

STUDENT COMMENTS

A CIVIL SOLUTION TO THE PROBLEM OF ORGANIZED CRIME—THE FLORIDA APPROACH

The existence of organized crime in America, and the threat it poses to the nation's economic, political and legal institutions, is an established fact.¹ One particularly troublesome aspect of the growth of organized crime is its investment in, and operation of, "legitimate" businesses.² The undesirable result of this penetration is that the American commercial system is being used to provide a "cover" for illegal activities,³ a repository for illegally acquired funds,⁴ and access to sources of illegal activities.⁵

In July of 1969, the Florida Legislature, acknowledging that the existing criminal laws were not successfully containing the expansion of organized crime,⁶ decided to attack the problem from a new angle. The legislature enacted a statute⁷ which empowers the Attorney General to institute civil proceedings designed to revoke the charter of a corporation or to enjoin the operation of a business in three distinct situations. First, the corporate charter may be forfeited when

¹ Special Senate Comm. to Investigate Organized Crime in Interstate Commerce, Third Interim Report 171 (1951) [hereinafter cited as Third Kefauver Report]; Johnson, *Organized Crime: Challenge to the American Legal System*, 53 J. Crim. L.C. & P.S. 127 (1963); President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* (1967) [hereinafter cited as *The Challenge of Crime*].

² The Kefauver Committee found evidence of infiltration by organized criminals into at least 50 separate industries in 1951. Third Kefauver Report 171. See E. Kefauver, *Crime in America* 16 (1961), quoted in Johnson, *supra* note 1, at 403.

³ E.g., to preclude possible prosecution for tax fraud of its members, a criminal organization might establish a legitimate business operation to which illegal profits from gambling or narcotics traffic could be attributed and reported as legal income from the operation of the business. "[T]o have a legitimate business enables the racket executive to . . . establish a source of funds that appears legal and upon which just enough taxes can be paid to avoid income tax prosecution." *The Challenge of Crime*, *supra* note 1, at 189.

⁴ "Organized crime invests the profit it has made from illegal service activities in a variety of businesses throughout the country." *The Challenge of Crime*, *supra* note 1, at 189-90.

⁵ "[Y]ou use the same kind of service facilities to maintain various types of gambling equipment that you use to maintain a perfectly legitimate jukebox or a perfectly legitimate cigarette vendor . . ." Johnson, *supra* note 1, at 405, n.41.

"Testimony about coin-machine operations in Gary, Ind., and New Orleans, La., established that industry participation gave to criminals the opportunity to obtain licenses for short-wave radio stations allegedly to dispatch vehicles servicing coin machines, but actually to disseminate racetrack results in furtherance of illegal book-making activities." *Id.* at 405-6.

"[T]rucking operations in some instances give gangsters access to the waterfront, where they can facilitate smuggling of narcotics. The importation of narcotics is also sometimes covered through import-export businesses . . ." *Id.* at 406 n.41.

⁶ See Preamble to Fla. Stat. Ann. ch. 69-272.

⁷ Fla. Stat. Ann. ch. 32, §§ 932.58-60 (1969).

corporate officers, directors, employees, agents or stockholders, in conducting the corporation's affairs, engage in certain illegal activities with the knowledge of the president and a majority of the directors, with the intent to compel or induce other persons or corporations to deal with such corporation or engage in such illegal activity.⁸ Second, the corporate charter may be forfeited when any corporate officer or any other person "controlling" the corporation, with the knowledge of the president and a majority of the directors, engages in certain illegal activities or is "connected directly or indirectly" with "organizations" engaging in such illegal activities.⁹ Third, the operation of any business other than a corporation may be enjoined when any person in control of the business, in conducting its business affairs, engages in certain illegal conduct, with the intent to compel or induce other persons or corporations to deal with such business or engage in such illegal conduct.¹⁰

The provision for forfeiture of the corporate charter because of an agent's unlawful acts are set forth in section 932.58(a) of the Florida Statutes. This section is unique in that it seeks to combat organized crime in a manner never before attempted. After suggesting why organized crime has not been contained by existing laws this comment will examine the constitutional validity, and the practical viability, of the new Florida statute.

I. THE INEFFECTIVENESS OF EXISTING LAWS

The extent to which organized crime has infiltrated into the actual operation and control of legitimate business indicates that existing laws have not been effective. This ineffectiveness may be directly attributable to the inability of the laws themselves to "pierce the corporate veil" of the criminal organization.¹¹ The structure of

⁸ Fla. Stat. Ann. § 932.58(b).

⁹ Fla. Stat. Ann. § 932.58(a).

¹⁰ Fla. Stat. Ann. § 932.59.

¹¹ The ineffectiveness of existing law may be caused by either "uninspired" enforcement or by inadequacies in the laws themselves. The term "uninspired" enforcement, relates to dishonesty, bribery, coercion, etc. of policemen, police officials, attorneys, judges and other public officials charged with the duty of enforcement and administration of the law. The term inadequacy of the law as used in this comment refers not only to the fact that a particular law may not extend its coverage to certain persons or actions, but also to the fact that the person who is reached by the law can avoid its effective use by such methods as intimidation and coercion of witnesses, or simply by devising methods to stay within the letter of the law while continuing to violate the spirit of the law. See for example the discussion concerning the application of tax law to control organized crime, at p. 977-78 *infra*.

These two causes of ineffectiveness of existing law go hand in hand; if the laws are inadequate, the most diligent and honest law enforcement machinery will be severely handicapped; if the machinery is "uninspired," even fully adequate laws will be of little value. Since the most important of these two factors is the adequacy of the laws themselves, this comment will assume that law enforcement agencies are both diligent and honest, and the inquiry will concern the laws themselves operating under ideal conditions.

organized crime parallels that of the military in that it is highly stratified. Therefore, the criminal organization leaders are "insulated by several layers of underlings from the actual physical acts which constitute criminal offenses committed by the organization."¹² The use of direct substantive criminal statutes in an attempt to control organized crime only results in removing "employees" of the organization while management is left unaffected.¹³ As long as the "employees" can be replaced easily, the effect of the substantive statutes on the operations of the criminal organization is minimal. One possible way of reaching beyond the employees is by using the conspiracy doctrine,¹⁴ which is specifically designed to reach the planner as well as the perpetrator of an unlawful act. It has been pointed out that prosecution for conspiracy presents an attractive opportunity for law enforcement officials to convict the leaders of organized crime because of the substantial reduction in standards of proof required in a conspiracy trial.¹⁵ However, while a conspiracy prosecution may be successful in a "minor" case, for example, gambling or prostitution, the penalties attached do not present a serious threat to the continued existence of organized crime. Moreover, the supposed ease of conviction in a conspiracy case may be frustrated altogether in a case involving a more serious charge, such as murder, because of organized crime's ability to intimidate and discourage potential witnesses from testifying.

The reluctance and refusal of witnesses to testify is caused by

¹² Johnson, *supra* note 1, at 416. In discussing the form and structure of organized crime, Mr. Johnson notes that lower echelon members of a criminal organization, such as gunmen or pushers can be easily replaced, much as minor employees in any business operation. Such persons are unimportant individually to the continued operation or success of the organization. As an individual moves upward through the hierarchy of the organization it becomes increasingly difficult to replace him. Yet, as Mr. Johnson states, "as the ease of replacement of a member of a criminal organization decreases, the probability that he can be prosecuted successfully also decreases." *Id.*

¹³ When using substantive criminal statutes "it is the hands, not the brains of an organization which commit the overt act and are caught if anyone is." *Id.* at 416.

¹⁴ "Conspiracy is commonly defined as 'a combination between two or more persons to do or accomplish a criminal or unlawful act, or to do a lawful act by criminal or unlawful means.'" Note, 62 Harv. L. Rev. 277 (1948). For a discussion of the use of conspiracy as a weapon against organized crime, see Johnson, *supra* note 1, at 2-3.

¹⁵ In a conspiracy trial not only can co-defendants be "prodded into accusing or contradicting each other," but also "[i]t is difficult for the individual to make his own case stand on its own merits in the minds of jurors who are ready to believe that birds of a feather are flocked together." Jackson, J., concurring in *Krulwich v. United States*, 336 U.S. 440, 454 (1949). Further, hearsay declarations by one or more of the defendant's admissible against the declarant but not against the others can be received into evidence. Thus the danger arises that the jury will disregard the limitation and use the evidence against all of the co-conspirators. *Id.* at 442-3. In addition, little proof of agreement is necessary, Note, 62 Harv. L. Rev. 276, 284 (1948). Finally the courts in conspiracy cases "have shown a lenient attitude toward the prosecution and have allowed juries to convict on an extremely low minimum of evidence." Note, 24 Brooklyn L. Rev. 1, 9 (1957).

the threat of violence against potential witnesses or the offering of rewards to those who fail to testify.¹⁶ The innocent observer of a crime may be subjected to threats of serious violence against himself or his family.¹⁷ Likewise, threats may be used against members of a criminal organization to insure their silence.¹⁸ In contrast to the stick, however, the organization may offer a carrot to the potential witness in the form of a money bribe to the innocent witness and an implied promise of advancement in the hierarchy to a member of the organization.¹⁹

The reward-punishment tactics engaged in by organized crime to suppress the testimony of potential witnesses is strengthened by the high degree of loyalty which the upper echelons of organized crime exhibit. There exists an unwritten code of silence which "makes it almost impossible to get a member to give evidence against his brethren"²⁰ This code is essentially a result of the reward-punishment tactics:

[The] code . . . is not something reduced to writing, and is rarely even spoken about—it is second nature. Members are only taken into the organization after they have proved their rights to membership in some positive fashion, such as by adherence to the code in the face of extreme danger.²¹

Since the American system of justice relies to a large extent on witnesses' testimony, the intimidation and bribery of potential witnesses by organized crime presents an extremely serious practical difficulty which must be overcome if conspiracy and other substantive statutes are to be effectively employed against organized crime.

Thus, it may be concluded that given the structure of organized crime, existing laws, in and of themselves, are essentially ineffective in reaching management. It may also be concluded that while conspiracy theoretically allows for proceeding directly against management for substantive criminal acts, in practice, the use of conspiracy is limited because whenever the potential penalties could be a threat to its continued existence, the resources and tactics of organized crime render potential witness testimony useless.

Law enforcement agencies have attempted to circumvent the obstacles presented by the structure of organized crime by prosecuting organization leaders for tax law violations. While such tactics initially enjoyed limited success, ironically, more convictions led to fewer prosecutions because organized crime's sophisticated structure—including

¹⁶ See Johnson, *supra* note 1, at 417.

¹⁷ See *Id.* at 408 n. 55, for examples of the use of violence to silence potential witnesses.

¹⁸ "The 'insiders,' the members of the organization who are involved, are little trouble The punishment meted out to them if they do turn state's evidence is merciless and virtually inescapable." *Id.* at 417 n.102.

¹⁹ *Id.* at 417.

²⁰ *Id.* at 417 n.103.

²¹ *Id.*

often extremely capable lawyers and accountants—created methods by which the leaders of the organization were able to operate within the letter of the tax law.²²

Although proceeding directly against the leaders of organized crime is at times successful, the actual effect on organized crime as a whole appears to be negligible. The convictions which are obtained are against individuals; the loss of an individual leader does not cripple the organization. Proceeding directly against individuals does not appear to be the answer to the problem of organized crime as long as the individuals can return to the organization after they have served their sentences or paid their fines. The only way direct proceedings will have a substantial effect on the penetration of legitimate business by organized crime would be through the unlikely possibility of obtaining simultaneous convictions against a large number of key leaders.

While "direct" laws fall short of posing serious difficulties to the continued existence of organized crime, "indirect" laws may be effective. "Indirect" laws, instead of aiming at the individual, seek to reach the equipment with which illegal activity is carried on or the fruits of the illegal activity, the object being to deprive organized crime of its means of existence or to make illegal activity unprofitable. Florida's new statute may be classified as an "indirect" law in that its aim is to prevent organized crime from investing in or operating business organizations in the state. The statute seeks to foreclose outlets for illegally acquiring funds and thus to discourage illegal activity. Other examples of "indirect" methods are forfeiture and confiscation,²³ and the closing of premises on which illegal activity is carried out.²⁴ The utility of confiscation and forfeiture proceedings, however, is clearly limited by their nature. Certain major activities of organized crime, for example loansharking and bookmaking, are carried on without using any materials which, if seized, would seriously hamper its operations. The closing-of-premises weapon is similarly limited, because certain criminal activities are simply not conducted at any specific location.

It was against this background—the almost complete failure of existing laws to adapt to the unique challenge posed by the structure of organized crime—that the Florida legislature embarked upon a new approach to combat the problem of organized crime—a statute designed to eliminate investment in and control of legitimate business by organized crime.

²² *Id.* at 15-18. The application of antitrust law to organized crime's legitimate business has been suggested. See Comment, *Antitrust Enforcement Against Organized Crime*, 70 Colum. L. Rev. 307 (1970). However, just as the organization adapted to tax law prosecution, it seems likely that it could comply with the antitrust laws if threatened by antitrust suits.

²³ Johnson, *supra* note 1, at 23-4.

²⁴ *Id.* at 24-5.

II. SOURCES OF AUTHORITY FOR THE FLORIDA STATUTE

There are three possible sources of authority upon which the new Florida law can be based: common law, state power to control corporations, and the police power. At common law, the state can revoke the charter of a corporation which fails to use or wilfully misuses its state-granted franchise.²⁵ It can be argued that Florida's law is merely a statutory codification of that aspect of the state's general power under common law which allows it to revoke a corporate charter which has been abused. Several cases indicate that one implied condition in the grant of corporate power is that the corporation will not violate the criminal law, and that when this condition is disregarded the corporate charter may be revoked.²⁶ Revocation for violation of this implied condition is the thrust of section 932.58(b), which states that a charter may be revoked if the public interest requires it and if an agent of the corporation, in conducting the corporation's affairs, with the knowledge of the president and a majority of the board of directors, purposely engages in a persistent course of one of several enumerated crimes with the intent to compel or induce other persons or corporations to deal with the corporation or to engage in such illegal conduct. The provision does not represent a significant departure from common law to the extent that "when the corporation enters upon an aggressive course of lawlessness,"²⁷ its charter may be revoked; this amounts to little more than applying the substantive criminal law to corporations through the sanction of forfeiture of charter.

Since, however, it is not at all clear that corporate charters were revoked at common law on the bases set forth in subsection (a) of the statute, in this respect the provision may be a significant departure from the common law of charter revocation in that it provides for the termination of the corporate existence because of the *personal* acts of an individual associated with the corporation when those who control the corporation are aware of or should be aware of such acts.

²⁵ See *New Orleans Waterworks Co. v. Louisiana*, 185 U.S. 336 (1902); *Collins-Doan Co. v. Collins*, 3 N.J. 382, 70 A.2d 159 (1949). In the *Dartmouth College* case, Justice Story pointed out that "an eleemosynary [corporation], like every other corporation, is subject to the general law of the land. It may forfeit its corporate franchises, by misuser or non-user of them." 17 U.S. (4 Wheat) 518, 675 (1819).

Quo warranto is the writ by which most states test the right of an individual or corporation to exercise a privilege or franchise which can be exercised only by virtue of a grant of authority from the state. See, e.g. *People v. White Circle League of America*, 408 Ill. 564, 566, 97 N.E.2d 811, 814 (1951).

²⁶ *State v. French Lick Springs Hotel Co.*, 42 Ind. App. 282, 82 N.E. 801 (1907) (hotel violated antigambling laws). See also *State v. Nebraska Home Co.*, 66 Neb. 349, 92 N.W. 763 (1902) (corporation conducted unlawful lottery); *People v. White Circle League of America*, 408 Ill. 564, 97 N.E.2d 811 (1951) (corporation persistently violated criminal libel laws).

²⁷ *State v. French Lick Springs Hotel Co.*, 42 Ind. App. 282, 82 N.E. 801 (1907).

Thus, it is clear, that Florida could not completely rely on common law to effect the objectives embodied in the statute.

That a corporation enjoys its continued existence as a privilege, not a right granted by the state, is well-established.²⁸ A state exercises control over its corporations both by granting the privilege to incorporate and by regulating existing corporations through an ever growing body of statutes. In *Trustees of Dartmouth College v. Woodward*,²⁹ however, the Supreme Court held that the corporate charter was a contract between the corporation and the state, and that certain subsequent attempts by the legislature to alter or amend the rights of the corporation would violate the impairment of contracts clause of the United States Constitution.³⁰ As a direct result of the *Dartmouth College* case, state legislatures began to reserve the power to amend or repeal corporate charters.³¹ The reservation of powers provision became part of the contract between the state and the corporation, and the state legislature thereby obtained the right to effect changes in the corporate charter in the form of alteration, amendment or repeal without violating Article 1, Section 10 of the Constitution.³² All but three states have constitutional or statutory reservation of power clauses.³³ Florida is one of the three exceptions and thus cannot rely upon any explicit reservation of power provision as the source of power for enacting the new law.

The third possible basis for the statute is the state police power. In *Helvering v. Northwest Steel Rolling Mills*,³⁴ the Supreme Court pointed out that the states may regulate corporations through legislation which promotes the public welfare notwithstanding the provisions of the corporate charter.³⁵ Florida had the power to enact the law if

²⁸ "But the right to conduct business in the form of a corporation . . . is not a natural or fundamental right. It is a creature of the law; and a state . . . may qualify the privilege by imposing such conditions and duties as reasonably may be deemed expedient in order that the corporation's activities may not operate to the detriment of the rights of others with whom it may come in contact." *Prudential Ins. Co. v. Cheek*, 259 U.S. 530, 536 (1922).

²⁹ 17 U.S. (4 Wheat.) 518 (1819).

³⁰ U.S. Const. art. 1, § 10.

³¹ "[I]f the legislature mean to claim such an authority, [to take away powers or control the exercise of the powers of a corporation] it must be reserved in the grant." Story J., concurring in *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518, 712 (1819). In some states the reservation of the power to alter, amend or repeal is in the constitution; in others, the power is given by statutory provision. *Greewood v. Freight Co.*, 105 U.S. 13 (1881).

³² See, e.g., *Spring Valley Waterworks v. Schottler*, 110 U.S. 347, 352 (1884), where the Court stated: "In California the Constitution put this reservation into every charter, and consequently this company was from the moment of its creation subject to the legislative power of alteration, and, if deemed expedient, of absolute extinguishment as a corporate body."

³³ The states which have neither constitutional nor statutory reservation of power provisions are Florida, Hawaii and Louisiana. ABA-ALI Model Bus. Corp. Act Ann. § 142-2.02.

³⁴ 311 U.S. 46 (1940).

³⁵ *Id.* at 51. See also *Eagle Ins. Co. v. Ohio*, 153 U.S. 446 (1894).

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this statute represents a valid exercise of the state's police power. In determining what is a valid exercise of a state's police power, the Supreme Court has established the following test:

To justify the State in . . . interposing its authority in behalf of the public, it must appear, first, that the interests of the public . . . require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals.³⁶

Although the "interference" which the Florida statute entails—the elimination of organized crime from legitimate business—is certainly within the public interest, it is not clear that the new statute constitutes a reasonable method for accomplishing the intended purpose or that the method is "not unduly oppressive upon individuals."

In *Goldblatt v. Town of Hempstead*,³⁷ the Supreme Court upheld a town ordinance regulating dredging and pit excavation as a reasonable exercise of police power. The Court discussed various factors it would consider in determining "reasonableness of method:"

To evaluate its reasonableness we . . . need to know such things as the nature of the menace against which it will protect, the availability and effectiveness of other less drastic protective steps, and the loss which appellants will suffer from the imposition of the ordinance.³⁸

In applying the first of these criteria to judge the reasonableness of the Florida statute, it can be argued that, as pointed out earlier, the menace of organized crime is such that existing "less drastic steps" are ineffective in protecting against it, and that therefore, new, imaginative approaches are necessary. It further appears that there is no other method which would effectively preclude organized crime from using corporate status as a vehicle for increasing its powerful position in the American economy.

In examining the "loss" suffered under the statute it is important to note that the section provides for forfeiture of the corporate charter because of the acts of an *individual* associated with the corporation. In *De Veau v. Braistead*,³⁹ the Supreme Court held that a New York statute which prohibited felons from collecting dues as union officers at the waterfront was constitutional. The Court found that the statute was reasonably related to eliminating the corruption that prevailed at the waterfront. In *De Veau*, then, the Supreme Court found reasonable a state statute which prohibited an individual "connected" with crime—through a felony conviction—from engaging in a particular business activity. The statute, however, does not

³⁶ *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594-5 (1962), quoting from *Lawton v. Steele*, 152 U.S. 133, 137 (1894).

³⁷ 369 U.S. 590 (1962).

³⁸ *Id.* at 595.

³⁹ 363 U.S. 144 (1960).

simply prohibit certain individuals from engaging in business, it also revokes the power of the corporations with which these individuals are associated to do business. For this reason, the statute may be challenged as being "unduly oppressive" to those associated with the corporation who have no connections whatsoever with organized criminal activities. It is submitted that, to the extent that the number of alternatives which will effectively implement a legitimate state interest decrease, the "loss" criterion should correspondingly be accorded less weight. Thus, with respect to the Florida statute, the "loss" criterion may not be controlling.

It is difficult to determine whether the far-reaching aspects of section 932.58(a) will lead the courts to conclude that the statute is an unreasonable exercise of the state's police power, or whether the statute will be upheld not only because it bears a rational relationship to the solution of a problem which is properly within the state's sphere of interest, but also because it arguably represents the sole method of effectively protecting that interest.

III. VAGUENESS

It is well settled that a state criminal statute which is overly vague violates the due process clause of the fourteenth amendment.⁴⁰ It has been observed that, with the exception of one unique case, "no vagueness attack on a noncriminal statute has succeeded."⁴¹ Presumably, one reason for the different treatment of civil statutes is that they do not carry the serious penalties which are often found in criminal statutes.⁴² If the Florida legislature's classification of its new statute as a civil statute is accepted, the conclusion would follow that a successful challenge to its constitutional validity on grounds of vagueness is unlikely. Nevertheless, there is some doubt as to whether the new statute should be characterized as civil or criminal.⁴³ For purposes of this discussion, it will be assumed that the law is criminal in nature. If it can survive an attack on the ground that it is unconstitutionally vague under criminal law standards, then it will probably survive such an attack if characterized as civil in nature.

One often quoted reason why a statute will be held to be unconstitutionally vague is that the terms of the statute cannot be understood by men of "common" intelligence so as to give fair warning to judge, attorney and individual alike as to what conduct is prohibited.⁴⁴

⁴⁰ See generally Comment, Due Process Requirements of Definiteness in Statutes, 62 Harv. L. Rev. 77 (1948); Comment, The Void-for-Vagueness Doctrine in the Supreme Court, 109 U. Pa. L. Rev. 67 (1960).

⁴¹ Comment, 109 U. Pa. L. Rev. at 70 n.16.

⁴² "[I]t is probable that a statute imposing penal sanctions will be looked at more severely than one whose operation is of less drastic effect . . ." Id.

⁴³ See discussion *infra* at 985.

⁴⁴ *Lanzetta v. New Jersey*, 306 U.S. 451 (1939); *Cline v. Frink Dairy Co.*, 274 U.S. 445 (1927); *Connally v. General Constr. Co.*, 269 U.S. 385 (1926).

The Supreme Court has indicated, however, that absolute precision is not always required:

Few words possess the precision of mathematical symbols, most statutes must deal with unforeseen variations in factual situations, and the practical necessities of discharging the business of government inevitably limit the specificity with which legislators can spell out prohibition.⁴⁵

Unfortunately, except for such broad policy statements the courts have not articulated a precise standard by which it can be determined whether a term is or is not unconstitutionally vague.⁴⁶ It is clear, however, that the process involves, a balancing of individual rights against the economic and social benefits of pursuing a particular state policy. Perhaps because of this balancing process, cases involving challenges upon vagueness grounds exhibit "an habitual lack of informing reasoning."⁴⁷ Because of a dearth of articulated standards, it is necessary to decide the vagueness issue on a case-by-case approach.

Examining the Florida statute without the aid of clearly articulated standards is not a futile exercise if the underlying balancing process between individual rights and public needs is concentrated upon. Given the intent of the Florida legislature to deprive "organized" crime of the benefits of engaging in legitimate business in Florida, the most critical word in the statute is "organized." Moreover, "organized" is the most difficult word in the statute to define and, therefore, is the most susceptible to a successful constitutional challenge.

It is important to note that while the legislature refers to "organized crime" in the preamble to the statute, subsection (a) enumerates specific crimes such as "organized" gambling, and "organized" extortion. In specifying particular forms of organized crime the legislature was undoubtedly attempting to add certainty to the statute. However, the term "organized" was not directly defined by the legislature.

The term "organized" crime has been used primarily in the years since the Kefauver Commission of 1951.⁴⁸ The various terms which are often substituted for "organized" crime including mafia, "syndicate," "mob" or "outfit" are no clearer in meaning. "Organized" crime is something which everyone knows exists, yet virtually no one has full knowledge of its scope, or of who is actually involved. The President's Commission on Law Enforcement and the Administra-

⁴⁵ *Boyce Motor Lines v. United States*, 342 U.S. 337, 340 (1952). See also *State v. Dennis*, 80 N.J. Super. 411, 194 A.2d 3, 7 (1963), where the court stated: "Where the legislative regulatory object is appropriate and the conduct intended to be prohibited is not fairly susceptible of definition in other than general language, there is no constitutional impediment to its use."

⁴⁶ Comment, 109 U. Pa. L. Rev. at 72-3.

⁴⁷ *Id.* at 70-1.

⁴⁸ See note 1 *supra*.

tion of Justice in 1967⁴⁹ set forth no clear definition but did suggest several key attributes which "organized" crime possesses, including permanency of membership (as opposed to ad hoc groups formed to commit a single crime), very close organization and strict discipline. The difficulty of proposing a meaningful definition of organized crime is illustrated by the futile attempt of forty law enforcement officials, university professors of criminology, sociologists, systems engineers and other experts who developed the following definition which is "still accepted as the best":

Organized crime is the product of a self-perpetuating criminal conspiracy to bring exorbitant profits from our society by any means—fair or foul, legal and illegal. Despite personnel changes, the conspirational entity continues. It survives on fear and corruption. By one or another means, it obtains a high degree of immunity from the law. It is totalitarian in its organization. A way of life, it imposes rigid discipline on underlings who do the dirty work while the top men of organized crime are generally insulated from the criminal act and the consequent danger of prosecution.⁵⁰

This definition conveys the same ideas as did the President's Commission as to the nature of organized crime, concluding that it includes at least the characteristics of permanence, a high degree of structural organization, and strict discipline. When broken down in this manner, the term takes on a certain degree of meaning. At least the one-time burglar (unless of course he disposes of his ill-gotten gain through a criminal organization) can be excluded. It also would exclude the one-time conspiracy made up of criminals on an ad hoc basis, who have little organization and no need for the methods of strict discipline or enforcement used by organized crime.

The line between "organized" and "non-organized" crime may not always be crystal clear but the distinction embodied in the definition of organized crime is a rational one. Just as the doctrine of conspiracy recognizes that there is more danger to the public from group criminal activity than from individual activity, so the concept of organized crime recognizes the greatly increased danger to the public from a highly structured permanent organization of criminals as compared to non-organized individual or group action.

Another factor which should be considered in deciding whether a statute is unconstitutionally vague is the scope of alternatives the legislature could have employed. With regard to the term "organized," it appears that the Florida legislature could have substituted the characteristics which the President's crime commission report set forth. But this substitution arguably would not have a clarifying effect at

⁴⁹ See note 1 *supra*.

⁵⁰ Grutzner, *How to Lock Out the Mafia*, 48 *Harv. Bus. Rev.* 45, 47 (1970), quoting from Salerno & Tompkins, *The Crime Confederation* 303 (1969).

all, because the term "organized" does nothing more than provide one word to summarize the several attributes of permanence of membership, rigid structure and strict discipline. The prosecutor will have the same characteristics to prove in either case, and it is not clear that the statute will describe any more precisely what conduct a potential defendant must avoid.

If no substitutes are available for the word "organized" which would in fact clarify the issue, the courts must face squarely the question of whether or not the sacrifice of individual rights in this particular case is violative of the due process clause when balanced against the needs of the public in attempting to eradicate organized crime. The importance of this balancing process should not be taken lightly, for the court, by striking down this statute on vagueness grounds, may at the same time be curtailing any further legislative attempts to regulate the particular conduct involved,⁵¹ thus dulling the "legislative appetite for dealing with new problems on an experimental basis."⁵²

It is submitted that the need for controlling organized crime should outweigh the fact that individuals at times may be required to make a "calculated guess" as to whether their conduct violates the provision of the statute. This would not be an unprecedented approach to take, for as Justice Holmes observed:

The law is full of instances where a man's fate depends on his estimating rightly, that is as the jury subsequently estimates it, some matter of degree. If his judgment is wrong not only may he incur a fine he may incur the penalty of death.⁵³

The Florida legislature in subsection (a) set forth an innovative experimental approach to the pervasive problem of controlling organized crime. In choosing between limiting individual rights and the economic and social policy involved, it would appear that better judgment would favor the latter.

IV. THE CIVIL-CRIMINAL DICHOTOMY

The *New York Times* described Florida's new law as "the first piece of civil legislation in the country which names organized crime as its target."⁵⁴ Florida's Attorney General has said that the legislature decided to combat organized crime through the civil courts rather than the criminal courts because of "the frustration of [criminal] law enforcement people throughout the nation."⁵⁵ It seems clear that Flor-

⁵¹ See Comment, 62 Harv. L. Rev. 77, 82-83 (1948); *United States v. Petrillo*, 332 U.S. 1, 7 (1947).

⁵² Comment, *supra* note 51, at 83; see Frankfurter, J., dissenting in *Winters v. New York*, 333 U.S. 507, 536 (1947).

⁵³ *Nash v. United States*, 229 U.S. 373, 377 (1913)

⁵⁴ N.Y. Times, Oct. 20, 1969, at 10, col. 2 (city ed.).

⁵⁵ *Id.*

ida at least in part framed this civil statute in order to take advantage of important procedural and evidentiary standards that would not be available in a criminal case against organized crime.⁵⁶

Even though the statute has been denominated as civil by the Florida legislature, it is arguable that the statute seeks to penalize individuals involved in various types of organized crime for violations of the criminal law through the civil process by forfeiting the charters of corporations with which these individuals are connected. If this position is accepted, the due process clause of the fourteenth amendment, as interpreted by the Supreme Court in a recent line of cases, may invalidate the statute. One commentator has pointed out that

[i]n the light of recent . . . constitutional developments and the exhortation of the Supreme Court . . . "a State cannot foreclose the exercise of constitutional rights by mere labels" the legal profession must awaken to the realization that the difference between "civil" and "criminal" cannot rest on arbitrary labeling by courts and legislatures, but requires careful re-examination of legal consequences to distinguish reality from fiction.⁵⁷

The Supreme Court has in several recent cases extended certain constitutional protections traditionally available only in "criminal" proceedings to proceedings which have been denominated as "civil." In *One 1958 Plymouth Sedan v. Pennsylvania*⁵⁸ the Supreme Court held that evidence obtained in violation of the fourth amendment was inadmissible in a proceeding to forfeit an automobile used by its owner to transport narcotics. The Court reversed the state court which had held that the exclusionary rule of *Mapp v. Ohio*⁵⁹ applied only to criminal prosecutions and was inapplicable to a forfeiture proceeding which is civil in nature. The Court indicated that a forfeiture proceeding is "quasi-criminal" because its object is to "penalize for the commission of an offense against the [criminal] law."⁶⁰ The Court pointed out that it would be "anomalous" to exclude the illegally seized evidence in the criminal proceeding and admit it in the forfeiture proceeding when the forfeiture was clearly a penalty for the criminal offense and when the owner of the automobile would suffer a greater penalty than a conviction and fine for the criminal offense.⁶¹

⁵⁶ The burden of proof in a civil case, for example, is lower than that in a criminal case. Further, the scope of discovery is much broader in a civil action.

⁵⁷ Fins, In Light of Recent Federal Constitutional Developments, When Is an Illinois Proceeding "Civil" and when "Criminal"? 2 John Marshall J. of Prac. & Pro. 205, 229 (1969), quoting NAACP v. Button, 371 U.S. 415, 429 (1963).

⁵⁸ *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965).

⁵⁹ 367 U.S. 643 (1961).

⁶⁰ 380 U.S. at 700.

⁶¹ *Id.* at 701. See also *Finn's Liquor Shop v. State Liquor Authority*, 24 N.Y.2d 647 (1969) in which the New York Court of Appeals held that illegally seized evidence was inadmissible under *Plymouth* in an administrative proceeding to revoke a liquor license.

Plymouth is applicable to cases which may arise under the Florida law because the statute provides for forfeiture of a corporate charter when certain crimes have been committed by an individual controlling the corporation or when such individual is connected with organizations engaging in such criminal activities. The Florida statute can be regarded as imposing a "penalty" on persons involved with organized crime as a substitute for the criminal sanctions which the state is unable to impose because of the difficulty of obtaining convictions against organized crime figures. If this is the object of the Florida statute, the *Plymouth* reasoning would warrant the conclusion that a proceeding under it is "quasi-criminal."

There may, however, be a significant distinction between the two situations. It can be argued that *Plymouth* does not apply to the Florida situation because in *Plymouth* the forfeiture proceeding was, in effect, against the same *individual* who committed the criminal offense while under subsection (a) the forfeiture proceeding is against the charter of a *corporation* with which the individual who committed the offense is associated. This distinction, however, is not significant in that the Florida law attempts to reach certain individuals through corporations which they control and thus the rationale of *Plymouth*, that an individual cannot be punished in a civil proceeding for an underlying criminal offense without certain protections afforded in criminal proceedings, is fully applicable.

Under the holding of *Plymouth*, therefore, illegally obtained evidence will probably be excluded from any forfeiture proceeding brought under the Florida law. In addition, *Plymouth* indicates the Court's willingness to look closely at the civil-criminal dichotomy and to guarantee in quasi-criminal proceedings at least some of the protections traditionally afforded only in criminal proceedings.

In *Specht v. Patterson*,⁶² the Supreme Court again concerned itself with this dichotomy. In *Specht*, an individual was convicted of a sexual offense but was not sentenced under the criminal act. He was instead committed under the Colorado Sex Offenders Act which requires not only the commission of a sexual offense, but a finding that the individual is a threat to the public or is an habitual offender and mentally ill.⁶³ In this commitment proceeding the offender was not afforded notice, a full hearing, or the right of confrontation. The Court held that whether the commitment proceeding was denominated civil or criminal, due process had not been satisfied because "punishment" under the Sexual Offenders Act is "criminal punishment even though it is designed not so much as retribution as it is to keep individuals from inflicting future harm."⁶⁴ The Court concluded that

The Court indicated that this reasoning applies whenever the government illegally obtains evidence. 24 N.Y.2d at 655.

⁶² 386 U.S. 605 (1967).

⁶³ Id. at 608.

⁶⁴ Id. at 608-09.

a defendant in such a proceeding is "entitled to the full panoply of the relevant protections which due process guarantees in state criminal proceedings."⁶⁵ *Specht*, therefore, arguably stands for the proposition that Florida must afford the full panoply of due process protections to the corporations it proceeds against under subsection (a).⁶⁶ The reasoning set forth in *Specht* and *Plymouth* should be applicable in any proceeding which may arise under the Florida statute in that in each case—commitment, forfeiture of personal property, and forfeiture of a corporate charter—a determination that the criminal law has been violated is essential to the imposition of a "civil" sanction.

The scope of due process protections applicable to quasi-criminal cases was further delineated in *In re Winship*.⁶⁷ In this case, the Court explicitly stated for the first time that the due process clause requires conviction only upon proof beyond a reasonable doubt. In *Winship* the Court held that this standard applied to the adjudication of a juvenile as a delinquent when the juvenile is charged with an act which would constitute a crime if he were an adult.⁶⁸ The Court reasoned that this standard of proof had to be applied to juvenile proceedings despite their "civil" label of convenience" because the juvenile was thereby subjected to the risk of the loss of his liberty and the stigma of "delinquency."⁶⁹ The Court in *Winship*, then, as in *Specht* and *Plymouth*, applied a criminal standard to a proceeding which in effect requires a determination that the criminal law has been violated before the adjudication of "guilt" under the "civil" statute. It can be argued that this is precisely how the Florida statute operates; if an individual is found to have violated⁷⁰ a criminal law the corporation loses its charter.

The Florida law, however, can be distinguished from *Specht* and *Winship* in that in both of these cases the Court regarded it as crucial that the defendant's personal liberty was at stake. No individual can lose his personal liberty under the Florida statute and it can be argued therefore that the statute must be held to be entirely civil in nature. Criminal punishment, however, can be effected not only through a loss of liberty but also through the imposition of a fine. The forfeiture in *Plymouth* in effect amounted to a fine, and it can be argued that the charter forfeiture under the Florida statute constitutes a fine for

⁶⁵ *Id.* at 609.

⁶⁶ Indeed it can be argued that the *Specht* doctrine should apply a fortiori to the Florida situation because in *Specht* the necessary conviction was obtained under the reasonable doubt standard while the Florida law requires no such conviction but presumably only a finding in the "civil" proceeding that the "illegal act" has occurred.

⁶⁷ 397 U.S. 358 (1970).

⁶⁸ Previously in, *In re Gault*, the Court held that the due process clause requires that a juvenile be accorded "the essentials of due process and fair treatment" in an adjudication which may lead to the juvenile's commitment. 387 U.S. 130 (1967).

⁶⁹ 397 U.S. 358, 365-67 (1970).

⁷⁰ See note 66 *supra*.

criminal conduct. Further, it seems that the "stigma" which will attach to the individuals involved in charter revocations will be at least as extensive as that which could attach to the juvenile in *Winship*.

An additional argument can be advanced to preclude the application of the holdings in *Plymouth*, *Specht* and *Winship* to cases arising under the Florida statute. There is nothing novel about the application of both a criminal and civil sanction to the same act.⁷¹ Arguably the *Plymouth* line of cases should not be applicable to the Florida law because that statute is truly civil in nature. The Supreme Court has indicated that one remedial sanction which is "characteristically free of the punitive criminal element is revocation of a privilege voluntarily granted."⁷² Florida can argue that incorporation is a state-granted privilege and that the state has a legitimate interest in regulating corporations with regard to possible connections with organized crime. The Supreme Court has recently held, however, that disbarment is a "punishment or penalty imposed on the lawyer" and is therefore a proceeding of a "quasi-criminal nature."⁷³ Thus, the Court now appears to regard the revocation of at least some state-granted privileges as quasi-criminal proceedings. With the advent of increased governmental regulation and the concomitant rise in the number and importance of state-granted "privileges," it seems doubtful that a state could not effectively "punish" an individual by revocation of such a privilege.

In summary, it is difficult to determine whether the Florida law will be held to be "quasi-criminal" under the rationale of *Plymouth*, *Specht*, and *Winship*. In all of these cases as well as under the statute, it is necessary to determine that the criminal law has been violated before the civil sanction can be imposed. On the other hand, as noted above, the Florida law can be distinguished from these cases on several grounds. It is clear that the civil-criminal issue goes directly to the viability of the Florida statute. If, for example, *Winship* is held to apply, one of the statute's critical weapons against organized crime will be lost. The state will not be able to proceed under the preponderance of the evidence standard, but only under the proof beyond a reasonable doubt standard.⁷⁴ Despite the broad language of *Specht*,

⁷¹ See, e.g., *Helvering v. Mitchell*, 303 U.S. 391 (1938). The issue was whether the defendant was subjected to double jeopardy when he was acquitted of willful tax evasion but was subsequently assessed the deficiency plus 50% for fraud and intentionally evading taxes. The Court held that there was no double jeopardy because the latter was a civil sanction of a remedial character.

⁷² *Id.* at 399.

⁷³ *In re Ruffalo*, 390 U.S. 544, 550-51 (1968). In *Spevack v. Klein*, 385 U.S. 511 (1967), the Court held that a lawyer was entitled to the privilege against self-incrimination in a disciplinary proceeding which would have led only to disbarment for soliciting. The Court indicated that depriving a lawyer of the right to practice law is a "penalty." *Id.* at 514-15. For a good discussion of these cases see Fins, *supra* note 57, at 214-16.

⁷⁴ An interesting and important issue which may arise if the Florida statute is held to be quasi-criminal for some purposes will be whether due process requires that the scope of discovery under the statute be limited to that available in a criminal proceeding.

it is not clear how far the Court will go in extending, in quasi-criminal proceedings, protections traditionally associated with criminal cases.⁷⁵ Since the Florida statute was specifically designed to take advantage of civil standards, to the degree that the protections afforded in criminal prosecutions are extended, the Florida statute is rendered ineffective.

CONCLUSION

Organized crime has proved to be durable, in part because of its high resistance to traditional methods of crime control. Florida has taken an imaginative approach which has the potential to frustrate the growth of organized crime by denying it access to legitimate business. The Florida statute, however, may be held to be an unconstitutional denial of due process under the fourteenth amendment on any of three grounds. First, the statute may be an unreasonable exercise of the police power because of its far-reaching effect. Second, the statute may be held to be void for vagueness because the term "organized" is not sufficiently clear. Finally, the practical value of the statute may be lessened because the constitutional protections associated with criminal proceedings may be required in proceedings under the statute. It is hoped that even if a constitutional challenge is successful, further legislative attempts to adapt the law to meet the unique problem posed by organized crime will not be discouraged.

ROBERT P. CRONIN
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⁷⁵ For a discussion of the various protections afforded in criminal cases which may be extended to quasi-criminal proceedings, see Fins, *supra* note 57 at 225-29.