.

83. James Ostrowski, *The Moral and Practical Case for Drug Legalization*, 18 *HOFSTRA L. REV.* 607, 614 (1990).

84. Bonnie & Whitebread, *supra* note 44, at 976.

85. *Id.* at 987.

Until more restrictive state and federal legislation and narrow judicial interpretation of these laws cracked down on the licensed sellers of narcotics, namely physicians and pharmacists, narcotics peddling had not been considered an extremely difficult enforcement problem.⁸⁶ By 1915, however, the State of New York was dominated by a "widespread belief that the underworld was moving into the drug market to fill the vacuum left by the physicians," who were disinclined to prescribe maintenance doses for drug addicts.⁸⁷

Eventually, it was the United States Supreme Court that turned the Harrison Act from a tax statute into a prohibition law. In *Webb v. United States*,⁸⁸ it held that it was a violation of the Harrison Act⁸⁹ for a physician to issue an order for morphine to an habitual user if the prescription was not issued in the course of an attempted cure of the drug habit.⁹⁰

Because the country was preoccupied with (alcohol) Prohibition in the following years, the effort expended on drug control was limited. Nevertheless, in 1922 Congress passed the Narcotic Import and Export Act, and in 1924 it outlawed the domestic manufacturing of heroin even for medicinal purposes.⁹¹ These post-Harrison Act narcotics statutes grew out of the hysterical climate caused by the increase in drug-related crime due to the closing of drug clinics, the lurid accounts of drug-induced crime in the media, and the effective separation of the addict from the medical profession.⁹² At that time, a widespread black market in opiates began to develop, and a well-coordinated national crime network devoted to the smuggling and distribution of drugs outside the law evolved.⁹³ Peddlers were attracted to narcotics trafficking because of the high profits it promised, and because the level of danger was low and the sentences were light. However, this began to change when, at the eve of the repeal of the Volstead Act, the Federal Narcotics Bureau was established.⁹⁴ It

86. MUSTO, *supra* note 80, at 95.

87. *Id.* at 106.

88. 249 U.S. 96 (1919).

89. *Id.* at 99.

90. The Harrison Narcotics Act, ch. 1, 38 Stat. 785 (1914) (current version at 21 U.S.C. §§ 801-969 (1988)).

91. DENNY F. PACE & JIMMIE C. STYLES, *ORGANIZED CRIME: CONCEPTS AND CONTROL* 149 (1975).

92. Bonnie & Whitebread, *supra* note 44, at 1011.

93. Ronald Hamowy, *Introduction: Illicit Drugs and Government Control in Dealing with Drugs*, in *CONSEQUENCES OF GOVERNMENT CONTROL* 1, 15 (Ronald Hamowy ed., 1987).

94. SMITH, *supra* note 18, at 186.

appears as if the struggle against human temptation just changed its target from alcohol to drugs.

During the first twenty years of its existence, the Federal Narcotics Bureau considered it its mission to cut off all supply lines to enforce the total prohibition of illegal narcotics. It used its political leverage as well as its tools as a police agency to accomplish this goal.⁹⁵ However, by the 1950's, it was clear that even the attempt to halt the growing rate of addiction was floundering. According to the Narcotics Bureau, the increase in drug addicts was due to the use of marijuana which served as the "stepping stone" for other drugs.⁹⁶ Therefore, it increasingly focused its enforcement efforts on marijuana. To justify the importance of its task and to explain its lack of success in the enforcement of federal anti-narcotic legislation, the Narcotics Bureau began to identify its opponent as a supercriminal organization controlled from abroad. Who better than the "Mafia" fit this description? The Narcotics Bureau described the connection between drug-trafficking and organized crime in the following terms: "The narcotics traffic was evil; it was alien; it was organized; it was conspiratorial; it was being forced upon us from abroad; it flaunted American law; and its entrepreneurs were usually successful in defying who would control it."⁹⁷

Responding to lobbying by the Narcotics Bureau the Boggs Act,⁹⁸ passed in 1951, imposed harsher penalties on drug dealers.⁹⁹ By 1956 the penalties were again increased because Congress worked under the assumption that organized crime controlled all drug peddlers.¹⁰⁰ This charge appeared to be vindicated by Joe Valachi's testimony before Senator McClellan's Subcommittee where he claimed that the major business of the Mafia was drug trafficking.¹⁰¹ By that time attitudes had shifted: No longer was addiction viewed as a simple punishable vice; the country appeared to be convinced that those who profited from addiction—corrupt police and the "Mafia"—were high-level criminals who needed to be punished severely.¹⁰²

95. The passage of the Marihuana Tax Act of 1937, for example, practically halted marijuana's continued use as a medicinal agent. Hamowy, *supra* note 93, at 24. It is ironic that most of the national legislation passed with regard to marijuana was enacted at a time when almost no national attention was paid to this drug. Bonnie & Whitebread, *supra* note 44, at 1167.

96. Bonnie & Whitebread, *supra* note 44, at 1063.

97. SMITH, *supra* note 18, at 186.

98. Boggs Act, Pub. L. No. 82-255, 65 Stat. 767 (1951).

99. Bonnie & Whitebread, *supra* note 44, at 1063.

100. *Id.* at 1079.

101. SMITH, *supra* note 18, at 219.

102. MUSTO, *supra* note 80, at 237.

Nevertheless, during the late 1960's it appeared as if the demise of the Volstead Act could prove to be an example for the fate of the Harrison Narcotics Act, at least with respect to marijuana.¹⁰³ However, despite their widespread use, illegal narcotics remained outlawed. In fact, in the late 1960's President Nixon declared the first "War on Drugs;" it failed. By the 1970's drug trafficking had become a major business because of the promise of fast money combined with the growing number of drug users and the moral ambiguity of drugs, which added an extra temptation to succumb to them. Another huge black market with all its attendant negative effects was flourishing in the middle of America. After another short period of debate on the issue of (marijuana) legalization, President Reagan declared a second "War on Drugs" in the early 1980's. Explicitly linking the supply of illegal narcotics to organized crime; he promised that he had an "unshakable commitment to do what is necessary to end the drug menace' and 'to cripple the power of the mob in America.'" ¹⁰⁴

B. ORGANIZED CRIME AND ILLEGAL NARCOTICS

The same pattern of relationships that existed during Prohibition also dominates the drug traffic: An illegal good is in demand; a supply organization develops that needs the tacit protection of law enforcement for the distribution of narcotics, thereby creating corruption; and competition in the distribution and supply of narcotics is reduced because of tougher laws and stiffer penalties. The main difference between Prohibition and drug trafficking rests in the product: in contrast to alcohol, hard drugs are not widely accepted.¹⁰⁵

Despite the official myth, no single homogeneous and impenetrable organization such as the Mafia controls the drug trade. No cohesive ethnic criminal organization has succeeded in monopolizing the market in drugs. The marijuana business, for example, is free of huge organized enterprises. The reasons are mostly economic: low barriers to entry, a modest return, and therefore a low level of violence.¹⁰⁶ However, in contrast to the overall drug trade, the trafficking in specific narcotics is often dominated by ethnic groups and concentrated in fewer and fewer hands. At present, Colombians and Bolivians run

103. Jerry V. Wilsom, *Our Wasteful War on Drugs*, WASH. POST, Jan. 18, 1984, at A19.

104. Wisotsky, *supra* note 2, at 1 (quoting President Reagan).

105. Francis A. Ianni, *New Mafia: Black, Hispanic and Italian Styles*, in *THE CRIME SOCIETY—ORGANIZED CRIME AND CORRUPTION IN AMERICA* 143-44 (Francis A. Ianni & Elizabeth Reuss-Ianni eds., 1976).

106. REUTER, *supra* note 3, at 170.

most of the multi-volume dealing in cocaine.¹⁰⁷ The Colombians from Medellin appear to be the first group to have developed a real drug cartel which operates as a coherent group, pools its finances, and makes collective marketing decisions.¹⁰⁸ For the domestic distribution of drugs abroad, they cooperate with previously established criminal organizations such as those groups that managed the smuggling of heroin.¹⁰⁹

It appears that most of these drug trafficking organizations are run in a business-like manner with proficient operators of capital and profits at the top.¹¹⁰

They reinvest a large percentage of their profits in legitimate businesses or real estate in the United States, Europe and South America. In Dade County, Florida, large investments of drug traffickers have inflated the value of real estate. In addition, large-scale trafficking organizations not only use financial institutions to launder their money but have even gone so far as to take over entire banks for the sole purpose of accounting for their profits.

The drug-trafficking organizations are distinguishable from legitimate businesses because of their ultimate reliance on force or the threat of force and the corruption of government to protect their business.¹¹¹ The Colombian drug dealers are especially reputed for the extreme degree of violence they employ; often they do not even hesitate to exterminate entire groups of victims.¹¹² Violence appears to have become a more important factor with increasing returns to scale, where scale is a measure of relative size.¹¹³ Therefore, it should not come as a surprise that high profit enterprises as well as large, geographically spread-out organizations display the largest degree of violence. The former use it to shield against competition and thereby protect profit, and the latter employ the threat of violence to intimidate their ultimate distributors and their customers. In addition, the large amount of money at stake and at hand has increased the problem

107. WISOTSKY, *supra* note 26, at 43.

108. MCCOY, *supra* note 23, at 479.

109. WISOTSKY, *supra* note 26, at 45.

110. Many of the ultimate distributors in the network are dependent on dealing drugs to defray the costs of their addiction. Because of their frequent and rapid entry and exit to and from the market, they should not be the main focus of police investigation. REUTER, *supra* note 3, at 184.

111. UNITED STATES DEP'T OF JUSTICE, MAJOR ISSUES IN ORGANIZED CRIME CONTROL: SYMPOSIUM PROCEEDING 194 (Herbert Edelhertz ed., 1987).

112. WISOTSKY, *supra* note 26, at 151.

113. REUTER, *supra* note 3, at 133.

of police corruption, which used to be a major issue during Prohibition.¹¹⁴

So far the War on Drugs has not led to any visible (positive) results. Despite its escalation, which resembles the increasing enforcement effort during the late 1920's when Prohibition was already in its final throes, the result seems to be similar: more drugs are being imported into the United States. Higher appropriations for drug-enforcement agencies, the involvement of the military in fighting the import of narcotics, and increased penalties for drug dealers have not cut off the supply.¹¹⁵ Quite to the contrary, the drugs offered on the market have become increasingly potent to make them more marketable and easier to smuggle.¹¹⁶ This renders drugs much more hazardous to users. For example, when the Reagan Administration in the mid-1980's began to strictly enforce the marijuana laws, the smugglers turned to cocaine. Consequently, it was the enforcement of the laws against a relatively harmless drug that eventually caused the cocaine epidemic.

In addition, the War on Drugs seems to often require the sacrifice of constitutionally guaranteed protection.¹¹⁷ Then as now, heightened drug enforcement has given organized crime an advantage over its competition because it is more enforcement-resistant than smaller suppliers due to its greater capacity for violence and corruption.¹¹⁸ Organized crime often manages to employ law-enforcement officers to their advantage by providing information on independent competitors. Large-scale suppliers have additionally manipulated the market by artificially constricting or increasing the supply of narcotics. Most importantly, the public has lost confidence in the criminal justice system because of its many failures and its utter waste in a battle of dubious moral character.¹¹⁹

114. WISOTSKY, *supra* note 26, at 149-50. Historically, gambling was the major illegal activity associated with corruption. Since the 1970's it has been replaced by narcotics trafficking. *Id.* at 149.

115. See DUKE & GROSS, *supra* note 6, at 200-30 ("Supply reduction has been and must continue to be a colossal failure" and "[d]emand reduction . . . can never produce a victory.'").

116. BRECHER, *supra* note 1, at 522.

117. See generally DUKE & GROSS, *supra* note 6, at 122-45. This is also a striking parallel to Prohibition when the Fourth Amendment came under increasing pressure. Bonnie & Whitebread, *supra* note 44, at 980.

118. UNITED STATES DEP'T OF JUSTICE, *supra* note 111, at 194-95.

119. WISOTSKY, *supra* note 26, at 154.

V. BLACK MARKETS AND ORGANIZED CRIME: A COMPARISON

A. *THE HISTORICAL DEVELOPMENT OF A BLACK MARKET*

Thomas Szasz attributed Prohibition and the War on Drugs to two complementary strains in American society, the democratic model and the Judeo-Christian tradition. The Judeo-Christian belief world is based on the struggle against temptation. When this struggle clashes with the desire to satisfy "needs," an intense ambivalence develops about the pleasure-producing act, whether it be drinking or taking drugs. When a democratic people, propelled by religious-moral beliefs, chooses to abolish a product it intensely craves, draconian enforcement measures are required to successfully restrain this desire.¹²⁰

This analysis appears to be borne out of the origin of both alcohol and drug prohibition in the Progressive Movement. However, while the prohibition on alcohol immediately impacted the majority of the population, the Harrison Narcotics Act did not have such a sudden influence on the lives of a substantial number of people. Consequently, the response to the Narcotics Act was very different from the reaction after the passage of the Eighteenth Amendment. During the 1920's a vast number of people broke the law by frequenting speakeasies, brewing liquor at home, or buying smuggled alcohol from bootleggers. Although the violence prevalent at that time was directed at other gangs and bootleggers, often innocent bystanders were harmed as well. Nevertheless, the stigma that is characteristic of other types of illicit behavior was never attached to bootlegging. Quite to the contrary, bootleggers were often viewed as all-American businessmen. Because of the country's attitude toward Prohibition and its veneration of many of the well-known gangsters of that time, the repeal of the Eighteenth Amendment was not fraught with moral dilemmas.¹²¹ It was not until the repeal of Prohibition that the Mafia label began to be attached to organized crime, and thereby implying ethnicity, violence and an un-American way of approaching life.¹²²

B. *ILLICIT PRODUCTS*

Alcohol as a product could easily be homemade or smuggled into the country. Home-brewing was the most frequently used method of

120. Thomas Szasz, *Foreword*, in WISOTSKY, *supra* note 26, at xv-xvi.

121. The depression also focused the country's attention on a more pressing subject. Tax money could no longer be spent on a dubious endeavor, as was the enforcement of Prohibition.

122. SMITH, *supra* note 18, at 88-89.

supplying alcohol during Prohibition, especially in rural areas.¹²³ In large urban centers, such as Chicago and New York, industrial alcohol was sold, often causing serious injury to or even the death of the consumer.¹²⁴ Alcohol was also smuggled into the country, mainly through Canada where alcohol production skyrocketed.¹²⁵

Drugs are inherently less of a uniform product than alcohol. Narcotics differ in their base products, the geographical areas in which they are produced, and their degree of purity. These variants determine the way in which the supply organizations are run. For example, joint demand tends to generate joint supply. This explains why marijuana and cocaine are often sold by the same enterprise whereas heroin distribution tends to be in the hands of one-product supply organizations. Usually diversification into unrelated product lines does not occur because conglomerates are more exposed to law enforcement.¹²⁶

In contrast to alcohol which had to be shipped in huge quantities, only small amounts of the base drug are needed for large profits, especially in the case of cocaine and heroin. In many respects, marijuana might be the drug that most resembles alcohol because, to a large extent, it is grown in the United States and Mexico.¹²⁷ Easy availability accounts for its wide dissemination, and its smuggling most closely parallels that of alcohol during Prohibition. The longer any prohibition lasts, however, the more likely becomes the use of stronger, less bulky products. Just as Prohibition witnessed a movement from beer to wine and hard liquor, drug enforcement has caused the suppliers to shift to more potent forms of drugs. Heroin and cocaine have replaced marijuana as the biggest money-maker. In addition, users no longer ingest drugs orally or nasally but increasingly take narcotics intravenously to increase their effect. Therefore, prohibition has changed the dominant product line from a relatively weak, bulky commodity to a more potent product that takes up less space. Because the product is less likely to be detected, the risk for illegal suppliers becomes smaller and their profit margin greater.

However, drugs were not long-standing or socially accepted goods in the way alcohol had been at the time of its ban. Even before the Harrison Narcotics Act was passed, drug use was most often a

123. CASHMAN, *supra* note 45, at 37-38.

124. *Id.* at 36-39.

125. *Id.* at 29-33.

126. REUTER, *supra* note 3, at 129.

127. Wilson, *supra* note 103, at A19 (marijuana, reported to be second most valuable cash crop grown in the United States, surpassed only by corn).

private activity, a feature that likened it to prostitution. In 1914, because of the then recent popularity of drugs and their small-scale consumption, in contrast to alcohol manufacturing in 1914 they were not produced by a large licit industry. Consequently, organized and well-financed pressure for the repeal of the Act never existed. This is different from Prohibition where the pressure of a strong manufacturing lobby, especially of beer-brewers, contributed to the repeal of the Volstead Act. Even today no part of the private industry would lead the legalization movement because it has no stake in the drug market, whereas the beer-brewers could expect to regain the business they had lost to organized crime. Even if organized crime had the financial and political resources to wage a battle for the legalization of drugs, it would have no incentive to destroy its highly profitable market.

C. *THE INVOLVEMENT OF ORGANIZED CRIME IN THE SUPPLY OF ILLEGAL PRODUCTS*

The events during (alcohol) Prohibition as well as those during the current narcotics prohibition highlight the fact that the prohibition of any personal vice transfers illicit trades from legitimate merchants to "entrepreneurs in vice and violence."¹²⁸ It is the prevalent economic conditions that dominate the supply of illegal narcotics. "Drug laws yield to a higher law: the law of the marketplace, the law of supply and demand."¹²⁹ This cannot be too surprising in view of the profit organized crime is reaping from the drug trade—some estimates place the total income accruing to organized crime from narcotics at \$63 billion annually.¹³⁰ The precise structure of the illicit market depends on the type of drug supplied. The heroin business, for example, consists of arms-length transactions rather than integrated components of import, wholesale, and retail. The sale of heroin is financed out of its immense profits which allows its trade to expand and grow quickly.¹³¹ Because the heroin market is generally considered high-risk, it is difficult to close off, which accounts for the low competitive

128. McCoy, *supra* note 73, at 14.

129. Wisotsky, *supra* note 2, at 107.

130. Hamowy, *supra* note 93, at 8 n.22. However, these estimates vary widely; the only common denominator is that the income generated by illegal narcotics trafficking is extremely high. Although no one knows the size of organized crime, the federal bureaucracy fighting it has grown exponentially. Consequently, the argument has been made that the alleged size of organized crime has been used as a political weapon for budget allocation purposes. Craig M. Bradley, *Racketeering and the Federalization of Crime*, 22 AM. CRIM. L. REV. 213, 214 (1984).

131. REUTER, *supra* note 3, at 121.

violence in this field.¹³² The so-called Mafia no longer derives a large portion of its income from heroin.¹³³ The reasons might be the uniquely high legal risk to most senior entrepreneurs and the fact that Middle Eastern heroin lost its predominant market position.¹³⁴ On the other hand, the distribution of marijuana is not controlled by organized crime because the barriers to market entry were low due to only modest returns to assets. Because of the limited profit margin, violence is also low. Since marijuana is being domestically cultivated, it is almost impossible to close off the market, which accounts for the involvement of numerous small players in the marijuana trade. "By now, the marijuana trade is so scattered and at the same time so fragmented (with no real hierarchy in the trade) that the unenforceability of [the marijuana] laws has reached Prohibition propositions."¹³⁵

These economic considerations illuminate the fact that after a product has been outlawed, economic determinants shape market organization most decisively.¹³⁶ For example, police enforcement factors as an economic determinant raises the price of a product because the suppliers must take increased safety precautions. In this respect, law enforcement can be analogized to environmental standards and regulations imposed on legitimate businesses.

Organized crime developed the way it did because of Prohibition which created a certain respectability for and tolerance of crime. During Prohibition organized crime changed from small-scale supply organizations to larger-scale, regional organizations that focused exclusively on the sale of alcohol. In many cases, local neighborhood gangs matured into regional organizations, often after bloody gang warfare. Nevertheless, in contrast to popular belief, the illegal market was not dominated by a single group but by numerous organizations, only some of which cooperated with each other.

The same holds true for the distribution of illegal narcotics in the United States which is also not controlled by one homogeneous dealer organization. Quite to the contrary, according to the Department of Justice, numerous different groups are involved in drug dealing, among them different ethnic organizations and motorcycle gangs.¹³⁷ Nevertheless, the so-called mafia, although only marginally involved

132. *Id.* at 141.

133. *Id.* at 180.

134. *Id.* at 184.

135. Bonnie & Whitebread, *supra* note 44, at 1101.

136. REUTER, *supra* note 3, at 130.

137. Kelly, *supra* note 76, at 5-49.

in drug dealing, has remained the paradigmatic enforcement target of federal agencies. The reason rests partly in the myth surrounding the Mafia, partly in the initial involvement of Italian organized crime in the drug trade. After Prohibition, the Mafia dominated the heroin import from the Middle East through Italy to the United States. However, with increased targeting by Italian, French and American law enforcement agencies and the destruction of important heroin laboratories in Marseille, France, in the early 1970's, heroin from the Far East began to replace the Middle-Eastern drug connection. The Vietnam War furthered this development acquainting numerous American soldiers with heroin grown in the Golden Triangle; it also allowed Asian organized crime to gain an advantage over Italians in narcotics trafficking. As a consequence, the formerly significant connection between organized groups in the United States and those in Italy (Sicily) declined precipitously in importance. Finally, in the course of the late 1970's when cocaine began to replace heroin, organized groups from Latin America began to play the dominant role in the drug trade.

The shift in the areas of production and the ethnic composition of suppliers indicates the global nature of drug trafficking. Whereas alcohol and marijuana could be, respectively, manufactured and grown in the United States, opium harvesting is geographically restricted to a limited number of countries. The enforcement of (alcohol) Prohibition constituted mainly a domestic problem;¹³⁸ drug trafficking, however, is an international enterprise. Nevertheless, countries have mainly attempted to suppress it through localized tactics.¹³⁹

Because of the extreme penalties threatening drug suppliers in many countries, including the United States, it cannot be surprising that most organizations are built on a characteristic shared by its participants, such as race, ethnicity, or religion.¹⁴⁰ In addition, the lines of authority tend to be hierarchical to isolate participants at different levels of the enterprise from certain knowledge. In this respect, these organizations do not vary substantially from legitimate organizations that operate under high levels of stress, such as the military.

The threat of long-term imprisonment for drug kingpins might also account for the fact that many major drug operations appear to be conducted from abroad. Domestic organizations, weighing costs and

138. The cross-border alcohol smuggling between the United States and Canada represented the major exception. CASHMAN, *supra* note 45, at 29-33.

139. MCCOY, *supra* note 73, at 486.

140. The importance of shared ethnicity is likely to be related to the national origin of the major suppliers whose identity tends to be determined by the respective supply country.

benefits, might have reached the conclusion that supplying drugs such as cocaine or heroin is too risky even despite the very favorable profit margin. The predominant political climate on the international scene might also contribute to the movement of drug suppliers from domestic soil to foreign countries. Alfred McCoy, in his book *The Politics of Heroin*, claims that it was the Cold War and the fight against Communism that caused the CIA and other Western intelligence organizations to protect foreign drug brokers, and support them financially and sometimes even logistically to avoid the victory of Communism in developing countries.¹⁴¹

As held true during Prohibition, mainly men—often immigrants—are involved in the intermediate and lower levels of the drug trade. According to the anthropologist Bourgeois, it is mainly “ambitious, energetic, inner-city youths” who are attracted to drug dealing precisely because they believe in the American dream.¹⁴² In this respect, they do not differ from the bootleggers of the twenties. However, the age of the participants has changed dramatically. Whereas only adults were involved in criminal organizations during Prohibition, street-level drug dealing is increasingly conducted by children who either have to support their families or who are trying to finance their addiction.¹⁴³ The threat of imprisonment does not seem to deter them, which is not surprising especially when compared to the occupational hazard of a violent death on the street.¹⁴⁴ When the lower level dealers are imprisoned or otherwise unable to do their job, their positions can be filled immediately because of the lure of quick money.

D. LEGALIZATION AND ORGANIZED CRIME

The outline above indicates how intricately interwoven the illegal status of a product and the development of organized crime are. What would organized crime do if drugs were legalized? Would the development parallel that after the repeal of Prohibition? Would legalization cause greater problems for society in the long run? What areas of business would organized crime turn to? Would the legalization of drugs lead to the eradication of organized crime? What are the lower

141. MCCOY, *supra* note 73, at 15-17.

142. Michael Z. Letwin, *Report From the Front Line: The Bennett Plan, Street-Level Enforcement in New York City and the Legalization Debate*, 18 HOFSTRA L. REV. 795, 814-15 (1990).

143. *Id.* at 813.

144. *Id.* at 816.

levels of organized crime going to do once deprived of their major source of income?

As the repeal of Prohibition did not coincide with the end of organized crime, so would the legalization of drugs not cause its demise. The eradication of one black market does not signal the end of all of them. Prostitution, gambling, and many other types of illegal behavior remain outlawed; and as long as one consumer desires such illegal services or goods, a supplier will exist to fulfill the demand. Consequently, drug legalization cannot be tantamount to the eradication of organized crime. However, we cannot expect the legalization of drugs to create an ideal world but rather only to improve our current situation. As Walter Lippmann remarked,

We find ourselves revolving in a circle of impotence in which we outlaw intolerantly the satisfaction for certain persistent human desires and then tolerate what we have prohibited. Thus we find ourselves accepting in their lawless forms the very things which in lawful forms we repudiate, having in the end to deal not only with all the vices we intended to abolish but with the additional dangers which arise from having turned over their exploitations to the underworld.¹⁴⁵

With the legalization of drugs, society could at least take back the control over the supply of drugs which it has left to organized crime.

In the pre-Harrison Act era, large-scale drug dealers did not exist because physicians and druggists could hand out the drugs. However, when the law closed in on the latter, the peddlers took over the streets. The prices of drugs increased dramatically,¹⁴⁶ and high profits presented such an attractive lure that the potential punishment did not act as a sufficient deterrent.¹⁴⁷ In addition, anti-narcotics laws turned the opium smoker into a morphine taker and finally an intravenous drug user.¹⁴⁸ Taken all together, since the Harrison Act, the addiction to opiates has come to pose a far greater social problem than it did during the nineteenth century.¹⁴⁹

145. Walter Lippmann, *The Underworld as Servant*, in *THE CRIME SOCIETY—ORGANIZED CRIME AND CORRUPTION IN AMERICA* 167 (Francis A. Ianni & Elizabeth Reuss-Ianni eds., 1976).

146. JOHN KAPLAN, *THE HARDEST DRUG: HEROIN AND PUBLIC POLICY* 65 (1983).

147. MUSTO, *supra* note 80, at 154.

148. BRECHER, *supra* note 1, at 46.

149. KAPLAN, *supra* note 146, at 65.

1. *Possible Developments*

The first question is whether legalization would remove the reign organized crime currently holds over the supply of illegal narcotics. The history of Prohibition indicates that organized crime "may not thrive or survive in the face of legal competition."¹⁵⁰ After Prohibition, legal alcohol manufacturers had no difficulty recapturing the market from the illegal entrepreneurs. Pharmacists and physicians have traditionally prescribed drugs. Consequently, this is a task within their special area of expertise. Why would anyone prefer to buy overpriced and potentially contaminated drugs from an illegal source if the same product is legally available at a lower cost and without any risk? In this respect, legalizing drugs is easily distinguishable from legalizing prostitution or even gambling. In both areas, no professional sources could immediately (or ever) supply the same services.¹⁵¹

As the repeal of the Volstead Act did not occur overnight, so would drug legalization be an incremental and slow process. Therefore, it would allow organized crime to look for other markets and to expand into previously unserved or underserved areas with an outlawed product line. In addition, it would provide organized crime with an extra incentive to move into legal enterprises.

Finally, organized enterprises might look for other markets to export their products, markets in which drugs would remain illegal. This situation occurred in 1976 when the Netherlands decriminalized the possession and sale of marijuana without adjacent states following suit. In addition, since then numerous Germans have crossed the border to buy marijuana in the Netherlands and import it into Germany.¹⁵²

150. Thomas E. Schelling, *What's the Business of Organized Crime?*, in *THE CRIME SOCIETY—ORGANIZED CRIME AND CORRUPTION IN AMERICA* 81 (Francis A. Ianni & Elizabeth Reuss-Ianni eds., 1976).

151. Gambling and prostitution, even if legal, might remain in the hands of organized crime. The best example is Las Vegas. For considerations concerning the legalization of gambling, see Fund for the City of New York, *Legal Gambling in New York*, in *THE CRIME SOCIETY—ORGANIZED CRIME AND CORRUPTION IN AMERICA* 256 (Francis A. Ianni & Elizabeth Reuss-Ianni eds., 1976).

152. Henk Jan van Vliet, *The Uneasy Decriminalization: A Perspective on Dutch Drug Policy*, 18 *HOFSTRA L. REV.* 717, 741-43 (1990). Foreign policy might become a major consideration in the legalization of drugs, as it is now in the War against Drugs. Germany protested heavily when the Netherlands contemplated the legalization of drugs. Now these concerns have become even more pressing because of the opening of the borders of the nations of the European Community. Paul Verschuur, *Dutch Drug Policy Gains Ground*, *L.A. TIMES*, Mar. 4, 1990, at A11. The

However, such a development might not only flow from the legalization of drugs, it could also be a result of market saturation. It appears that at this point Latin American drug cartels attempt to open the European markets because they consider the American cocaine market almost saturated. In addition, strengthened drug enforcement and steep penalties in the United States might increase the lure of foreign markets.¹⁵³ Already a growing amount of illegal narcotics is shipped into Western Europe. In 1991, for example, the German death rate due to drug overdoses doubled over that of 1990.¹⁵⁴

To sum up, organized crime has three routes to expand or rechannel business once drugs become legalized. First, it can expand its involvement in other existing black markets or attempt to create new ones. Second, it can move further into legitimate enterprises. Third, it can shift its illegal drug market to Europe. Which route are the upper echelons of organized crime most likely to take? And what are the consequences for enforcement agencies in the United States?

2. *A Forecast*

The crucial variable for the development of organized crime after the legalization of drugs will be the regulatory system adopted by the state and federal governments in dispensing drugs, and thereby fulfilling the need of consumers. For example, cigarette production is controlled by an oligopoly; and governmental regulation restricts cigarette distribution to adults. It can be expected, however, that some persons within the excluded age group demand the illegal good. Consequently, any governmental restrictions, however limited, create some black market.¹⁵⁵ However, in the case of drugs, the extent and degree of such an illegal trade would be very different from the unprecedented scope of the currently existing black market. In any event, the number of consumers who desire drugs illegally would be radically reduced, and less organized groups might be able to service a much smaller market. A corollary positive feature of such a regulatory regime

repeal of the Eighteenth Amendment did not have any international consequences because alcohol had remained legal in other countries.

153. Terry Leonard, *Europe Fears Cocaine Problem Will Worsen as U.S. Gets Tough*, L.A. TIMES, Oct. 29, 1989, at A5.

154. The figure pertains only to the so-called *alte Bundesländer*, the states that used to form the Federal Republic of Germany. The death toll is relevant because enforcement officials generally assume that it correlates directly with the amount of narcotics imported and with the purity of illegal drugs.

155. John C. Lawn, *The Issue of Legalizing Illicit Drugs*, 18 HOFSTRA L. REV. 703, 713 (1990).

would be the "eliminat[ion of] possible contact between the [drug] user and [the Mafia's] henchmen."¹⁵⁶ This means that a smaller segment of the population would come in contact with and be dependent on organized crime.

Organized crime can be expected to continue expanding into legitimate enterprises.¹⁵⁷ The amount of money available from drug trafficking must be invested, and legitimate enterprises are the best avenue. So far, organized crime has put its money into banking, real estate, restaurants, and other commercial enterprises. By channelling managing skills into legal enterprises, through the control of legitimate businesses organized crime might become more mainstream itself; especially if the criminals gain status in society and therefore become more risk-averse.

To retain the "crime tariff," organized crime will have to focus its attention on other areas in which it could supply illegal products and/or services, just as it shifted from narcotics to alcohol starting in the 1930's. The two major areas currently in vogue besides drugs are prostitution and gambling.¹⁵⁸ Both black markets seem to be fairly well under the control of previously established groups, such as Italian organized crime. Because of their long-standing involvement and the smaller profit margin, it seems unlikely that other organized groups would enter into an all-out warfare to gain entrance into these areas. It should also be fairly impossible for them to penetrate the labor racketeering area which is firmly controlled by Italian gangs. Currently, no new illegal product line seems to be available into which presently established groups could move.¹⁵⁹

Assuming that not all currently illegal drugs will be legalized, organized crime might continue to control parts of the narcotics market. For example, individual groups might attempt to move into the synthetic drug market, if that remained illegal. However, those drugs

156. Bonnie & Whitebread, *supra* note 44, at 1180.

157. This, however, is not a new development. In 1976 Ianni noted that the involvement of organized crime in legitimate business has been a constant trend over decades. Francis A. Ianni & Elizabeth Reuss-Ianni, *A Family Business: Business and Social Organization in the Lupello Family*, in *THE CRIME SOCIETY—ORGANIZED CRIME AND CORRUPTION IN AMERICA* 240 (Francis A. Ianni & Elizabeth Reuss-Ianni eds., 1976).

158. The legalization of drugs will most likely also affect prostitution because many prostitutes are addicted to drugs. With a legitimate avenue to satisfy their addiction, prostitutes will be less pressured economically to enter that trade. Consequently, legalization might alter the dynamics of prostitution positively.

159. With the increasing trend toward gun control, organized crime might become more involved in the supply of weapons. However, in contrast to the markets in illegal narcotics, prostitution and gambling, the demand for weapons is much more limited.

are fairly expensive to produce and require some chemical knowledge. Because of these prerequisites, we cannot assume synthetic drugs alone to present a viable alternative for organized crime. Even if they were, the current profit margins would shrink dramatically. In any event, policy makers must consider that the more extensive the legalized product line, the less likely it is that organized crime will continue to control a large share of the remaining market in illicit goods.

In contrast to Prohibition, organized crime now can be expected to expand its market globally. The reasons are twofold: First, during the 1920's the United States was the only country that outlawed alcohol. Consequently, other countries did not have a black market in alcohol and no void existed that needed to be filled by illegal alcohol. Second, the drug trade currently has international dimensions because most drugs (or the raw materials) must be imported to Europe and the United States.¹⁶⁰ Therefore, the major distributors already have a worldwide sales and distribution system in place.¹⁶¹ Consequently, it would not be surprising if organized criminal groups reacted to legalization in the United States merely by shifting their target markets.

The decline in the amount of money available to organized crime after legalization would eliminate a powerful source of police corruption.¹⁶² Although corruption will exist as long as the police has to enforce laws, the sheer amount of money now available to corrupt the police not to (or to selectively) enforce the drug laws would melt away. Consequently, the scale of police corruption would be substantially diminished.

3. *Minor Dealers*

So far this article has focused on the upper echelon of organized crime. As outlined above, drug legalization will not lead to its demise. However, it will curb the profitability of the largest illegal market in the United States and thereby eliminate some of the negative consequences that the anti-narcotics laws entail.

160. This analysis does not apply to marijuana because the illegal marijuana trade is mainly run by domestic distribution networks without international connections. Therefore, it is unlikely that current marijuana suppliers would attempt to or could expand internationally.

161. In Italy, Colombian operators have allegedly joined forces with the Camorra to distribute cocaine. Alan Riding, *Colombian Cocaine Dealers Tap European Market*, N.Y. TIMES, Apr. 29, 1989, at 1. See also Lally Weymouth, *Organized Crime: The New Russian Menace*, WASH. POST, Dec. 28, 1993, at A15 (cooperation between Russian gangsters and Italian mafia in importing heroin into the United States).

162. For an account of the present corruption of the criminal justice system, see DUKE & GOSS, *supra* note 7, at 113-16.

What will happen to all the low-level dealers involved in the distribution of illegal narcotics? Will they inevitably turn to other crime, and therefore constitute a greater threat to society than they do now?

No data available seems to indicate that the general crime rate skyrocketed with the repeal of Prohibition. Quite to the contrary, violent crimes and property offenses decreased.¹⁶³ Also, many small players in the illegal supply of alcohol suddenly found themselves jobless, and that during the worst depression in twentieth century American history. Probably many of them could have turned to robberies or burglaries. However, there is no indication that this actually occurred. This might be because alcohol distribution, just like narcotics distribution, is a trade which requires almost no skills. Therefore, there is no danger that distributors could have acquired any transferable skills which could be used profitably in any other illicit market. In addition, because of the gloomy economic picture at that time, a large part of the population was poor. Therefore, the men who had been involved in bootlegging might not have experienced a disproportional loss of economic advantages by being made redundant.

In contrast to Prohibition, low-level narcotics dealers belong probably to one of two groups: either they are drug addicts or they are young and ambitious men (mostly) who do not see any possibility of getting rich in the legal market, an opportunity the illegal market seems to offer. For both groups, drug legalization would dramatically change their incentive structure to get involved with organized crime. Addicts could then get the drugs they need legally for a smaller amount of money. Therefore, they would have no further reason to engage in a large-scale black market.¹⁶⁴

The second group would no longer be confronted daily with the blatant display of the money derived from illegal narcotics trafficking. Although other illegal markets also offer rewards, the wealth derived from those areas was never as ostentatiously displayed as drug profits are, mainly because other illegal markets operated with much smaller profit margins. The most daring and adventurous of these low-level dealers might find their place in the structure of organized crime, merely working in another black market, such as gambling. However, many of the others would turn to legitimate occupations for lack of

163. Thornton, *supra* note 75.

164. It can be expected that some small-scale dealing will always occur on the side. Even when a maintenance dose of drugs is supplied, the recipients might sell a part of it on the black market. This is what occurred in Britain. However, the scale of such a black market is not comparable to the currently existing one. DUKE & GROSS, *supra* note 7, at 304.

opportunities in the crim sector. Criminal propensity is simply insufficient, the opportunity to use it must present itself as well. There is a possibility that, in the short run, the street-crime rate might increase; however, in the long run, many of the low-level players now involved in narcotics trafficking would be taken out of this market and rejoin the productive strata of society. This might not be too optimistic an assessment if the government were willing to pour the money that will be saved from enforcing the narcotics laws into education, job-training programs, and the actual creation of jobs.

V. CONCLUSION

Although drug legalization cannot serve as a panacea, it would help curb the profits of organized crime, thereby limiting its involvement in other illegal as well as legal markets. In addition, legalization would reduce the incentive for lower-level dealers to engage in illicit drug distribution and would create incentives for them to become productive members of society.

One major concern remains with the legalization of drugs and its impact on organized crime. How will America's allies react if the United States legalizes drugs and their markets become swamped with a massive supply of cheap drugs? It is worth thinking about these issues now, even if it appears as if there were as much a chance for the repeal of the narcotics laws as "there is for a humming-bird to fly to the planet Mars with the Washington Monument tied to its tail."¹⁶⁵ Senator Morris Sheppard uttered these words only three years before the Eighteenth Amendment was repealed—who knows what 1997 holds in store for us?

165. CASHMAN, *supra* note 45, at 229 (quoting Senator Morris Sheppard).