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# The Mob Lawyer's Constitution

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## Abstract

This article reconstructs the constitutional rhetoric of mob lawyers, as well as drug lawyers and other icons of the high-priced criminal defense bar, from the 1970s through the 1990s—the heyday of federal organized crime prosecutions and thus, of the lawyers who defended against them. Drawing upon pop-culture sources including archival television footage, magazine features, newspaper coverage, and ghost-written mass-market memoirs, the article pieces together the constellation of soundbites through which mob lawyers disseminated their views. As the subjects of frequent media coverage, these lawyers advanced a coherent and distinctive (if crude) set of ideas about the proper relationship between individuals, the state, law, and wealth.

In investigating constitutional history, legal scholars often focus on elite legal actors and Supreme Court doctrine, or, if they examine popular constitutionalism, on organized litigation campaigns, rather than the more diffuse world of solo practitioners and small law firms. Bringing together legal and cultural history, this article contributes a new angle on these themes—looking for insights into Reagan-era constitutional culture not in the Department of Justice or the Supreme Court, but at Manhattan steakhouses and Miami nightclubs.

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The high-priced criminal defense bar advanced a highly individualist, libertarian, and consumer-oriented conception of constitutional rights, as well as a thoroughly suspicious orientation towards the government generally, and towards its exercise of the prosecutorial power specifically. Against the backdrop of the post-Vietnam, post-Watergate historical context, the mob lawyer fused the traditional rhetoric of constitutional rights and the time-honored rituals of courtroom advocacy with late-twentieth-century cynicism about government corruption and prosecutorial overreach.

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> It may sound trite, but when I was practicing law, I really saw myself as a defender and protector of the Constitution.
>
> —Oscar Goodman[1]

## INTRODUCTION

He was coming from his lawyer's office when he was shot to death on the sidewalk outside of a midtown Manhattan steakhouse. The story is a staple of mafia chronicles and late-night cable TV. On December 16, 1985, Paul Castellano "was in the midst of one federal racketeering trial and facing another," as one of several defendants targeted in the Southern District of New York's then-novel attempt to decapitate several mafia families at once with one massive

[1] OSCAR GOODMAN WITH GEORGE ANASTASIA, BEING OSCAR: FROM MOB LAWYER TO MAYOR OF LAS VEGAS—ONLY IN AMERICA 24 (2013).

racketeering indictment.[2] Court was out of session that Monday afternoon, but Castellano had business in the city. Driving in from Staten Island, he first had his driver Tommy Bilotti stop by the office of his longtime attorney and friend, James "Jimmy" LaRossa, to chat about how the cases were going and drop off a Christmas gift for LaRossa's secretary. From there, Castellano and Bilotti may have run another errand or two, but eventually made their way towards the Sparks Steak House on East 46th Street for what they thought was an amicable dinner meeting with some underlings. It was a set-up. No sooner had they parked (illegally) in front of the steakhouse than they were ambushed by pistol-toting hitmen. Both men bled out on the scene, as office workers and holiday shoppers screamed and scattered.[3]

Thus did the final hours of Paul Castellano, the boss of the Gambino crime family, exemplify the life of a mafia don in the 1980s: a lot of murder, but also a lot of meetings with lawyers. In 1989, in one of his many conversations that were intercepted by a hidden FBI recording device, John Gotti—the engineer of Castellano's assassination, and his successor as the head of the family—groused about all the money he was spending in legal fees. The tapes captured Gotti referring to various well-known criminal defense attorneys: "Where does it end? Gambino Crime Family? This is the Shargel, Cutler, and who do you call it Crime Family."[4]

Conversely, the Castellano episode and its aftermath also illustrate some common pitfalls in the life of a so-called "mob lawyer." That fateful Monday in 1985, Castellano had urged his lawyer LaRossa to come along with him to the steakhouse. Fortunately for LaRossa, he declined. According to his son, "it was a big trial day the next day" and he needed to prepare. "It wasn't lost on any of us, however, that had Dad gone to eat with them that night, as he sometimes did, he would have been killed as well."[5] The subtler danger, avoided by LaRossa but not by John Gotti's far more crass attorney, Bruce Cutler, was that you might become one with your clientele. Cutler continued to insist years

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[2] SELWYN RAAB, FIVE FAMILIES: THE RISE, DECLINE, AND RESURGENCE OF AMERICA'S MOST POWERFUL MAFIA EMPIRES 270 (10th anniv. ed.) (2016).

[3] JOHN GLEESON, THE GOTTI WARS: TAKING DOWN AMERICA'S MOST NOTORIOUS MOBSTER 1-8 (2022); RAAB, FIVE FAMILIES, at 270-74, 372-73; JAMES M. LAROSSA, JR., LAST OF THE GLADIATORS: A MEMOIR OF LOVE, REDEMPTION, AND THE MOB 164-75 (2019); Robert D. McFadden, *Organized-Crime Chief Shot Dead Stepping From Car on E. 46th St.*, N.Y. TIMES, 17 December 1985, at A1; Ken Gross, *Cold-Blooded King of a Hill Under Siege*, PEOPLE, 27 March 1989, at 70-77.

[4] Quoted in United States v. Gotti, 771 F. Supp. 552, 555 (E.D.N.Y. 1991).

[5] LAROSSA, LAST OF THE GLADIATORS, at 175, 164.

later, in his autobiography, that no one could ever really know who put the hit on Castellano—notwithstanding the conclusions of mob historians, the testimony of Gotti's underboss, and the verdict of a federal jury. "John told me he had nothing to do with Castellano's killing," Cutler wrote, and "I believe it—from what I knew of John, if he'd had a problem with Castellano, he would have taken care of it himself."[6]

But is the mob lawyer simply a stock character around the edges of mafia folklore, or is there anything serious that scholars can learn about American legal culture from such figures? In legal scholarship the mob lawyer often appears in passing, as a generic subtype of lawyer whose existence is presumed. In fact, when discussing *other* types of lawyers, legal scholars and media commentators alike often recruit the term "mob lawyer" as an insult.[7] When examined at greater length, the mob lawyer's tendencies may provide fodder for the analysis of some larger topic such as right-to-counsel jurisprudence or professional norms. The mob lawyer can be a data point in the sociology of the legal profession, a source of exam hypotheticals and cautionary tales in legal ethics, and, because organized crime is ubiquitous in the movies and on TV, the basis for scholarly examinations of how lawyers are portrayed in popular culture.[8]

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[6] BRUCE CUTLER WITH LIONEL RENÉ SAPORTA, CLOSING ARGUMENT: DEFENDING (AND BEFRIENDING) JOHN GOTTI AND OTHER LEGAL BATTLES I HAVE WAGED 99 (2003); see also JAMES PATTERSON & BENJAMIN WALLACE, THE DEFENSE LAWYER: THE BARRY SLOTNICK STORY 173–74 (2021) (describing how various lawyers rolled their eyes at Bruce Cutler's increasing proximity to, and resemblance of, John Gotti). For a summary of underboss Salvatore "Sammy the Bull" Gravano's account of how he and Gotti engineered the hit, see Bill Hewitt & Ken Gross, *Bad Fellas*, PEOPLE, 23 March 1992, at 42.

[7] E.g. Dahlia Lithwick, *Lawyers Aren't Wizards*, SLATE, 21 July 2017, https://slate.com/news-and-politics/2017/07/lawyers-and-the-constitution-alone-wont-save-us-from-donald-trump.html (disparaging the Trump Administration's "dream team of mob lawyers"); cf. also, e.g., PATRICK RADDEN KEEFE, EMPIRE OF PAIN: THE SECRET HISTORY OF THE SACKLER DYNASTY 381 (2021) (quoting Massachusetts attorney general's statement that representing Purdue Pharma is "no different from representing a drug cartel"); JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 149 (2008) (quoting comparison of Department of Justice torture memo with "a bad defense lawyer's brief").

[8] On legal ethics, classic treatments concerning criminal defense lawyers more generically (not specific to mob lawyers) include MONROE H. FREEDMAN, LAWYERS ETHICS IN AN ADVERSARY SYSTEM (1975); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEG. ETHICS 125 (1987); for a general history of the field, see MICHAEL S. ARIENS, THE LAWYER'S CONSCIENCE: A HISTORY OF AMERICAN LAWYER ETHICS (2023). On the question of when criminal defense lawyers themselves become criminals, see Charles W. Wolfram, *Lawyer Crimes: Beyond the Law?*, 36 VAL. U. L. REV. 73 (2001); Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327 (1998). The temptation to criminal behavior could theoretically arise in any area of legal practice, but

In considering such questions, legal scholars often portray high-priced criminal defense attorneys as eccentric, taking pains to define them as unrepresentative of lawyers generally. In legal scholarship produced around the time of the big mob trials (and thus, during the heyday of the mob lawyer), one can detect flashes of an undercurrent debate about the extent to which such lawyers should be regarded as typical or marginal within the profession. Legal ethicist David Luban contrasted public defenders for the indigent, who represent the majority of criminal defendants, with "white-collar defense lawyers, the mob lawyers, the Miami drug bar." It might be plausible to worry about lawyers for "mobsters and druglords," Luban allowed, but he insisted that such cases were unusual, and legal ethics debates should proceed by assuming the more typical situation of the overburdened public defender.[9] Complementing Luban's argument in the realm of legal ethics, constitutional scholar Pamela Karlan cautioned that courts should not allow what might be legitimate concerns about lawyers on the long-term payroll of criminal enterprises to distort the more general body of doctrine governing the Sixth Amendment right to counsel.[10]

Yet in other contexts, scholars have sometimes referred to the private criminal defense bar as exemplary of the American legal profession's political and ideological commitments. Legal historian Robert Gordon, for example, has suggested that criminal defense lawyers best embody the American bar's "libertarian" ideology. "Though in fact most lawyers avoid criminal defense practice, and its prestige is low," Gordon writes, "they hold up the model of criminal defense as the paradigm of what they do: the aggressive protection of private rights against an overreaching state."[11] Of course, these accounts are not

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"most of the reported decisions—and there are not many—deal with lawyer crimes committed in the course of conducting a criminal-defense practice." Wolfram, *Lawyer Crimes*, 36 VAL. U. L. REV. at 78. The literature on lawyers in pop culture is vast, but for a brief introduction, see Norman L. Rosenberg, *Law and Commercial Popular Culture in the Twentieth-Century United States*, in 3 CAMBRIDGE HISTORY OF LAW IN AMERICA, ed. Michael Grossberg & Christopher Tomlins (2008). For a discussion at the intersection of multiple of these types of inquiries, see Alison Siegler & Erica Zunkel, *"I Got the Shotgun, You Got the Briefcase": Criminal Defense Ethics in The Wire*, 2018 U. CHI. LEGAL F. 209 (2018).

[9] David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1763, 1765-66 (1993).

[10] Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 672 (1992). Karlan did not use the term "mob lawyers," but referenced "the many organized crime 'families' that virtually keep criminal defense litigators on retainer to represent family associates." Id. at 681. In the footnotes, she referred (among other sources) to articles discussing Bruce Cutler.

[11] Robert W. Gordon, *The Legal Profession*, in LOOKING BACK AT LAW'S CENTURY 290 (ed. Austin Sarat et al.) (2002).

mutually exclusive: high-priced criminal defense lawyers may be fringe figures within the profession in terms of numbers and status, while simultaneously playing an outsized cultural role as the legal profession's public mascots—shaping, for better or worse, the ideas and assumptions of the general public about law and lawyers. It might be reasonable to write off the mob lawyer as exceptional for the purposes of intra-professional rulemaking or doctrinal analysis, but for the legal historian, the mob lawyer looms as an intriguing and potentially central figure in late-twentieth-century popular discourse about law and government.

Taking up this inquiry, this article examines the representations that mob lawyers, and their professional cousins such as drug lawyers, made about themselves from the late 1970s through the early 1990s. The article makes two contributions. First, it provides a portrait of the constitution (in a descriptive sense) of the high-priced criminal defense bar during the decades when federal prosecutors cracked down in new ways on mob bosses and drug kingpins, and thereby guaranteed a lucrative market for legal services on the defense side. The article draws upon archival television footage, newspapers, magazines, and mass-market biographies, alongside more conventional legal history sources such as bar publications and Supreme Court opinions, in order to demonstrate the extent to which the general public had the opportunity to read and learn about criminal defense lawyers during these years. To a degree belied by their small numbers and relatively low prestige within the profession, criminal defense lawyers were consistently among the profession's most prominent representatives in the media.[12]

Second, the article proceeds to consider these lawyers' Constitution in the big-c sense, i.e., the normative vision of governance and liberty that they presented to the public, through the many opportunities that they were given to deliver interviews and soundbites. I argue that mob lawyers, drug lawyers, and other professional cousins advanced a distinctive constitutional vision, even if they did so in an uncoordinated way, because they articulated and publicized ideas about the proper balance of power between the individual and

[12] On prestige, cf. Robert W. Gordon, *The American Legal Profession, 1870-2000*, in 3 CAMBRIDGE HISTORY OF LAW IN AMERICA, ed. Michael Grossberg & Christopher Tomlins (2008) (noting that since about 1900, partnership in a corporate law firm has been viewed as the most prestigious legal career); YVES DEZALAY & BRYANT G. GARTH, LAW AS REPRODUCTION AND REVOLUTION: AN INTERCONNECTED HISTORY 9-10 (2021) (noting that in the United States, corporate law firm partners occupy the top of the legal profession's status hierarchy).

government authority.[13] These ideas were obviously cruder than academic theories about the state, but they circulated more widely, and precisely because of their simplicity and repetition, were presumably stickier in the public mind. Although they did not add up to a comprehensive constitutional theory in the academic sense, they did imply an understanding of the state that, if taken seriously, would have wide-ranging constitutional significance: a thoroughly suspicious orientation towards the government generally, and towards its exercise of the prosecutorial power specifically. Against the backdrop of the post-Vietnam, post-Watergate historical context, the mob lawyer fused the traditional rhetoric of constitutional rights and the time-honored rituals of courtroom advocacy with late-twentieth-century cynicism about government corruption and prosecutorial overreach.

Mob lawyers consistently described themselves as defenders of the Constitution. So too did drug lawyers, murder trial specialists, and their various other professional cousins. Barry Slotnick, who had represented mob clients since the 1960s including the Colombo crime family, and later gained notoriety for representing the subway shooter Bernhard Goetz, "describe[d] his practice in constitutional terms. 'Keeping government in check,' he says, 'is the most important thing I do.'"[14] Jimmy LaRossa, according to his son, "was an old-world guy who believed that his job … was mandated by the Constitution."[15] Frank Ragano, longtime counsel to the Florida crime boss Santo Trafficante, Jr., adopted a personal vendetta against attorney general Robert Kennedy, "because I thought he was violating my client's constitutional rights."[16] Renowned Miami defense lawyer Albert Krieger "was known for always carrying a pocket-sized edition of the U.S. Constitution."[17] In 2008, the president of the National Association for Criminal Defense Lawyers rehashed the same tropes, describing

[13] Reva Siegel has defined constitutional culture broadly to encompass the ways that "citizens and officials … question and … defend the legitimacy of government, institutions of civil society, and the Constitution itself." Reva B. Siegel, *Constitutional Culture, Social Movement Conflict, and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1327 (2006).

[14] Peter McKillop, *Slotnick for the Defense*, NEWSWEEK, 4 May 1987, at 62; see also PATTERSON, THE DEFENSE LAWYER, at 112 ("Slotnick felt strongly that he was doing God's work by upholding the Constitution").

[15] Quoted in Julia Pagnamenta, *"Gladiator" or "Bionic Mouth"? The Making of a Mob Lawyer*, THE CRIME REPORT, 21 November 2019, https://thecrimereport.org/2019/11/21/732443/.

[16] Frank Ragano, quoted in A&E/The History Channel special "Defending the Mob" (A&E Television Networks, 1995), VHS tape.

[17] Jim Ash, *Section Remembers Legendary Criminal Defense Lawyer Albert Krieger*, THE FLORIDA BAR, 19 August 2020.

NACDL as an organization filled with "protectors and enforcers of the Constitution"—more so than the government itself. "The government enforces the law," he asserted, but "often at the expense of the Constitution and Bill of Rights. We ensure the government complies with the law. We, too, are enforcers of the Constitution."[18]

There is an academic tendency to dismiss such stock phrases as mere platitudes or marketing puffery, perhaps useful for giving lawyers a sense of purpose but not containing enough substance to merit scholarly analysis. On this account, criminal defense lawyers play an important and constitutionally protected role, but are not themselves historically significant exponents of constitutional ideas. As to mob lawyers in particular, they are regarded by many commentators as purely opportunistic, in which case anything they say about the Constitution can be written off as empty. In media coverage of actual mob lawyers, journalists often raised questions about their sincerity. For example, a *People* magazine profile of Slotnick asked: "Is [he] really functioning, as he claims, on some higher, idealistic plane, or is he sabotaging the ends of justice?"[19] The *New York Daily News* columnist Jimmy Breslin wrote sarcastically of lawyers like Slotnick: "A criminal defense lawyer in this country, under our Constitution, has two duties. First, he must get paid." Second, "try to confuse" the jury.[20]

It would misunderstand mob lawyers' rhetoric, however, to interpret their references to constitutional principle as merely a thin veneer for baser pecuniary motives—as if pecuniary motives could not themselves have constitutional significance. *Pace* Jimmy Breslin, the fact that these lawyers valued "get[ting] paid" was not proof of hypocrisy or thin commitment to principle, because getting paid was one of their principles. They posited that *privately retained* and *highly paid* criminal defense lawyers in particular, and not just lawyering or due process in a more generic sense, played an essential role in the maintenance of liberty. Of course, many other participants in America's ongoing constitutional conversation had emphasized the importance of the right to counsel to fair trials, but that right could theoretically be fulfilled by cause lawyers, charitable volunteers, or public officials. The private criminal defense bar promoted a

[18] John Wesley Hall, *President's Column: We Are Enforcers of the Constitution*, THE CHAMPION, August 2008. Similar language can be found readily on any local criminal defense lawyer's marketing website.

[19] Ken Gross, *Subway Shooter Bernhard Goetz Is the Latest Defendant to Hire the Hottest Legal Gun in Town—Barry Slotnick*, PEOPLE, 4 May 1987, at 116.

[20] Quoted in PATTERSON, THE DEFENSE LAWYER, at 295 (quoting a Breslin column published during the Goetz trial).

more specific vision of the right to counsel as related to economic autonomy and a faith in the ability of markets to best allocate legal talent to situations where liberty was under threat. As one Miami drug lawyer in the 1980s proclaimed: "The lowest of low human beings is entitled to the best defense he can afford."[21]

This article's methodological approach, combining legal and cultural history, offers a way to bring the history of criminal defense lawyering, which is often cabined as a topic within legal ethics or criminal procedure, into conversation with the broader literature on popular constitutionalism. In recent years, scholars have sought to broaden the cast of characters deemed relevant for understanding American legal culture.[22] However, when legal scholars move beyond academic theory and judicial opinions, and examine examples of popular engagement with the Constitution, they often still focus on organized movements with strategic litigation campaigns, such as the identity-based civil rights movements of the twentieth century, or more recently, the pro-life and gun rights countermovements.[23] There are certainly good reasons, both substantive and methodological, for studies of popular constitutionalism to focus on movements: history is ultimately about explaining change, and organized movements have historically appeared especially successful at causing change; and even when they fail, they leave behind a lot of records. But popular constitutionalism also extends to vaguer attitudes and orientations towards the law, which may not animate any singular organized campaign, but which nevertheless shape the parameters of discourse and the bounds of political possibility.

By framing the right to counsel in the vocabulary of luxury consumption—the right to "the best defense he can afford"—the private bar associated criminal lawyering less with generic due process concerns than with the fetish for markets that had overtaken American political discourse by the 1980s.[24] Thus, this article builds on recent work by legal scholars to contextualize criminal defense

[21] Quoted in James S. Kunen, *Joel Hirschhorn*, PEOPLE, 26 August 1985, at 62.

[22] See, e.g., KEN I. KERSCH, CONSERVATIVES AND THE CONSTITUTION: IMAGINING CONSTITUTIONAL RESTORATION IN THE HEYDAY OF AMERICAN LIBERALISM 27 (2019) (calling for more attention to the history of constitutional thought outside the legal academy).

[23] See, e.g., William N. Eskridge, Jr., *Some Effects of Identity-Based Social Movements on Constitutional Law in the Twentieth Century*, 100 MICH. L. REV. 2062 (2002); Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

[24] See generally DANIEL T. RODGERS, AGE OF FRACTURE ch. 2 (2010) ("The Rediscovery of the Market").

within the history of neoliberalism.[25] While these scholars have largely focused on Supreme Court doctrine, this article's attention to trial-level lawyering and lowbrow, pop-culture sources helps to fill in the cultural background against which such doctrine developed.

A caveat: scholars of constitutional law may come to this article expecting to find an argument about, or at least some documentation of, the particular doctrinal successes (or failures) of the private criminal defense bar. Did these lawyers, for example, move or attempt to move the constitutional law of criminal procedure in a particular direction? This article does not offer any such argument, for two reasons. First, this article focuses upon high-priced lawyers' public presentations of their constitutional role, relying largely on cultural history sources; tracing in a more granular way the doctrinal rules advanced by the criminal defense bar in appellate litigation and legislative lobbying is beyond the scope of this article, although a worthy subject for further research.[26] Second and more substantively, however, there is a sense in which it would misunderstand the cultural role of the flashy trial lawyer to attempt to measure his legal influence by asking whether he achieved doctrinal change. Legal scholars are understandably concerned with doctrine, but trial lawyers are concerned with convincing juries and also the general public. From their perspective, the defense lawyer's constitutional significance inhered in the embodied rituals of courtroom combat more than in abstract debates over what the rules for such combat should be. Whether or not the doctrine moved in their direction—and in fact, perhaps most importantly at moments or in contexts where higher doctrine was unfavorable to their clients' interests—trial lawyers performed their constitutional role day-to-day by objecting to prosecutorial actions that they framed as epitomizing government overreach.

Thus, this article connects the history of criminal defense lawyering with more general trends in late-twentieth-century popular constitutionalism such as complaints about federal overreach and the growing appeal of libertarianism.

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[25] See Zohra Ahmed, *The Right to Counsel in a Neoliberal Age*, 69 UCLA L. REV. 442, 446 (2022) (arguing that Supreme Court right-to-counsel doctrine post-1975 "reflect[s] neoliberal orthodoxy" such as an emphasis on individual choice and autonomy, having "granted defendants greater choice to customize their representation, with little regard for the consequences or quality"); Shaun Ossei-Owusu, *The Sixth Amendment Façade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1211-30 (2019) (in section entitled "The Post-1970s Right to Counsel and Mass Incarceration," examining how, in the same years, the Supreme Court curtailed the right to appointed counsel in opinions that made racialized allusions to crime control and fiscal austerity).

[26] Future research might examine, in particular, the litigation and lobbying efforts of organizations like the National Association of Criminal Defense Lawyers; see below, note 131.

The mob lawyer was indeed a colorful pop-culture figure on the fringes of legal culture, but also—perhaps precisely because of his marginality within the profession—a prominent fount of widely circulating tropes about the connection between the individual, the state, the law, and money. High-priced criminal defense lawyers sold a service that was both a right and a luxury good, then used the proceeds to buy luxury goods of their own. In the courtroom as in society, they exemplified the creed of the "consumers' republic": that the best way to advance collective wellbeing is to let each individual decide for himself how to advance his interests and what to buy in the marketplace.[27] It is more difficult to measure how the general public received such rhetoric, but it seems likely that these widely chronicled figures had some effect on popular perceptions of the law, if only to reinforce late-twentieth-century cynicism and suspicion of the state.

## I. PICTURING THE MOB LAWYER

As an archetype and a target of reform efforts, the mob lawyer has had a longer history in American legal culture than is recounted in this article. The "lawyer-criminal" who abets gangsters became an object of elite legal opprobrium during the age of Prohibition and Al Capone.[28] In the 1950s, Senator Estes Kefauver, an anti-mafia crusader, revived this trope, warning about close ties between corrupt lawyers and criminal enterprises. Kefauver described "instances where the tie-in between certain attorneys and organized gangs were so close that when small-fry associates of the gangs were arrested in raids, lawyers retained by the gang headquarters appeared in their behalf without having been called by the defendants—in many cases without ever having known the defendants."[29] Into the 1980s, the "small-fry" mob lawyer remained a known

[27] This reference is an allusion to LIZABETH COHEN, A CONSUMERS' REPUBLIC: THE POLITICS OF MASS CONSUMPTION IN POSTWAR AMERICA (2004). Cohen defines the consumers' republic as "an economy, culture, and politics built around the promise of mass consumption, both in terms of material life and the more idealistic goals of freedom, democracy, and equality." In this ideal, "the consumer satisfying personal material wants actually served the national interest" in a literal sense, since the postwar economy depended on mass consumption, but the consumer role also became a model for thinking about citizenship.

[28] See, e.g., Homer S. Cummings, *The Lawyer Criminal*, 20 A.B.A. J. 82 (1934).

[29] "The Menace of Organized Crime," Senator Estes Kefauver before the American Bar Association, Criminal Law Section, 19 September 1950, Washington, D.C., available at https://digital.lib.utk.edu/collections/islandora/object/ekcd%3A457. For an example of this archetype, see FRANK RAGANO & SELWYN RAAB, MOB LAWYER 12-13 (1994). In 1954, Ragano was an upstart criminal lawyer in Tampa, Florida, when the local crime boss, Santo Trafficante,

type. When Congress held hearings on organized crime in 1985, one such lawyer, Martin Light, was invited to testify about his career in Brooklyn, representing small-time associates of various La Cosa Nostra families.[30] Miami drug trafficking cartels relied upon the parallel phenomenon of the so-called "boat bar," comprising defense lawyers on retainer to the cartel to represent low-level crew members caught smuggling contraband.[31]

However, in the 1970s and '80s, circumstances combined to train the cultural spotlight upon a different subtype of mob lawyer: not the anonymous upstart on-call to bail out "small-fry" gangsters, but the trial lawyer who aspires to conduct a bravura courtroom defense of the mafia don or the trafficking kingpin himself. Although these decades were difficult ones for the private criminal defense bar generally, they presented exciting opportunities for lawyers at the top tier of the specialty who could command high prices. Even if the brunt of the "war on crime" fell upon the poor, the federal government was also using the criminal law in new ways to target higher-level wrongdoing. By the early 1970s, federal prosecutors were increasingly indicting so-called "white-collar crime," with the Southern District of New York making corporate malfeasance a special focus.[32] The growing number and complexity of white-collar prosecutions spurred, in turn, the emergence of a specialized defense bar, dominated by former federal prosecutors who found they could monetize their familiarity with the field by switching sides.[33] Federal prosecutors launched similar offensives against organized crime and drug trafficking.

All of these developments presented openings for entrepreneurial defense counsel with the right connections and expertise. Jimmy LaRossa, for example, established himself as an expert in the novel subfield of racketeering defense when he represented labor leader Anthony Scotto in 1979 in one of the first

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Jr., retained him to dispose of the pending criminal charges against 28 low-level runners in Trafficante's *bolita* gambling operation (all black men). For this work, Ragano was paid $5,000 in cash per defendant, a total of $140,000 at the time, or $1.5 million in today's dollars.

[30] Ultimately Light got sucked into drug trafficking himself and was sentenced to 15 years in prison for heroin possession. Light's testimony is reproduced in *The Impact: Organized Crime Today*, a report of the 1986 President's Commission on Organized Crime, available at https://hdl.handle.net/2027/mdp.39015019148165.

[31] Neil A. Lewis, *Drug Lawyers' Quandary: Lure of Money vs. Ethics*, N.Y. Times, 9 February 1990, at A1.

[32] KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 3-5, 19-22 (1985). Although the term "white-collar crime" had been coined in the 1940s, corporate malfeasance only became a prosecutorial priority in the late 1960s and early 1970s.

[33] MANN, DEFENDING WHITE-COLLAR CRIME, at 21-22.

major RICO cases.[34] Scotto, the head of the International Longshoremen's Association, was convicted for extortion from shipping companies and sentenced to five years in prison. Although Scotto was convicted, LaRossa was well situated to join the defense team in the subsequent series of mafia trials brought by New York federal prosecutors. The Las Vegas lawyer Oscar Goodman reflected that "being a so-called mob lawyer gave me the opportunity to practice law at a very high level. Every day I would wake up to some monumental issue concerning wiretaps or the RICO law, or a search and seizure … I had to perform at the peak of my ability."[35] Bruce Cutler, though not known for his legal acumen, did a steady business simply by representing John Gotti in various criminal proceedings; he described the 1980s as a "golden age of criminal, and in particular organized crime, litigation."[36] By the 1980s, a law professor could observe that lawyers in "the white collar and the drug law bars" were at the top of the criminal defense profession, "command[ing] shockingly high fees."[37]

### *A. Godfathers on Trial*

Prior to the 1970s, federal action against organized crime was intermittent and based on incomplete information about the scale and scope of mafia activities.[38] Crime bosses avoided direct involvement in the crimes of their

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[34] LAROSSA, JR., LAST OF THE GLADIATORS, at 158-60; Douglas Martin, *James M. LaRossa, Defender of Mob Bosses in Court, Dies at 82*, N.Y. TIMES, 17 October 2014.

[35] GOODMAN, BEING OSCAR, at 136.

[36] CUTLER, CLOSING ARGUMENT, at 175.

[37] Bruce J. Winick, *Forfeiture of Attorneys' Fees under RICO and CCE and the Right to Counsel of Choice: The Constitutional Dilemma and How to Avoid It*, 43 U. MIAMI L. REV. 765, 781 (1989).

[38] James B. Jacobs, *The Rise and Fall of Organized Crime in the United States*, 49 CRIME & JUST. 17, 19 (2020); see also BEVERLY GAGE, G-MAN: J. EDGAR HOOVER AND THE MAKING OF THE AMERICAN CENTURY xvi (2022) (noting Hoover's obsession with leftist organizations that he deemed especially dangerous to national security). But Gage debunks the myth that Hoover refused to admit the existence of the mafia altogether. See, e.g., id. at 485-86 (noting that Hoover acknowledged national coordination between local mafias by 1957 and pursued various FBI initiatives against organized crime, although he did think that it was primarily an issue for local law enforcement and was concerned about the need to "insulat[e] FBI agents from the temptations of graft, vice, and corruption" that often accompany mafia investigations). Recent research has revealed that Hoover's FBI kept closer tabs on organized crime than was previously appreciated, but the goal was information-gathering and crime prevention, not necessarily courtroom prosecutions, and the programs were generally kept secret. See generally GAGE, G-MAN, ch. 40 (describing Kennedy's history against organized crime and clashes with Hoover), 492 (on the "Get Hoffa" squad); see also GLEESON, THE GOTTI WARS, at 146-47 (summarizing the history of the DOJ strike forces started by RFK, which were phased out in 1989). Robert

subordinates, and could keep their criminal operations running even as smaller fish might rotate in and out of prison.[39] As late as 1977, an exhaustive cover story in *Time* magazine could report that it remained virtually impossible for law enforcement to win convictions against mafia defendants.[40]

The death of longtime FBI director J. Edgar Hoover in 1972, combined with several significant acts of Congress, encouraged new directions in federal law enforcement and a more comprehensive effort to take down the "five families" who dominated New York, as well as other mob organizations around the nation. Several significant acts of Congress empowered prosecutors in new ways. First, Title III of the Omnibus Crime Control Act of 1968 legitimated the use of electronic surveillance. Prior to Title III, police and federal agents had used wiretaps and bugs, but the evidence was generally inadmissible in court, and the practice was politically controversial.[41] Title III formally authorized and comprehensively regulated the use of electronic surveillance at the federal level, and provided for its admissibility in court so long as the requisite procedures were followed.[42] Second, the federal witness protection program,

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Kennedy argued in 1961 that "new laws [were] needed" to empower the FBI against organized crime. Quoted in GAGE, G-MAN, at 489-90.

[39] RAAB, FIVE FAMILIES, at 177 (describing how before RICO, mafia leadership "were effectively insulated from arrest" because "they gave orders but never personally committed crimes"); see also Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts III and IV*, 87 COLUM. L. REV. 920, 967 (1987) (hereinafter Lynch, *RICO II*) (observing "the difficulty of securing evidence directly connecting [the leadership of organized crime rings] to particular crimes"). Although RICO would eventually be used by prosecutors to solve this problem, that was not necessarily the congressional intent; Lynch summarizes evidence that RICO appears to have been subjectively intended by its sponsors to deal with a narrower issue (mafia infiltration of legitimate businesses).

[40] *The Mafia: Big, Bad and Booming*, TIME, 16 May 1977, at 35.

[41] The Communications Act of 1934 prohibited publishing or divulging intercepted communications, and was interpreted to render wiretapped evidence inadmissible in federal court. See Nardone v. United States, 302 U.S. 379 (1937). Controversially, the FBI took the position that the law did not prohibit them from intercepting conversations for background investigatory purposes, only from divulging or using their contents. See EDWARD BENNETT WILLIAMS, ONE MAN'S FREEDOM 109-12 (1962). On the political and cultural history of electronic surveillance, see generally BRIAN HOCHMAN, THE LISTENERS: A HISTORY OF WIRETAPPING IN THE UNITED STATES (2022). In addition to the legal issues, the physical equipment itself was often bulky and unwieldy in the 1950s. See GAGE, G-MAN, at 487-88.

[42] On the legislative history of Title III, see generally HOCHMAN, THE LISTENERS, at ch. 7. Title III requires that specifically designated individuals apply to a federal judge for wiretap authorization. Among other requirements, the application must include a statement of probable cause and a statement as to why other investigative procedures are inadequate. Wiretap orders

established in 1970, made it possible to offer more robust protection to underlings willing to testify against their higher-ups.[43]

Third, and most significant, was the Racketeering Influenced and Corrupt Organizations Act (or RICO), enacted in 1970.[44] RICO departs from the traditional paradigm of criminal law, in which each case is a standalone prosecution of a discrete criminal "transaction" such as a murder or a robbery, and evidence about a defendant's larger criminal career is generally excluded as irrelevant or prejudicial.[45] RICO makes it a federal crime for anyone involved in a criminal enterprise "to participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity," and then defines "racketeering activity" to include a long list encompassing virtually any state or federal crime (murder, kidnapping, gambling, arson, extortion, embezzlement, false use of a passport, dealing in controlled substances, etc.).[46] Moreover, the predicates for a RICO conviction could include offenses up to twenty years old.[47] In other words, RICO established, in Gerard Lynch's pithy formulation, "the crime of being a criminal."[48] As Lynch explains: "Rather than taking the evidence gathered in a lengthy investigation of a criminal group … and chopping it up into trial-size bits focused on individual crimes, RICO permits a single trial to become a presentation of the full picture" of an ongoing, complex criminal enterprise.[49] RICO enabled federal prosecutors to invent and carry out the novel phenomenon of the large-scale mafia mega-trial, in which jurors—

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may only be granted for a specified period of time, and notice must be sent within 90 days to the parties whose conversations were intercepted.

[43] RAAB, FIVE FAMILIES, at 179; Ed Magnuson, *Hitting the Mafia*, TIME, 29 September 1986, at 22.

[44] Pub. L. No. 91-452, 84 Stat. 941 (1970), codified at 18 U.S.C. §§ 1961-1968.

[45] Lynch, *RICO II*, at 961-65.

[46] 18 U.S.C. § 1962(c) (emphasis added).

[47] Lynch, *RICO II*, at 940.

[48] See Gerard E. Lynch, *RICO: The Crime of Being a Criminal, Parts I & II*, 87 Colum. L. Rev. 661, 662-63 (1987) (characterizing RICO as effectively "an expanded conspiracy statute") (hereinafter Lynch, *RICO I*); id. at 706 (observing that given its expansive interpretation by the courts, RICO effectively "makes it a crime […] to be a gangster, whether in the Mafia or in a much more loosely affiliated criminal combine"); see also RAAB, FIVE FAMILIES, at 178 (explaining that RICO effectively "outlawed the Mafia's fundamental and ingrained operating procedures").

[49] Lynch, *RICO II*, at 965-66; see also RAAB, FIVE FAMILIES, at 177-78 (explaining how "RICO empowered prosecutors to dismantle the hierarchy of a family with one sweeping indictment"). Thanks also to Daniel Richman for clarifying some nuances of RICO.

and the media—could be presented with the full picture of a defendant's underworld connections and his criminal history over a long period of time.

None of these developments had immediate effect. For a time after Hoover's death, the DOJ and FBI remained in a state of some disarray.[50] It took trial and error for federal agents to build expertise in wiretapping and electronic surveillance, to place and monitor bugs, to marshal facts connecting various mafia figures to one another, and to build cases. By the 1980s and '90s, however, the evidence contained in audio recordings would become the centerpiece of major mafia prosecutions. Similarly, RICO was on the books for several years before federal agents and prosecutors began using it regularly.[51] But once they became comfortable with how the statute worked, racketeering became the basis for the series of high-profile mafia trials from the mid-1980s through the 1990s that ended with most of the era's most notorious crime bosses in federal prison.[52]

It is a testament to the cultural prominence of organized crime that unlike most arcane legal developments, the story of RICO became mass-market pop-culture fare. In a 1986 cover story, *Time* magazine reported on the "wave of trials … putting the nation's crime bosses behind bars."[53] The article was lavishly illustrated with courtroom drawings and a family tree-style diagram of the "five families," all of whose bosses were under indictment: John Gotti, Anthony "Fat Tony" Salerno, Anthony "Tony Ducks" Corallo, Philip Rastelli, and Carmine "Junior" Persico (the latter four on trial together in the so-called "Commission" case in the Southern District of New York, Gotti on trial separately in the Eastern District). In 1989, *People* magazine explained in some detail how the federal government had leveraged the racketeering statute in order to "turn[] up the firepower against the mob."[54] Through such coverage, an American teen might well have learned about RICO in the dentist's waiting room,

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[50] See *The Mafia*, at 41-42.

[51] See Lynch, *RICO I*, at 662-63 (noting that prosecutors came to use RICO as "an all-purpose prosecutorial tool"); 695 (noting that prosecutors initially did not "push at [RICO's] outer limits"). The full story of RICO is an interesting tale of the single-minded entrepreneurialism of George Blakey, a lawyer and legal scholar who helped draft RICO and then sold it to prosecutors and law enforcement agents. For a narrative overview of this saga, see generally RAAB, FIVE FAMILIES, ch. 17.

[52] See generally RAAB, FIVE FAMILIES (chronicling the legal travails of the Colombo, Gambino, Lucchese, Genovese, and Bonanno crime families); GLEESON, THE GOTTI WARS (chronicling the campaign to take down the Gambino family from the perspective of one of the federal prosecutors involved).

[53] Magnuson, *Hitting the Mafia*.

[54] Gross, *Cold-Blooded King*, at 73.

at her grandmother's house after school, or wherever else magazines were found.

The New York mafia trials were only the most prominent in a wave of criminal prosecutions targeting organized crime.[55] According to statistics cited by *Time*, from 1981 to 1986 federal prosecutors had indicted 2,554 mafia defendants nationwide, and convicted 809 of them; and those numbers did not include thousands of similarly structured indictments using RICO against motorcycle gangs, drug trafficking rings, and other criminal enterprises.[56] RICO trials were characteristically complex and unwieldy; as a representative example, the 1986 trial in Brooklyn involved 30 hours of audio recordings, 90 witnesses, and seven defendants.[57]

Criminal defense lawyers decried RICO as an "atrocity."[58] In their view, the statute had been stretched far beyond the congressional intent by "overzealous prosecutors."[59] And yet, for those at the top tier of the criminal defense bar, RICO was an undeniable business opportunity. Given public fascination with the mafia, these trials received exhaustive media coverage.[60] Organized crime had long been the subject of extensive reporting in the mainstream press. For example, in 1977, *Time* magazine proclaimed the mafia "big, bad, and booming," and covered in some detail the in-fighting occasioned by the death of Carlo Gambino.[61] Through the 1980s, the New York tabloids provided daily

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[55] Magnuson, *Hitting the Mafia*, at 19, cites indictments around the country targeting 17 of 24 organized crime families. The Gambino family was also intended to be included in the "Commission" trial as both the boss Paul Castellano and his underboss Agnello Dellacroce had been indicted, but both died prior to the trial (Castellano in a targeted hit, Dellacroce of cancer). A set of 1983 indictments, brought in Kansas City, targeted mafia skimming of Las Vegas casino profits as well as organized crime in the Midwest. *Shaking the Mob's Grip*, TIME, 24 October 1983, at 31.

[56] Magnuson, *Hitting the Mafia*, at 19. For a comprehensive overview of the law enforcement campaign against the mafia, see generally Jacobs, *The Rise and Fall of Organized Crime*. Looking at federal appellate opinions alone, one study found 250 RICO cases between 1974 and 1985. Lynch, *RICO I*, at 724; see also Lynch, *RICO II*, at 928-32 (summarizing additional examples of RICO indictments against multifaceted criminal enterprises).

[57] PATTERSON, THE DEFENSE LAWYER, at 217.

[58] Bob Anderson Mitcham, *RICO: Acronym for Atrocity*, 8 CRIM. DEF. 7 (1981); see also Lynch, *RICO II*, at 961 (noting "the perspective of defense attorneys" that RICO trials are "abominations" that violate traditional norms of criminal procedure).

[59] Mitcham, *RICO*, 8 CRIM. DEF. at 7-8.

[60] On popular mythmaking around the Mafia, see Adam Gopnik, *Why New York's Mob Mythology Endures*, THE NEW YORKER, 7 December 2020.

[61] *The Mafia: Big, Bad and Booming*, TIME, 16 May 1977, at 32-42.

updates on mafia mega-trials, which were framed for readers as stress tests for "the rule of law itself."[62] According to the *New York Daily News*, at stake was whether "the government [could] guarantee that the mob cannot run wild" over "the laws of this land."[63] In 1989, John Gotti was identified on the cover of *People* magazine as "Public Enemy No. 1," "a sleek, shrewd killer who laughs at the law."[64] Subsequent coverage updated *People* readers on the "turncoat" Gravano, covering the trial as if it were a new installment of *The Godfather*: "Rarely if ever had the kiss of betrayal so shaken the American mob—or provided such high drama."[65]

The media fascination with mafia dons extended to their lawyers. A spread in *GQ* magazine anointed Barry Slotnick "The Godfather's Lawyer."[66] Along with his client John Gotti, Bruce Cutler was covered extensively in *Vanity Fair.*[67] In fact, Cutler alone, in 1991 alone, and while ostensibly under a gag order not to discuss the Gotti case, "was quoted … in all four major New York dailies" multiple times; "gave a long interview to *Interview Magazine*"; "showed up on *60 Minutes*"; and "appeared on a local television news program … where he accused the government of persecuting Gotti."[68]At times, the magazines bathed mob lawyers and their clients in an outlaw mystique, but at other times they framed the coverage in cartoonish terms of good and evil. Among the federal prosecutors leading the charge against the mob was Rudy Giuliani of the Southern District of New York; in the pages of *Time* magazine, he was described in admiring terms as "a thoughtful, driven man" who "resembles a quattrocento fresco of an obscure saint."[69] On the next page was an item tagged "A mob lawyer discusses his code of conduct," about the crooked Martin Light, who had recently testified at Congress about his legal services on behalf of La Cosa Nostra.[70]

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[62] PATTERSON, THE DEFENSE LAWYER, at 181.

[63] *New York Daily News* article, quoted in PATTERSON, THE DEFENSE LAWYER, at 181.

[64] Front cover, PEOPLE, 27 March 1989.

[65] *Bad Fellas*, PEOPLE, 23 March 1992, at 40.

[66] PATTERSON, THE DEFENSE LAWYER, at 204.

[67] See, e.g., Marie Brenner, *Prime-Time Godfather*, VANITY FAIR, May 1990; Ron Rosenbaum, *The Irresistible Rise of Big Brucie*, VANITY FAIR, October 1987.

[68] United States v. Cutler, 58 F.3d 825, 830 (2d Cir. 1995). LaRossa's son recalled that his father "was in the news all the time, mainly because the mob trials were so well covered." Pagnamenta, *"Gladiator" or "Bionic Mouth."*

[69] Richard Stengel, *The Passionate Prosecutor*, TIME, 10 February 1986, at 51-52.

[70] Jacob V. Lamar Jr., *Protecting the Family: A mob lawyer discusses his code of conduct*, TIME, 10 February 1986, at 52.

The "war on drugs," first declared by President Richard Nixon and prosecuted with increasing zeal by subsequent administrations, would present similar opportunities of business and publicity for the high-end criminal defense bar.[71] Most drug defendants, of course, especially in state courts, were lower-level distributors (or even just users); they were typically represented by public defenders, and resolved their cases through plea negotiations, not dramatic trials.[72] But federal prosecutors also sought to build cases against drug kingpins and large-scale traffickers, using the same legal tools, such as wiretaps and RICO, that they had used to rack up mafia convictions.[73] Just as with white-collar and mafia prosecutions, complex drug conspiracy prosecutions gave rise to a specialized bar. In 1988, the *American Bar Association Journal* christened Miami "a criminal defense attorney's paradise," given that the city was both a waystation for illicit cocaine and a center of pan-American political intrigue. "The pages of the local newspapers are filled with an endless saga of unusual crime and spectacular trials," marveled the *ABA Journal*. Only in Miami might the "routine drug bust at the mall" turn out to constitute "part of a plot to fund an army that would infiltrate Guatemala and stage a coup."[74]

The mainstream press also noticed the growing ranks of drug lawyers. For example, the *New York Times* reported on the rise of the so-called "white-powder bar." Neal Sonnett, then the president of the NACDL, took umbrage at the term as "very pejorative," but acknowledged that criminal lawyers in Miami had a lot of drug clients, since, after all, there were a lot of drug cases. "It's the responsibility of lawyers not to refuse cases merely because the subject matter may be unpopular," he reminded readers of the *Times*.[75] The *Washington Post* reported on the phenomenon as well. According to the *Post*, reporting on the Florida bar in the early 1990s: "Young hot lawyers in the state or federal prosecutor's offices often could not wait to finish their three years of public service

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[71] As one drug lawyer told Newsweek: "There's no question the U.S. crackdown is good for business." Steven Waldman, et al., *The Drug Lawyers*, NEWSWEEK, 13 November 1989. For an overview on the the War on Drugs as federal policy, see generally David Farber, *The Advent of the War on Drugs*, *in* THE WAR ON DRUGS: A HISTORY 17 (David Farber, ed., 2022).

[72] See, e.g., Peter Pihos, *The Local War on Drugs*, *in* THE WAR ON DRUGS: A HISTORY 131 (David Farber, ed., 2022) (documenting the shift to arresting and prosecuting "retail-level" drug dealers in 1980s Chicago).

[73] See *The Mob Lawyer*, TIME, 25 March 1985, at 65 (presenting mafia and drug cases as two parts of one larger campaign against organized crime).

[74] Dave Von Drehle, *Ohhhhh, Miami!*, 74 A.B.A. J. 62 (1988).

[75] Quoted in Lewis, *Drug Lawyers' Quandary.*

and get into private practice."[76] Joel Hirschhorn appeared frequently in the press as a quintessential Miami drug lawyer; *People* magazine photographed him and his family standing in front of his boat, the *A Quit-All*.[77] (Not to be confused with New York mob lawyer Jerry Shargel's boat, the *Defense Rests*.[78]) The *New York Times* described Hirschhorn as "among the most brazen of those specializing in drug work" and similarly mentioned the "42-foot boat … that he boasts was paid for by drugs."[79]

As with mob lawyers, so too could drug lawyers be divided into different levels and subtypes. Drug trafficking rings employed a similar practice to the mafia, in which the boss might hire a run-of-the-mill defense lawyer for his underlings and pay their legal fees, on the condition that they were precluded from seeking their own counsel.[80] The top-tier drug lawyers were those who might be trusted to manage a complex conspiracy trial; the *New York Times* estimated that there were only "about two dozen veteran criminal lawyers" in this rank. At the time of the report, many lawyers in this "top echelon" were busy representing the erstwhile Panamanian strongman Manuel Noriega and his co-defendants against allegations of drug trafficking.[81] Sonnett had a particularly headline-worthy docket: in addition to working on the Noriega case, his clients included "the notorious global arms merchant Sarkis Soghanalian," "Alvaro Rafael Saravia, wanted in El Salvador for the 1980 assassination of Archbishop Oscar Romero," and various "representatives of the Medellin Cartel."[82]

### *B. Upward Mobility*

The high-flying criminal defense bar had a distinctive ethnic and class profile, at least in the public imagination. In media profiles, criminal defense lawyers were invariably described as upwardly mobile sons from humble and often immigrant backgrounds. For example, a *People* magazine feature in 1978 profiled several criminal defense lawyers, leading off with Jimmy LaRossa, "the son

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[76] William Booth, *High Life's High Price*, WASHINGTON POST, 13 June 1995.

[77] Kunen, *Joel Hirschhorn*, at 61, 62. The author of the profile had previously worked as a public defender and published a memoir about his experiences. Hirschhorn's boat became a staple of drug lawyer media coverage, also depicted in Waldman et al., *The Drug Lawyers*.

[78] Fredric Dannen, *Defending the Mafia*, THE NEW YORKER, 21 February 1994, at 70.

[79] Lewis, *Drug Lawyers' Quandary*.

[80] See Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 122&n183 (1995) (collecting cases describing this practice).

[81] Lewis, *Drug Lawyers' Quandary*.

[82] Von Drehle, *Ohhhhh, Miami!*.

of a mailman."[83] Then came Bobby Lee Cook, the "son of a country store owner," discharged from the Navy in 1945, and the first in family to go to college. Nowadays the North Georgia trial specialist rode to court in a "chauffeured silver-and-blue Rolls-Royce."[84] Gerry Spence grew up as the child "of a chemist and a schoolteacher" in Depression-era Wyoming, sleeping outside in a tent so his parents could rent the house's spare rooms to tourists.[85] The legendary Texas lawyer Richard "Racehorse" Haynes grew up in a San Antonio family so poor that they celebrated Christmas around "a mesquite bush with ornaments fashioned from cigarette packet tinfoil." "Now he flies his own Cessna, sails his own handsome Cal 40 and drives both a $44,000 Porsche turbo Carrera and a $16,000 Excalibur."[86]

Any defense lawyer's biography could be, and was, fit into the upwardly mobile mold. Frank Rubino, trial counsel to Noriega, was the son of a beer distributor and a nurse.[87] Drug lawyer Samuel Burstyn, who represented several associates of the Medellín cartel, "grew up in a Hasidic family in Boston and ran away from home at 16 … put himself through the University of Miami and its law school, married a Cuban-American woman and began taking drug cases because 'that's where the money was.'"[88] Barry Slotnick was "the child of middle-class parents who emigrated from Russia," according to *People*, and grew up in the Bronx.[89] By the 1980s, Slotnick, "who'd snuck into Yankees games as a kid," had attained such a degree of wealth and clout that he "could now score field-level tickets whenever he wanted."[90] Joel Hirchhorn was, it was true, related to the Hirshhorn philanthropic dynasty, but the branches of the family were estranged; he instead grew up working for his father's furniture business.[91] A profile of Jerry Shargel offered a twist on the standard tale. His mobility was existential, from baby-boom boredom to the thrill of an interesting life. He grew up in New Jersey, where his father owned a paint store. He was indeed the first in the family to attend college, but they were not poor. Theirs was "a

[83] *James La Rossa wants only the tough ones*, PEOPLE, 18 September 1978, at 29.

[84] *Bobby Lee Cook would give the devil his due*, PEOPLE, 18 September 1978, at 30.

[85] Cheryl McCall, *For Country Lawyer Gerry Spence It's Open Season on Big Corporations*, PEOPLE, 24 August 1981, at 58.

[86] *Racehorse Haynes bids sweet potatoes adieu*, PEOPLE, 18 September 1978, at 33.

[87] David Grogan & Meg Grant, *Devil's Advocate*, PEOPLE, 18 November 1991, at 132-33.

[88] Lewis, *Drug Lawyers' Quandary*.

[89] Gross, *Subway Shooter Bernhard Goetz*, at 116; but see PATTERSON, THE DEFENSE LAWYER, at 42-45 (stating that Slotnick's father emigrated from Poland).

[90] PATTERSON, THE DEFENSE LAWYER, at 123.

[91] Kunen, *Joel Hirschhorn*.

typical fifties tract house, with a Chevrolet, and plastic on the furniture," he recalled, not fondly. "I don't think a Beaver Cleaver childhood is something I wanted to give to my kids."[92]

The stereotype of the "ethnic" criminal defense lawyer was longstanding, dating to the late nineteenth and early twentieth century.[93] Because criminal defense had long been considered a lower-status legal specialty within the bar, it had also been the province of lawyers who could not get into Ivy League law schools or white-shoe, corporate law firms, i.e., lawyers who were not white Protestant men.[94] These stereotypes persisted well into the 1980s, particularly in New York City. Lawyers traded on their image as scrappy, the children of "the working-class outer boroughs" who had risen to become "characters in the great drama of a great city."[95] New York lawyer Eddie Hayes referred to the type as "neighborhood white boys."[96] An Irish Catholic native of Queens, Hayes was the model for Tommy Killian, the criminal defense lawyer in Tom Wolfe's panoramic novel of 1980s New York, *The Bonfire of the Vanities.* A publishing sensation, Wolfe's novel depicted the criminal courts as the province of the "ethnics"; the novel's pages are dotted with Irish, Italian, and Jewish lawyers and judges.[97]

The demographic stereotype found some support in statistics. In the 1970s, one study of the criminal defense bar found that nearly 50% of the sample were Jewish, followed by 30% Catholic and only 20% Protestant. Contrasted with the general population, such percentages represented a slight overrepresen-

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[92] Dannen, *Defending the Mafia*, at 72, 89.

[93] See Ossei-Owusu, *The Sixth Amendment Façade*, 167 U. PA. L. REV. at 1173-77 (describing how Gilded Age reformers' depictions of "immigrant and Jewish attorneys" as unethical animated indigent defense and legal aid proposals).

[94] See Gordon, *The Legal Profession*, at 289-90 (describing how corporate lawyers, before 1975, "were almost entirely white, male, and Protestant," and graduates of "elite university law schools"; in contrast, lawyers handling ordinary criminal cases and civil disputes were "likely to be of recent immigrant origins and to have gone to law school at night or part-time").

[95] PATTERSON, THE DEFENSE LAWYER, at 36 (discussing Slotnick).

[96] EDWARD HAYES WITH SUSAN LEHMAN, MOUTHPIECE: A LIFE IN—AND SOMETIMES JUST OUTSIDE—THE LAW 29 (2006).

[97] See, e.g., TOM WOLFE, THE BONFIRE OF THE VANITIES 106-07 (1987) (in which a Jewish prosecutor ruminates on the Irish and Italians who dominate the office, and describes Bronx County prosecutors as sons of the "outer boroughs," earning "$36,000 to $42,000 a year instead of down at Cravath, Swaine & Moore or some such place at $136,000 to $142,000"); for an example of the media coverage of the novel, see Toby Thompson, *The Evolution of Dandy Tom*, VANITY FAIR, October 1987.

tation of Catholics and a dramatic overrepresentation of Jews.[98] The study's author attributed these patterns to the legacy of anti-Semitism in the legal profession; although law firms had become less likely to discriminate overtly, Jewish lawyers remained wary of large firms and looked for mentorship to older Jewish lawyers in solo practice.[99] The overrepresentation of Catholics reflected the legacy of similar, although somewhat softer barriers to access.[100] The study reported significant percentages of Irish and Italian lawyers, even though the sample's nine cities did not include New York City, which presumably would have tilted the numbers further in that direction. LaRossa's son recalled that his father had interned at "a white-shoe law firm" but was not offered permanent employment, and maintained "quite a chip on his shoulder … about the Italian-American thing."[101]

### *C. Playing the Part*

Physical description pervaded media coverage of the private criminal defense bar, as well as defense lawyers' self-depictions. They were celebrated (and celebrated themselves) for their performance and oratory rather than the more modern legal skills of writing briefs, crunching cases, or mastering complex regulatory regimes. As one lawyer wrote: "in law school we learn of the opinions of the higher courts and even cherish some of them," but "our warrior" (the criminal defense lawyer) "knows the number of reversals are insignificant and he learns to distrust the expounders of the law. His trust lies in the jury box."[102] Noriega's defense lawyer Frank Rubino explained, "a trial lawyer is a gladiator. He gets into the ring and he fights."[103] The television screen was another frequent metaphor. One lawyer wrote that "whether we like it or not, the criminal lawyer is in show business. … The true art of trial work is in achieving

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[98] PAUL B. WICE, CRIMINAL LAWYERS: AN ENDANGERED SPECIES 68-69 (1978) (but note that most of the sample said they did not represent organized crime defendants).

[99] WICE, CRIMINAL LAWYERS, at 69.

[100] For example, graduates of Catholic colleges had difficulty getting admitted to Harvard Law School. DEZALAY & GARTH, LAW AS REPRODUCTION AND REVOLUTION, at 64-65.

[101] Pagnamenta, *"Gladiator" or "Bionic Mouth."*

[102] Emmett Colvin, *Anatomy of a Criminal Defense Lawyer*, 10 CRIM. DEF. 6, 7 (1983). Celebrity trial lawyers would typically have on staff a "law man" to research and write briefs, if needed. See, e.g., PATTERSON, THE DEFENSE LAWYER, at 113.

[103] Grogan & Grant, *Devil's Advocate*, at 134.

this audience reaction." He concluded with a crude metaphor: "Certainly if an actress can peddle a maxi-pad, a lawyer should be able to sell a human being."[104]

By analogizing lawyers to boxers and movie stars, commentators associated criminal defense with the entertainment industry and the consumer economy, imagining law as a genre of popular culture rather than an arcane academic field. Like athletes and actors, lawyers were performers-for-hire, and therefore relied, in part, upon their physical traits to prevail. As a professional newsletter observed, "In a courtroom setting a lawyer is as much an actor … The best defense attorneys possess not only a high degree of legal expertise but also an individualized charisma formed through a particular way of talking, listening, walking, gesturing, dressing—coupled with other variables—which enable them to dominate a courtroom."[105] On at least one occasion, the National College of Criminal Defense offered—alongside workshops on topics like "Jury Selection" and "White Collar Crime"—a weekend course entitled "Acting—A Lawyer's Approach." Lawyers could travel to Houston for a three-day course in "voice control, body posture, improvisation, eye contact, and relaxation methods."[106]

Given these associations, professional and media discourse about criminal defense lawyers relied heavily upon physical description. For example, a professional newsletter, advertising the expert faculty for the National Criminal Defense College annual training program, included extensive detail about the faculty members' bodies, clothing, and voices. Albert Krieger dressed like "a Sunday School preacher" in order to keep the focus on "the force of his personality and strength." James Hewitt was a "heavy-set man with bright blue eyes," befitting the lighter, humorous approach that he took to his trials. James Shellow was "intelligent and looks it," with "an aristocratic nose." Richard "Racehorse" Haynes was known for his "drawly Texas voice" and "four hundred dollar ostrich boots." Robert Bailey was "slender," wore a red bowtie, and was described by Racehorse Haynes as having "'an affidavit face'—he looks so honest the jury would have a hard time not believing anything he said."[107]

Similar tropes appeared in media profiles. The *New Yorker* described Jerry Shargel as "a man of immense charm" with "the soothing voice of a

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[104] Colvin, *Anatomy of a Criminal Lawyer*, 10 CRIM. DEF. at 8-9.

[105] *Off-stage with the Experts*, 3 CRIM. DEF. 22 (1976).

[106] *1984 Catalog*, 10 CRIM. DEF. 20 (1983). And yet Edward Bennett Williams opposed televising legal proceedings because it would turn lawyers "into actors"; see WILLIAMS, ONE MAN'S FREEDOM, at ch. 13.

[107] *Off-stage with the Experts*, 3 CRIM. DEF. at 22-23.

bartender."[108] Combining their fascination with the profession's lucrative possibilities and its performative quality, journalists writing about mob and drug lawyers often lingered upon their expensive attire and accessories. Barry Slotnick, as described in *People* magazine, "wears $2,500 suits and costly shirts with monogrammed cuffs," and "a gold Piaget watch, a gift from a grateful client."[109] According to his biographer, he was known for walking into the courtroom, "his overcoat draped over his shoulders like a cape, as if he were a matador or a count or Superman."[110] Joel Hirschhorn, also according to *People*, wears a "two-carat diamond pinkie ring" to his son's baseball game; it is a gift from "a grateful friend of a client who was caught with 30,000 pounds of marijuana and got off with probation." The ring was in addition to his other accessories: "the mandatory gold Rolex," "the gold chain bracelet," and "the five cars, including the red Corvette he gave his wife for her birthday."[111] Frank Rubino, during the Manuel Noriega trial, was described as "a flashy figure around Miami with his $800 Hugo Boss suits and tropical-patterned ties, a red Mercedes 500SL and blond identical-twin secretaries." Alongside this description ran several photographs of Rubino: riding a Harley motorcycle; driving a race car; and smiling alongside Noriega, who is handing him a machete.[112] Michael Abbell, lawyer to the Cali drug cartel, was the exception that proved the rule. His involvement with the cartel shocked his neighbors partly because "he wears sober suits and functional footwear, not diamond tie tacks and Guccis."[113]

Bespoke tailoring and diamond jewelry, which signified glamor on a Hollywood actress, had a different semiotics within the legal profession. Such details marked mob and drug lawyers as somewhat déclassé but also very rich. Lawyers and journalists together created and circulated this image of the high-priced defense bar: although it was true that the lawyers wore the suits and the jewelry, it was also true that the journalists consistently chose those details to highlight when covering a particular type of lawyer. Consider, by contrast, another

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[108] Dannen, *Defending the Mafia*, at 65.

[109] Gross, *Subway Shooter*, at 119; see also Dorothy Rabinowitz, *Slotnick's Law*, NEW YORK, 2 January 1989, at 33 (recounting how muggers stole Slotnick's "$15,000 Piaget" watch). On his $2,500 Fioravanti suits and the theft of his $15,000 Piaget watch, see also PATTERSON, THE DEFENSE LAWYER, at 6–7. William Fioravanti was also the tailor to Las Vegas hotelier Steve Wynn and celebrities such as Frank Sinatra. Slotnick reportedly bought six bespoke suits from him every year. PATTERSON, THE DEFENSE LAWYER, at 41–42.

[110] PATTERSON, THE DEFENSE LAWYER, at 122.

[111] Kunen, *Joel Hirschhorn*, at 62.

[112] Grogan & Grant, *Devil's Advocate*, at 131–32.

[113] Meredith K. Wadman, *Cocaine and Abbell*, WASHINGTON CITY PAPER, 3 November 1995.

upwardly mobile son of the outer boroughs who became a household name in the 1980s: Antonin Scalia, nominated to the Supreme Court in 1986. News coverage pictured Scalia alongside President Reagan, wearing a drab gray suit and a conservative burgundy tie, and neither described Scalia's appearance nor listed what jewelry or marine vessels he may or may not own. Instead of how he looked, the *New York Times* highlighted Scalia's "reputation as a legal scholar" and his "deeply conservative" views.[114] Thus, the media reinforced a divide in which appellate judges and legal scholars were regarded as having ideas, while trial lawyers were regarded instead as engaged in a kind of performance, more like celebrities than participants in constitutional debates.

As the physical descriptions also made clear, the professional identity of the criminal defense lawyer was highly gendered. Although women were joining the legal profession in growing numbers by the 1970s, criminal defense remained almost exclusively a male preserve. One scholar who sought to develop a representative sample of the criminal defense bar in nine cities could come up with a roster of interviewees that included only 2% women, and estimated that women constituted perhaps 4% of the defense bar nationwide.[115] According to the male lawyers he interviewed, women could not succeed in criminal defense because of "the sleazy clientele, possible physical risks, and women's lack of the necessary combative nature in the courtroom." These lawyers asserted "that women were best at some nonlitigation type of civil cases, where their minds could be put to good use; once before a judge, a woman's self-confidence and intelligence would quickly evaporate."[116] Other than acknowledging that women might have a role to play in non-litigation specialties, which was a new concession, these tropes about why women were ill suited for lawyering had changed strikingly little since the nineteenth century.[117] Given gender stereotypes, it is probably fair to assume that one defense lawyer partly had women

[114] Bernard Weinraub, *Burger Retiring, Rehnquist Named Chief; Scalia, Appeals Judge, Chosen for Court*, N.Y. TIMES, 19 June 1986; for photos, see the *New York Times* front page, 19 June 1986.

[115] WICE, CRIMINAL LAWYERS, at 68.

[116] WICE, CRIMINAL LAWYERS, at 68.

[117] See, e.g., Bradwell v. State, 83 U.S. 130, 141-42 (1873) (Bradley, J., concurring) (in a case affirming a state's denial of a bar license to a woman, postulating that "[t]he paramount destiny and mission of woman are to fulfill the noble and benign offices of wife and mother," given their "natural and proper timidity and delicacy").

in mind when he asserted: "There is no place in the defense bar for the faint-hearted, the timid, the overcautious, or the reluctant advocate."[118]

Finally, but also fitting the performative theme, criminal defense lawyers frequently leavened the warrior imagery with references to their sense of humor. A common device was to contrast the humorless prosecutor with the lighthearted, anti-establishment defense attorney. John Gleeson, the anti-mafia federal prosecutor, was referenced in magazine coverage as "a dull dresser," "something of a zealot," "an angry Clark Kent."[119] According to the *New Yorker* magazine: "The criminal bar's perception of him is best summed up in five words of Jimmy LaRossa's: 'You can't make him laugh.'"[120] In contrast, in the same article, Shargel recalled how he decided to become a defense lawyer. He had been working in the Brooklyn U.S. Attorney's office as a law student, when he witnessed the legendary LaRossa on the opposite side of the courtroom; he would later work for LaRossa after graduating. As Shargel remembered it: "The prosecution table was drab and humorless, while the defense table seemed stylish and alive."[121]

## II. THE CONSTITUTIONAL VISION

When they spoke in public, which was often, mob lawyers advanced a particular constitutional vision. So too did drug lawyers, murder trial specialists, and their various other professional cousins. This vision was neither an elaborate account of constitutional doctrine nor a comprehensive theory of governance, and it was loosely connected (at best) with the constitutional text. But it was nevertheless a set of ideas and beliefs about the proper balance of power between the individual and government authority, rooted in a deep skepticism of the state, which, if taken seriously, would have significance for many areas of constitutional interpretation.

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[118] C. Anthony Friloux, Jr., *The Criminal Defense Practice: An Introduction*, 1 NAT'L J. CRIM. DEF. 1, 1 (1975).

[119] Dannen, *Defending the Mafia*, at 65.

[120] Dannen, *Defending the Mafia*, at 78.

[121] Dannen, *Defending the Mafia*, at 72.

*A. Lawyers against Tyranny!*

"If you stop and think about it," claimed one Tennessee attorney, "the only people charged with defending liberty are criminal defense lawyers."[122] Such extraordinary claims to significance were the rhetorical stock in trade of the criminal defense bar. "We criminal lawyers are the last defense against tyranny," claimed the mob lawyer Barry Slotnick, because "[we] represent unpopular people against the abuses of the state."[123] Invoking an image of the lawyer as a John Wayne-type character, standing alone on the frontier, the National Association of Criminal Defense Lawyers advertised itself as "Liberty's Last Champion."[124]

To be sure, such rhetoric could serve instrumental motives. Invoking principle might help to justify what might otherwise seem like unsavory work, transforming the representation of drug dealers and hitmen into the defense of the constitutional order. "I don't approve of drug smuggling," Hirschhorn told the *Times*, "but isn't there some social utility in making sure that every man's right to a fair and impartial trial is assured?"[125] More concretely, the private defense bar sought to preserve their increasingly beleaguered market niche. By 1978, a political scientist studying the legal profession could declare old-fashioned, fee-for-service criminal lawyers "an endangered species."[126] In Philadelphia alone, one elderly criminal defense lawyer claimed that there were only 40 to 60 "courthouse regulars" anymore, down from 200 in "the old days."[127] Defense lawyers attributed the decline in their numbers to the recent expansion of public defender agencies.[128] The 1970s had witnessed growing investment in public defender services for the indigent; eventually, state-funded counsel

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[122] Robert Ritchie quoted in Damien F. Carey, *Everything Humanly Possible*, 10 CRIM. DEF. 11 (1983).

[123] Gross, *Subway Shooter*, at 116. Slotnick apparently recycled these sayings often: according to his mass-market authorized biography, he "saw himself as the foe of the all-powerful government. He was liberty's last champion." PATTERSON, THE DEFENSE LAWYER, at 11.

[124] E.g. NACDL ad, 10 CRIM. DEF. 31 (1983).

[125] Kunen, *Joel Hirschhorn*, at 62.

[126] WICE, CRIMINAL LAWYERS (reference is to the book's subtitle: "An Endangered Species").

[127] WICE, CRIMINAL LAWYERS, at 217. These perceptions were likely exaggerated. Overall, the number of lawyers in the United States exploded from 221,605 in 1951 to nearly 900,000 in 1995. LAWRENCE M. FRIEDMAN, AMERICAN LAW IN THE 20TH CENTURY 457 (2002). It therefore seems reasonable to assume that the total number of criminal defense lawyers also increased, even if it may have increased at a slower rate.

[128] WICE, CRIMINAL LAWYERS, at 217. Defense lawyers nearly uniformly attributed the decline in their numbers to "the growth of their city's public defender program."

would come to represent 80% of all criminal defendants in the United States.[129] A political scientist who conducted a study of the private bar in the late 1970s heard tropes about liberty and tyranny repeatedly from his interview sample. He concluded that defense lawyers repeated these "myths" because of their specialty's threatened market share; they needed "the general public … to see them as the only remaining obstacle between the freedom of the individual and the possible oppression by the state."[130]

Reflecting this sense of endangerment, the NACDL defined its mission not just as promoting defense lawyers' policy interests, but also at a more basic level, "the preservation and welfare of the criminal defense bar."[131] Whatever the precise mix of self-interest and sincere principle, criminal defense lawyers equated their work with the maintenance of a free society. Anthony "Tony" Friloux, a leader of the NACDL and former dean of the National Criminal Defense College, lamented in 1977: "Liberty, freedom, privacy and due process have been placed on the endangered species list as a result of a well-directed assault by partisans in the judiciary, in the Justice Department, in legislative bodies, and in a mis-led lay public."[132] Similarly the *National Journal of Criminal Defense*, a short-lived, practice-oriented journal for trial lawyers, complained in 1976 about the "ominous erosion of individual rights in America," the changing composition of the Supreme Court, and "the rightward drift of the country."[133]

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[129] John Rappaport, *The Structural Function of the Sixth Amendment Right to Counsel of Choice*, 4 Sup. Ct. Rev. 117, 134 (2017) (for statistic); see generally Sara Mayeux, *What* Gideon *Did*, 116 COLUM. L. REV. 15 (2016) (documenting how *Gideon v. Wainwright*, decided in 1963, was received at the state level to prod adoption and/or expansion of the public defender model).

[130] WICE, CRIMINAL LAWYERS, at 93.

[131] E.g. NACDL ad, 10 CRIM. DEF. 31 (1983). The NACDL has since developed into a highly professionalized litigation and lobbying organization based in Washington, D.C., but in the 1970s was a smaller operation based in Houston, Texas, and one which prided itself on "retain[ing] complete independence from any outside funding sources." NACDL ad, 10 CRIM. DEF. 15 (1983). As of the late 1970s, one scholar found that the NACDL mailing list was dominated by lawyers who had joined out of curiosity but did not practice much criminal law, and that, conversely, only a small percentage of practicing criminal defense lawyers were members of any professional organization. WICE, CRIMINAL LAWYERS, at 21, 86-88. However, it would be useful for legal historians to know more about the influence of the NACDL and similar groups, especially as, over time, they became more institutionalized and connected with established civil liberties organizations. Although an institutional history of the NACDL is beyond the scope of this article, whether and how such groups have influenced constitutional doctrine is an important question for further research.

[132] C. Anthony Friloux, *Partisans in a Common Cause*, 4 CRIM. DEF. 4 (1977).

[133] Patrick Bishop, *Editor's Foreword*, 2 NAT'L J. CRIM. DEF. iv (1976).

Beyond an agreement about their own importance, criminal defense lawyers did not have uniform political leanings. Some, like the mob lawyer Barry Slotnick, identified as conservative Republicans.[134] More typically, they were generically liberal—LaRossa's son remembered him as a "Kennedy-era Democrat."[135] Some may have identified with the far-left, radical lawyering tradition, but it is important to distinguish between the high-priced criminal defense bar and self-proclaimed movement lawyers, like William Kunstler or Charles Garry (who represented the Black Panthers), who often charged nominal fees and were fairly selective about their clients.[136] In contrast, mob and drug lawyers tended to be "door lawyers"—open to representing any client who walked through the door, as long as the client could pay.[137]

Whoever their clients, criminal defense lawyers portrayed themselves as underappreciated heroes, safeguarding the freedoms that ordinary Americans failed to understand. "The criminal defense attorney," one wrote, occupied "the unenviable position of defending individual freedom at a time when a growing segment of the public thinks such freedom is a danger to the peaceful operation of society."[138] Friloux worried about the "lack of understanding of the role of the defense lawyer" even among judges, legislators, and other lawyers. He urged defense lawyers to recognize that "we are in the 'eleventh hour' … Every time a legal corner is cut, every time due process is violated, liberty dies a little."[139] This rhetoric, although common in the 1970s, echoed earlier tropes. Edward Bennett Williams, the rare celebrity criminal defense lawyer who was also a fixture of the D.C. establishment, had used the same dire imagery in his 1962 tract *One Man's Freedom*. According to Williams, "[t]he fires once blazing for freedom in the minds and hearts of Americans … need new kindling if we are to compete successfully for the ideological adherence of the uncommitted

[134] E.g. Gross, *Subway Shooter* ("Slotnick is a Republican and a conservative").

[135] Pagnamenta, *"Gladiator" or "Bionic Mouth."*

[136] For an excellent recent study of radical lawyers, including their involvement in criminal cases, see generally LUCA FALCIOLA, UP AGAINST THE LAW: RADICAL LAWYERS AND SOCIAL MOVEMENTS, 1960S-1970S (2022); on Garry, see *The Panthers' Honky Lawyer*, TIME, 12 January 1970, at 30.

[137] See PATTERSON, THE DEFENSE LAWYER, at 104-05. There were some exceptions. Skolnick said he would probably not take a child molestation case. Many defense lawyers didn't represent "rats." See Richman, *Cooperating Clients*, 56 OHIO ST. L.J. at 118-19; GLEESON, THE GOTTI WARS, at 217 (explaining that no "mob lawyer" would want to become known as a "rat lawyer," as this would deter any future mob clients).

[138] Bishop, *Editor's Foreword*, 2 NAT'L J. CRIM. DEF. at iv.

[139] Friloux, *The Criminal Defense Practice*, 1 NAT'L J. CRIM. DEF. at 1.

world." Americans had degenerated into "collective lethargy" and were too willing to trade liberty for security.[140]

Thus, in the bombast of the private criminal defense bar, did professional self-interest merge with the defense of the Constitution. By attacking them, critics were also attacking "the basic Constitutional protections defense lawyers seek to uphold."[141] A speech given by one defense lawyer in 1975 exemplified the theme. As a representative of the NACDL, Melvin Lewis had been invited to address the Southern Legislative Conference, an annual gathering of state legislators and government staffers. After talking to some of the legislators and hearing some of the speakers on the program, he detected "an attitude of hostility toward some procedural safeguards" in the Constitution.[142] He decided to scrap his prepared remarks about the merits of specific legislative proposals, and instead delivered a speech warning in a more general sense that individual liberty was under threat from a pervasive political climate of "fear and vengefulness."[143]

Lewis's speech hinted at an assumption widely shared by the criminal defense bar: that the government will maximally exploit any power it is given, and therefore must be kept within strict limits. When referring to the Constitution, Lewis did not refer solely to the technical requirements of constitutional doctrine, but also to a more general spirit of liberty, which he worried had been lost. "Constitutions are nothing but words: inspiring words, perhaps, but in the final analysis nothing more than words," unless they were translated into action.[144] Lugubriously, Lewis lamented that he was "not a free man … not in the sense of the freedom which Paine, Jefferson, Adams and their colleagues wanted me to have."[145] Lewis urged legislators to "resist the temptation to make blind and irretrievable grants of greater and greater power to the police," and instead to infuse their lawmaking with "the thinking of Patrick Henry and Adams and Jefferson and not the thinking of a George III."[146]

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[140] WILLIAMS, ONE MAN'S FREEDOM, at 7-9.

[141] Friloux, *Partisans in a Common Cause*, 4 CRIM. DEF. at 4.

[142] Melvin B. Lewis, *Preserving Individual Rights*, 2 CRIM. DEF. 4-5 (1975).

[143] Lewis, *Preserving Individual Rights*, 2 CRIM. DEF. at 4. He asserted: "I do not speak to you about the requirements imposed by the Constitution. I question whether the Constitution even exists in the sense in which the word is customarily used."

[144] Lewis, *Preserving Individual Rights*, 2 CRIM. DEF. at 4.

[145] Lewis, *Preserving Individual Rights*, 2 CRIM. DEF. at 10.

[146] Lewis, *Preserving Individual Rights*, 2 CRIM. DEF. at 10.

There was often an overtly gendered and martial dimension to criminal defense lawyers' rhetoric about constitutional rights. Tony Friloux, a leader of the NACDL, decried tough-on-crime politics for threatening "to strip away our basic Constitutional protections and to emasculate the defense adversary" in the courtroom.[147] Against political and legal threats, Friloux urged the criminal defense bar to "organize and *fight* … We must become strong, well-lead [sic], well-financed, and capable of entering the arena as equals."[148] Both journalists and lawyers themselves depicted the defense lawyer as an independent, swashbuckling figure. In 1978, *People* ran a feature on "the criminal lawyers to dial" nationwide. It described murder trial specialists as "the Lone Rangers of their profession"[149] and quoted one Philadelphia lawyer who explained that criminal lawyers stood for "the individual pitted against organized authority."[150] Another *People* magazine feature, published in 1981, opened with a full-page photograph of Wyoming lawyer Gerry Spence (who was known primarily for winning large tort verdicts, but also took criminal defense cases), wearing a cowboy hat and fringed leather jacket, and pointing a long gun at the camera.[151]

Although high-priced criminal defense lawyers presented themselves as champions of the Constitution, they typically did not identify themselves as permanent allies of any particular social movement or political cause. They were not, in the parlance of legal sociology, "cause lawyers," unless the cause was their own fun and profit. And they were generally not disingenuous on that score, even if they may have been on others. The Las Vegas mob lawyer Oscar Goodman explained, for example, that he took mafia cases because "I was providing a service, and they were willing to pay for it"; the fact that he "was also honoring the Constitution" was a bonus.[152] The Miami lawyer Joel Hirschhorn told *People* magazine that he represented large-scale drug traffickers both because he was an idealist and because "[t]he money's good." The article estimated his earnings at more than $1 million a year.[153] Hirschhorn was also

[147] Friloux, *Partisans in a Common Cause*, 4 CRIM. DEF. at 4.

[148] Friloux, *Partisans in a Common Cause*, 4 CRIM. DEF. at 4-5.

[149] *Allowed One Call in the Police Station? These Are the Criminal Lawyers to Dial*, PEOPLE, 9 September 1978, at 28.

[150] *Donald Goldberg works quietly—and always alone*, PEOPLE, 18 September 1978, at 32.

[151] McCall, *For Country Lawyer Gerry Spence*, at 56. Spence wrote a memoir entitled *Gunning for Justice*, which one admiring reviewer described as putting the reader in the position of "a witness at the bullfight." Book review, 10 CRIM. DEF. 12 (1983).

[152] GOODMAN, BEING OSCAR, at 66.

[153] Kunen, *Joel Hirschhorn*, at 62.

quoted in the *New York Times*: "There's only one reason to represent someone charged with a drug crime and that's money, big money."[154]

Actually there was another reason, for some lawyers: the thrill of underworld voyeurism. Another Miami defense lawyer, Joel Rosenthal, was known for "regal[ing] other lawyers with dramatic tales" of his travels to meet with his client—Pablo Escobar of the Medellín cartel.[155] (Rosenthal later pleaded guilty to money laundering related to his work for the Cali cartel.[156]) Jerry Shargel explained that he enjoyed representing mobsters because it was "colorful and exciting," commenting on the clientele: "A good number of people are undeniably boring. These people are not boring."[157] With his penchant for socializing with his mafia clients at their Little Italy haunt, the Ravenite Social Club, which would later get him into legal trouble, Shargel went too far for his mentor Jimmy LaRossa: "I can't defend Jerry's appearance in that goddam place," LaRossa told the press. "I love him like a son, and I'd like to strangle him for doing it."[158] But Shargel had an easy explanation for why he did it: "I went to the Ravenite Social Club because I *loved* to go to the Ravenite Social Club. I loved the idea. … Going to the Ravenite's cool because it's like a movie."[159] The mob lawyer of an earlier generation, Frank Ragano, gave a similar assessment of his own motives, although with a more pessimistic spin; in his memoir, he regretted that he had succumbed to the allure of "infamous yet charismatic clients."[160] And yet, regardless of where they fell on the spectrum of succumbing to their clients' allure, criminal defense lawyers all generally deployed the same tropes to explain their courtroom role and how the vigorous defense of even unsavory clients propped up the constitutional rights of all.

### *B. Proof*

How exactly, though, did criminal defense lawyers defend the constitutional order? The mob lawyer's constitutional vision revolved not around

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[154] Quoted in Lewis, *Drug Lawyers' Quandary*.

[155] Quoted in Lewis, *Drug Lawyers' Quandary*.

[156] Fredric Dannen, *The Thin White Line*, THE NEW YORKER, 31 July 1995, at 31.

[157] Joyce Wadler, *Public Lives: Not Mob Lawyer. Just Lawyer. Uh, for Gotti*, N.Y. TIMES, 5 February 1998.

[158] Dannen, *Defending the Mafia*, at 74.

[159] Dannen, *Defending the Mafia*, at 70.

[160] RAGANO & RAAB, MOB LAWYER, at 9; see also Gerald Alch, *Reflections on the Experience of Representing Organized Criminals*, 38 NEW ENG. J. CRIM. & CIV. CONFINEMENT 219, 219-21 (2012) (discussing the "glamour" of becoming a lawyer for organized crime defendants).

technical doctrine, but around the ritual of courtroom combat. Unlike a legal academic or an appellate specialist, the mob lawyer's prized skill was not textual exegesis or doctrinal manipulation but trial advocacy, and especially the trial skill of cross-examination. At its core, the mob lawyer's Constitution revolved around proof and in particular, the government's obligation to prove criminal charges. Jimmy LaRossa explained to *People* magazine in 1978 that "he did not mind defending someone he knew was guilty. 'I'm not proving their innocence,' he said. 'I'm attempting to stop the prosecution from proving their guilt.'"[161]

Mob lawyers emphasized that ideally, the requisite proof must be provided in a particular venue: the jury trial. Of course, it was (and is) the great lament of criminal defense lawyers that the number of jury trials has declined over the decades. Eventually this change came to the mafia also, after a string of courtroom defeats convinced crime bosses to entertain plea deals or even cooperation (previously unthinkable). But for a long time, the typical mob boss remained uninterested in plea bargaining, and so too, therefore, did the most prominent mob lawyers. Jimmy LaRossa's son recalled: "You didn't go to my father if you wanted a plea deal. … You went to my father when the only other option was a full blown trial."[162] Bruce Cutler described himself as follows: "I try cases. I'm not good at negotiations and pleas and things."[163] Jerry Shargel, similarly, was described in the press as a lawyer who "does not like to settle cases."[164] Frank Rubino, who defended Manuel Noriega at trial, was recommended to Noriega by colleagues because he had tried 136 federal conspiracy trials in 17 years, according to *People* magazine. "I pick juries and try cases," he told the press; "get someone else '[i]f you want to play *Let's Make a Deal*.'"[165]

The mob lawyer's burden of proof exceeded the strict courtroom definition, however, insofar as it had a qualitative dimension. The official constitutional standard, beyond a reasonable doubt, is about the quality and quantity of proof, even if not reducible to a particular number. The mob lawyer cared particularly about the purity of proof. The type of evidence least acceptable to the mob lawyer was testimony from a "rat." For Jimmy LaRossa, as remembered by

[161] As quoted in Martin, *James M. LaRossa, Defender of Mob Bosses in Court, Dies at 82*; for the original quote, see *James La Rossa wants only the tough ones*, at 29.

[162] Pagnamenta, *"Gladiator" or 'Bionic Mouth"*; see also see also LAROSSA, JR., LAST OF THE GLADIATORS, at 132 ("Federal prosecutors knew there was no deal-making with Jimmy").

[163] Jan Hoffman, *At the Office with: Bruce Cutler; Even Mob Lawyers Get the Blues*, N.Y. TIMES, 7 April 1993.

[164] Dannen, *Defending the Mafia*, at 68.

[165] Grogan & Grant, *Devil's Advocate*, at 131.

another lawyer upon his death, "cooperators were snitches and cooperation akin to treason."[166] One Miami drug lawyer confirmed that he disliked representing government informants, both because they are "sleazy, morally deficient people" and because "[i]f you become known as a snitch attorney, you won't get any more cases."[167] Another drug lawyer raised his sons not to tattle-tale, instructing them: "If you want to be an informant, join the FBI."[168]

The mob lawyer was constantly disdaining the government for relying on informants and turncoats—not just because such figures violated *omertà*, but also because their information was deemed unreliable, corrupted by government favors and interests. Bruce Cutler, John Gotti's defense attorney, accused the government of "singling people out, going after them, harassing them, using witnesses who lie, who say anything for money and a new identity."[169] Albert Krieger agreed: "You make the price high enough and almost anybody is going to say anything in order to either reap a financial benefit, a liberty benefit, or whatever the government happens to be selling at the time."[170] The mob lawyer Oscar Goodman asserted that the government did not really care about "the truth" but only whether the testimony offered "was consistent."[171] For example, Goodman accused federal prosecutors of having "paraded" one informant "at almost every mob trial in Philadelphia in the late 1980s," because he was "willing to say whatever it was the prosecution needed to make its case."[172]

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[166] Lawrence S. Goldman, "Death of a Gladiator," White Collar Crime Prof Blog, 29 October 2014, https://lawprofessors.typepad.com/whitecollarcrime_blog/2014/10/james-jimmy-larossa-one-of-new-york-citys-top-criminal-defense-lawyers-died-recently-larossa-according-to-the-new-york.html. This view was widespread among defense lawyers. See Richman, *Cooperating Clients*, 56 OHIO ST. L.J. at 118–19 (collecting references to defense lawyers who "proclaimed snitching morally repugnant").

[167] Irwin Lichter, quoted in Waldman, et al., *The Drug Lawyers*, at 44. The ideological opposition of defense lawyers to representing cooperators created interesting ethical and legal questions explored in Richman, *Cooperating Clients*.

[168] Kunen, *Joel Hirschhorn*.

[169] A&E/History Channel special "Mob Rats" (A&E Television Networks, 1995), VHS tape.

[170] "Mob Rats," VHS tape.

[171] GOODMAN, BEING OSCAR, at 56; see also GOODMAN, BEING OSCAR, at 54–55, 123; ROBERT F. SIMONE, THE LAST MOUTHPIECE: THE MAN WHO DARED TO DEFEND THE MOB 225–27 (2001) (similarly criticizing the government's use of informants).

[172] GOODMAN, BEING OSCAR, at 54–55; see also SIMONE, THE LAST MOUTHPIECE, at 225–27 (similarly criticizing the government's use of informants like Caramandi, and describing how he and Goodman attacked Caramandi as co-counsel in a drug trafficking trial); CUTLER, CLOSING ARGUMENT, at 143 (arguing that prosecutors would offer informants inducements to say what they wanted).

While beaten into a cliché by mob lawyers, the disdain for government informants was shared by higher-class criminal defense lawyers. In 1975, Edward Bennett Williams assailed the government's case against former Treasury Secretary John Connally in an interview with *People* magazine. "'The government comes along,' growls Williams, 'takes a penitentiary-bound informant and says, 'It's okay, you're free as long as you put someone else in.' I tell you it's frightening.'"[173] Twenty years later, this same trope recurred in news coverage of the trial of Manuel Noriega. The then-president of the NACDL observed that whatever one's feelings about Noriega, his defense attorney Frank Rubino was upstanding and charismatic, and "Frank's integrity is providing a glaring contrast to that of the government witnesses, whose testimony has been bought and paid for."[174] The *People* article cited news reports that witnesses had been provided with visas, green cards, and cash assistance. Then the article quoted a U.S. attorney explaining that such arrangements were not unique to the Noriega trial: "That goes on every day of the week. The government has to offer deals in order to get firsthand testimony."[175]

By insisting upon a high standard of courtroom proof in every case, defense lawyers posited, they kept the government in its place; and limiting government ultimately benefited everyone. As Edward Bennett Williams put it: "society is often the winner when the prosecutor loses."[176] Implicit was the claim that these societal benefits outweighed any societal harm caused by whatever advantages may have accrued to their clients' criminal enterprises by virtue of being acquitted. Mob lawyer Jerry Shargel observed:

> A lot of clients tell me they're innocent, because they think I'll work harder for them … That's not true. It's irrelevant. The question is: Can the State prove its case? The guy can be guilty as hell, but if I win an acquittal it means a fortiori that there was something infirm or wrong with the prosecution's case, and they weren't entitled to the conviction. I am intellectually satisfied and I am morally satisfied, because the system worked. I think I served society.[177]

Thus, criminal defense could be reframed as a duty: when asked why he agreed to represent John Gotti at trial, Krieger implied that it wasn't really up to him:

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[173] Lansing Lamont, *If You're Rich, Famous, and in a Jam—Call Edward Bennett Williams*, PEOPLE, 5 May 1975, at 58.

[174] Jeffrey Weiner, quoted in Grogan & Grant, *Devil's Advocate*, at 131.

[175] Grogan & Grant, *Devil's Advocate*, at 131.

[176] WILLIAMS, ONE MAN'S FREEDOM, at 20.

[177] Dannen, *Defending the Mafia*, at 71.

"The sense that I feel of criminal defense lawyers and what they owe to society mandated my accepting that retainer."[178]

In a general way, such tropes had long circulated as rallying cries for the entire criminal defense bar. Samuel Dash, at the 1976 banquet of the National Criminal Defense College, "congratulated the students for their decision to become criminal defense lawyers" and emphasized their "vital function." By defending the individual, the criminal defense lawyer actually promoted "the highest level of law enforcement," by "forc[ing] the government to use their highest standards of care where a citizen's rights are concerned—rights that have been guaranteed us by the Bill of Rights …. It is a challenge making the federal government prove its case. Our adversary accusatory system performs the vital social function of demanding that the prosecutor be careful in preparing his case…. The lowest of criminals deserves the best defense because at stake are every citizen's rights."[179]

When imported into the mafia context, though, the stock rhetoric about safeguarding liberty caused some prosecutors and legal scholars to raise their eyebrows. The mob lawyer's premise was that challenging the prosecution of powerful crime bosses would necessarily redound in some way to the benefit of vulnerable defendants as well. All criminal cases were interchangeable; defeating the government in one case would weaken the government overall in ways that would preserve limited government and therefore enhance the liberty of everyone.

As some commentators observed, this logic depended upon viewing state power as an undifferentiated and malign force, which if weakened or checked in one realm, would be valuably diminished in every realm. Occasionally, this logic was questioned, particularly by commentators more sanguine about state power as a check against powerful conglomerations of private violence. Michael Chertoff, who prosecuted one of the New York mob trials, complained in a cable TV documentary: "The criminal justice process isn't a sporting event. The point of the process isn't to even the odds so the criminals have an even chance to beat the case."[180] Legal ethicist William Simon, in a 1993 article, used a similar analogy, pointing out that if the goal was merely "to level the playing field," then "we could 'handicap' state officials … the way we handicap horses in thoroughbred races—by requiring the stronger ones to carry weights." He

[178] Quoted in Roberts, *Albert Krieger*; see also WILLIAMS, ONE MAN'S FREEDOM, at 12-13.

[179] *Dash and Cole Speak at Graduation Banquets*, 3 CRIM. DEF. 20 (1976).

[180] Chertoff, quoted in A&E/The History Channel special "Defending the Mob" (A&E Television Networks, 1995), VHS tape.

continued: "The reason why this sounds silly is that the premise that there is any interest in *categorically* remedying imbalances of power between prosecution and defense is silly." Simon questioned the premise that the "indiscriminate weakening of state power" was inherently valuable: "The problem with aggressive defense is that it impedes the state's ability to convict the guilty without affording any significant protection to the innocent."[181]

Simon lambasted the usual arguments to the contrary as "libertarian dogma" that rested upon exaggerated suspicions of state power, while ignoring "the dangers to liberty of the weak state."[182] As Simon pointed out, arguments within legal ethics on behalf of aggressive defense advocacy often made references "to totalitarian regimes like Nazi Germany and Soviet Russia and the absence of criminal defense rights in such regimes." Simon observed that in focusing on such comparisons, the literature overlooked counterexamples closer to home: "Latin America has seen many examples of weak states powerless to check the oppression of the paramilitary forces of landowners or narcotics traffickers."[183]

Law professor Gerard Lynch made a related point in the course of disputing defense attorneys' criticisms of RICO. The defense bar complained that RICO enabled prosecutors to introduce large swathes of evidence about a defendant's criminal career that ordinarily would be deemed irrelevant or prejudicial. Lynch rejoined: "Our system is not designed to give both sides an even shot at winning," only to safeguard against "the conviction of the innocent."[184] By the time an organized crime figure became a RICO defendant, he had often committed a series of lesser crimes over a long period of time, seemingly with impunity. In Lynch's view, this history and context was perfectly appropriate for jurors to consider, precisely because it was the overall pattern that "makes the defendant's actions particularly threatening to society."[185] From this perspective, RICO was not an example of state overreach but rather a valuable corrective to traditional limitations in the state's ability to punish.

Thus the battle between the criminal defense bar and federal prosecutors in organized crime cases was also a battle between clashing visions of the state. Were all uses of prosecutorial power inherently suspect and potentially corrupt, such that it was necessarily always a boon for constitutional governance if any defendant was acquitted, no matter what his criminal history or role? Or was

[181] William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1708 (1993).

[182] Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. at 1708.

[183] Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. at 1709.

[184] Lynch, *RICO II*, at 967.

[185] Lynch, *RICO II*, at 967.

the state's monopoly on criminal prosecution an important counterweight against organized criminal enterprises that would otherwise erode the rule of law, such that constitutional governance ultimately suffered when mafia kingpins escaped punishment?

### *C. Cross-examination*

Comporting with their demands for both proof and unimpeachable evidence, criminal defense lawyers' most prized talent was cross-examination. This trial practice was associated with the constitutional right to confront witnesses, and celebrated by Edward Bennett Williams as "an indispensable safeguard in any system of justice."[186] So too was the practice celebrated by mob lawyers. Indeed, cross-examination could prove especially significant, or at least dramatic, in organized crime cases where the government's star witnesses were typically co-conspirators who had "flipped," and alone had the inside knowledge to explain to the jury the complex and secretive workings of a criminal organization. By definition, such witnesses, however key to the prosecution's case, were also readily impeachable, with long criminal records of their own and likely a history of making contradictory statements. As one journalist memorably described the ritual: "The tense, often vicious mongoose-and-cobra battle between the criminal lawyer and the rat has always been a dramatic centerpiece of organized-crime trials."[187]

Mob lawyers uniformly praised themselves for their renowned cross-examinations, and this was also their form of praise for other lawyers.[188] Philadelphia mob lawyer (and later, mob co-defendant) Bobby Simone described at length the "secrets to effective cross-examination" and extolled his own reputation in the legal community "as a 'C&C,' or 'cross and close,' man."[189] Jimmy LaRossa's son marveled that his father "was considered the most amazing cross-examiner since Clarence Darrow."[190] Another lawyer praised LaRossa, upon his death, as

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[186] WILLIAMS, ONE MAN'S FREEDOM, at 186, 190.

[187] Rosenbaum, *The Irresistible Rise of Big Brucie*, 138; for example highlights (or lowlights), see PATTERSON, THE DEFENSE LAWYER, at ch. 57-58.

[188] See, e.g., CUTLER, CLOSING ARGUMENT, at 72 (praising another defense lawyer known for "his scathing cross-examinations"); SIMONE, THE LAST MOUTHPIECE, at 7, 64-65 (2001) (describing cross-examination as a "talent," "something that cannot be taught," and praising the Philadelphia civil rights lawyer Cecil B. Moore as "great at cross-examination").

[189] SIMONE, THE LAST MOUTHPIECE, at 113; see also id. at 228 (quoting a judge supposedly praising his closing argument as the best he had ever heard).

[190] Pagnamenta, *"Gladiator" or 'Bionic Mouth."*

"the last of a dying breed of old-fashioned criminal trial lawyers" and "probably the best cross-examiner I have ever seen in a courtroom."[191] A magazine profile described Shargel as "one of the best pure trial lawyers in town, known for the exceptional skill of his cross-examinations and for his physicality."[192]

Despite the centrality of cross-examination to trial practice, it was (and is) not central to the law school curriculum. In fact, a law student could easily graduate without being taught anything about cross-examination at all. Not surprisingly, therefore, cross-examination was one of the topics most frequently requested by lawyers attending the well-regarded continuing education programs offered by the Texas-based National Criminal Defense College (NCCD).[193] "The ability to cross-examine effectively is the hallmark of the successful trial lawyer," announced a 1982 advertisement for the NCCD's three-day seminar on Advanced Cross-Examination, where up-and-coming lawyers could practice under masters such as Charles Garry, Albert Krieger, and James Shellow.[194] The NCCD also sold a deep catalog of audio and video tape-recorded lessons, including an array of specialized sessions on cross-examination.[195]

Like trial lawyering more generally, cross-examination called upon a lawyer's physical presence and acting skill more than legal research or doctrinal expertise. Gerry Spence attributed his talents to his youthful training in hunting game: "I get information from witnesses in ways that are similar to tracking an animal, through body language and other things."[196] A successful cross-examination required asking the right questions, but also asking them in the right

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[191] Goldman, "Death of a Gladiator."

[192] Dannen, *Defending the Mafia*, at 67.

[193] *National College of Criminal Defense Lawyers and Public Defenders Announces Conferences for 1975-1976 Academic Year*, 2 CRIM. DEF. 12 (1975). The other most requested topic was working with forensic experts. The NCCD was praised for its seminars, faculty, and teaching techniques as well as its more academic journal, the *National Journal of Criminal Defense*. WICE, CRIMINAL LAWYERS, at 88. This journal was published from 1975 to 1981 and published an array of articles with practical tips for defense lawyers such as "The Preparation and Trial of a Drunken Driving Case Involving a Breathalyzer" and "The Tax Fraud Investigation: An Outline for the Defense Attorney." NCCD, founded in 1973 by Tony Friloux and Paul Smith, fell into financial difficulties with the withdrawal of federal LEAA funds, and was supported primarily through cash donations from prominent trial lawyers such as Garry Spence, Bobby Lee Cook, Richard Haynes, and Neal Sonnett. See *Project '80 Contributors*, 10 CRIM. DEF. 21 (1983); *1984 Catalog*, 10 CRIM. DEF. 20 (1983).

[194] *Advanced Cross-Examination*, 9 CRIM. DEF. 22 (1982).

[195] *1984 Catalog*; Richard "Racehorse" Haynes, *Cross-Examination of an Expert Witness*, 10 CRIM. DEF. 4, 4-7 (1983).

[196] McCall, *For Country Lawyer Gerry Spence*, at 58.

manner. The skills for which lawyers praised one another were the skills of an actor: delivering lines with the perfect tone of voice, eliciting the desired reaction in the audience.[197] Shellow, regarded as a special "'expert' at cross-examining the 'expert' witness," was known for his courtroom mastery of "dripping sarcasm" and "shocked disbelief."[198] Shargel had similar talents, displayed in his noted cross-examination of one Vincent (Fish) Cafaro on the subject of mafia induction rituals, in which he asked dryly: "In other words, you were going to get into the Mafia, but you didn't want to infect your finger?"[199] Shargel was also capable of manipulating his own emotional affect in the courtroom: "Like most good trial lawyers," one journalist wrote, "he can manufacture hatred for government witnesses."[200]

In their enthusiasm for cross-examination, criminal defense lawyers were partly keeping alive a tradition dating to the nineteenth century, when "legal biographies, novels, and newspaper articles celebrated the art of cross-examination and the lawyers who had mastered it."[201] However, for most lawyers by the twentieth century, cross-examination had become irrelevant to their day-to-day work. And accordingly, as legal academia became more established and more oriented around training corporate and commercial lawyers, cross-examination was not typically portrayed by legal scholars as either pedagogically or ideologically significant. Students might learn the mechanics in a clinical or elective course on trial advocacy, but examining witnesses never became core to the modern law school curriculum. After all, in a legal culture in which fewer and fewer matters went to court, many lawyers might never participate in a trial.

In contrast, nineteenth-century lawyers more universally had at least some courtroom experience, and they venerated cross-examination, in particular, as central to the professional identity of lawyers in a democratic republic. As described by legal historian Amalia Kessler, they envisioned cross-examination "as distinctively American," a ritual through which lawyers could "undertake

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[197] Cf. WICE, CRIMINAL LAWYERS, at 76 (noting that many criminal lawyers he interviewed were "former thespians," unsurprisingly because "[t]he ability to act and deceive the audience as to one's true feelings is a critical ability for the private criminal lawyer").

[198] *Off-stage with the Experts*, 3 CRIM. DEF. at 22-23; see also Michael S. Rosenwald, *James M. Shellow, criminal defense lawyer and masterful cross-examiner, dies at 95*, WASHINGTON POST, 4 November 2022.

[199] Dannen, *Defending the Mafia*, at 85.

[200] Dannen, *Defending the Mafia*, at 67.

[201] AMALIA KESSLER, INVENTING AMERICAN EXCEPTIONALISM: THE ORIGINS OF AMERICAN ADVERSARIAL LEGAL CULTURE, 1800-1877, at 165 (2017).

highly dramatic republican self-display by virtuously bringing to light those malefactors who had engaged in perjury and were otherwise unworthy of the public trust."[202] In other words, they relished cross-examination not only as a vehicle to discredit witnesses but also as a vehicle for flaunting their own virtue.[203] In fact, Kessler raises the interesting possibility that lawyers themselves may not have seriously believed that cross-examination revealed the truth; after all, it was often abused to obscure the truth. But it was indisputably useful for showcasing the lawyer's own forensic talents.[204] In the nineteenth-century context, when a prominent statesman might also occasionally defend a murder trial before a live audience of everyone in the local community, displaying virtue in public settings had obvious potential benefits for the lawyer's longer-term political aspirations.

But mob lawyers did not merely preserve cross-examination as an encased nineteenth-century inheritance; rather, they also infused the practice with new, twentieth-century ingredients, such as post-1970s cynicism and the fetish for scandal. *Pace* Oscar Goodman—who had a second career as the mayor of Las Vegas—the late-twentieth-century mob lawyer was generally not an aspiring political leader. Instead, he was likely to cultivate more of an anti-establishment or libertarian persona. And accordingly, he used cross-examination less to display his own virtue than to expose the vice and hypocrisy of the government. Because defense lawyers in organized crime trials were often cross-examining criminal informants, they could use cross-examination as a vehicle to cast doubt upon the expanding federal law enforcement bureaucracy, upon prosecutors' campaign against organized crime, and upon the questionable deals and moral compromises that were the tools of the trade in that campaign. As a magazine profile of Shargel observed, the trick of cross-examination in the 1980s and '90s was to "play[] on the distrust that jurors often feel toward law officers."[205] Thus did the mob lawyer update the nineteenth-century tradition of cross-examination for the post-Vietnam, post-Watergate, post-Church Committee political culture.

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[202] KESSLER, INVENTING AMERICAN EXCEPTIONALISM, at 164.

[203] KESSLER, INVENTING AMERICAN EXCEPTIONALISM, at 167 ("lawyers embraced cross-examination at least as much because of what it implied about their own character as for what it revealed about the witnesses they questioned"; it "highlighted the lawyer's passionate commitment to virtue and trampling vice").

[204] KESSLER, INVENTING AMERICAN EXCEPTIONALISM, at 166-66.

[205] Dannen, *Defending the Mafia*, at 68.

*D. Government Overreach*

> The criminal defense bar is the last line of defense against Government overreaching.
>
> — Samuel Burstyn, counsel to several members of the Medellín cartel.[206]

For mob lawyers, their courtroom foes—federal prosecutors—embodied the corrupting and imperialistic tendencies of government power. They frequently described the prosecutors they encountered in unflattering terms: they were "arrogant,"[207] "self-righteous,"[208] and driven by a "lust for convictions."[209] To Oscar Goodman, U.S. attorneys and FBI agents "acted like they were doing God's work, and therefore they didn't have to play by the rules."[210] At a Florida conference for drug lawyers in the 1980s, one speaker labeled prosecutors "scumbags" and another portrayed them as jealous of the defense bar: "'You're driving the Mercedes; they're driving the Chevy Nova.'"[211] Goodman similarly characterized FBI and IRS investigators as "envious or jealous of the persons whose conversations are overheard" on wiretaps revealing the large profits owed to organized crime.[212] In this view of the world, public servants abused their power to compensate for their inability to enjoy the (ostensibly less corrupting) monetary returns of private practice.

In settings where they needed to frame their allegations in more respectable terms, defense lawyers used overwrought diction rather than personal insults to convey their anger at the government, but the implication remained the same: government power was imagined as akin to a noxious gas, expanding indefinitely unless contained. In 1975, in the *National Journal of Criminal Defense*, Goodman published an exemplar of a motion that he had filed to suppress wiretapping evidence. In this motion, Goodman portrayed Title III as the first step toward a "fascist-like state." "On every side," he argued, "we see the steadily mounting evidence of the impending destruction of those rights and liberties

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[206] Quoted in Lewis, *Drug Lawyers' Quandary*.

[207] GOODMAN, BEING OSCAR, at 176; see also id. at 177 ("smug").

[208] GOODMAN, BEING OSCAR, at 71.

[209] CUTLER, CLOSING ARGUMENT, at 142.

[210] GOODMAN, BEING OSCAR, at 9.

[211] Quoted in *Mob Lawyer*, TIME, 25 March 1985, at 65.

[212] Oscar B. Goodman, *The Motion to Suppress in a Wiretap Case: An End to This Dirty Business*, 1 NAT'L J. CRIM. DEF. 49, 50 (1975).

which the Framers of the Constitution were so convinced would create, sustain and perpetuate on these shores a free and open society unlike any other on the face of the globe."[213] Electronic surveillance exemplified "the rapidly spreading neo-fascism that is threatening to destroy us as a community of free people."[214] The courts must "serve notice upon all concerned that this 'dirty business' shall cease forthwith," lest the United States fall into "the dark whirlwind that, in 1933, overwhelmed … the Weimar Republic."[215]

To be sure, the typical mob lawyer did not develop or invoke any comprehensive philosophical theory about government. Although mob lawyers traded in a vaguely libertarian suspicion of state power, they did so in cartoonish and sloganeering fashion. The precise limits of their political views could be murky, and their sincerity hard to discern, since they often endorsed criminal punishment of those who were not their clients. When they criticized prosecutorial leniency towards cooperating witnesses, their critique was predicated precisely upon the complaint (however disingenuous) that these informants were unjustly escaping the prison sentences they rightfully deserved.[216] Goodman complained that police in Las Vegas had such a single-minded "vendetta" against organized crime that "they weren't doing anything about the rampant street crime."[217] At least according to *People* magazine, the drug lawyer Joel Hirschhorn said he didn't want drugs legalized.[218] And the mob lawyer Barry Slotnick argued the subway shooter Bernhard Goetz's self-defense case, asking the jury to regard his client as a "decent citizen fighting back" against crime.[219] To be clear, Slotnick made this argument in the context of his role as a courtroom advocate. For the purposes of understanding his public persona, however, his role in the Goetz case is worth noting because it is unlikely that the general public would have recognized the distinction between a lawyer's personal positions and statements made on behalf of a client.

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[213] Motion attached to Goodman, *The Motion to Suppress in a Wiretap Case*, 1 NAT'L J. CRIM. DEF. at 79.

[214] Goodman, *The Motion to Suppress in a Wiretap Case*, 1 NAT'L J. CRIM. DEF. at 79.

[215] Goodman, *The Motion to Suppress in a Wiretap Case*, 1 NAT'L J. CRIM. DEF. at 79–80.

[216] E.g. SIMONE, THE LAST MOUTHPIECE, at 227; see also 252, 301 (similar language in his closing argument representing himself), 326 (asserts that criminals kill with abandon because they know they can escape punishment by becoming informants).

[217] GOODMAN, BEING OSCAR, at 74.

[218] Kunen, *Joel Hirschhorn*, at 70.

[219] Quoted in McKillop, *Slotnick for the Defense*. For a comprehensive account of the Goetz trial, see the entry at Professor Douglas O. Linder's excellent *Famous Trials* website, "The Trial of Bernhard Goetz: An Account," https://www.famous-trials.com/goetz/133-home.

If there was any comprehensive theory of government latent within the mob lawyer's professional identity, some indications of its contents can perhaps be gleaned from the career of Oscar Goodman. In 1999, Goodman became the rare mob lawyer to segue into a political career when he was elected mayor of—fittingly enough—Las Vegas. That city has a very weak mayor system, so the position was part-time and somewhat nominal (other than having a vote on the city council), but Goodman reinvented the position into a civic booster role. As the city's ceremonial figurehead, he made public appearances with a martini in hand and two Vegas showgirls at his side. During his tenure, the city revitalized its dilapidated downtown area (not to be confused with the Strip, which is technically in the city of Paradise), complete with a brand-new Mob Museum, where visitors can learn about the history of organized crime.

In his new role as mayor, the erstwhile defense lawyer who had railed against "neo-fascism" was not especially precious about individual rights. He took pride in his efforts to revive downtown Las Vegas, but complained that whenever the city would develop a park, "before you knew it, it was overrun by homeless people."[220] As mayor, Goodman distinguished those who needed mental healthcare or other assistance, along with veterans to whom "the government has a moral obligation," from the "segment of homeless who are able-bodied and of sound mind, but who just don't want to conform to any kind of societal norms."[221] He caused some uproar when he stated at a press conference about this supposed second group that he would "like to run them out of town and all the way to the Pacific Ocean."[222] On another occasion, he joked that a graffiti artist who defaced a piece of public artwork—a tortoise sculpture intended to beautify the highway—should have his thumb chopped off.[223]

Insofar as Goodman's mayoralty was representative of mob lawyers' politics (which is admittedly not necessarily a solid assumption), we might understand the mob lawyer to represent an impolitic and nondoctrinaire but basically libertarian ethos—except that it combined libertarianism with a fair amount of broken-windows style policing. The government should generally leave people alone, but also occasionally step in to remove incalcitrant homeless people from public spaces. An improbable and unstable mix, perhaps, but also an apt encapsulation of the instability of American political culture more generally in the late twentieth century. The mob lawyer's constitutional ideal seems to have

[220] GOODMAN, BEING OSCAR, at 214–15.

[221] GOODMAN, BEING OSCAR, at 215.

[222] GOODMAN, BEING OSCAR, at 215.

[223] GOODMAN, BEING OSCAR, at 233–34.

encompassed a small and weak federal government, libertine substantive law and very lax regulation of vice, but aggressive local policing of public spaces to preserve them as consumer lifestyle amenities. Referring to a rave held in Las Vegas, and the city's response, Goodman shrugged his shoulders: "We policed it as best we could. We made sure the residents didn't see any negative impact, but I can't worry about what individuals do. It's a free society."[224]

In sum, then, mob lawyers gave voice less to a coherent critique of law enforcement than to the general sense of post-1970s malaise, confusion, and lack of consensus about the role of government. As one defense lawyer put it, their job was to give voice in court to the realization that "we live in a frustrated society; a society that knows it has little control of its destiny, its taxes, its government. … Thus, when the jurors hear the United States Attorney say he represents the United States, they may be merely reminded of the source of their frustration."[225] Defense lawyers updated nineteenth-century lawyerly traditions like cross-examination and performative trial antics into twentieth-century gambits for exposing government corruption. Such tactics rarely succeeded at getting their clients acquitted, but through their individual efforts one trial at a time, the defense bar did succeed at keeping in media circulation a recurring refrain of cynicism about government. At the end of one mafia trial in New York, which actually did end in acquittal, a juror told the press: "If the FBI's like this, society is really in trouble."[226]

## CONCLUSION

There will probably always be a market for high-priced criminal defense representation,[227] but the heyday of the generation of mob lawyers and drug lawyers who rose to prominence in the 1970s and '80s petered out in the 1990s. That was in part because of the declining clout of the mafia itself, caused by legal defeats but also by economic and cultural shifts.[228] In addition, though,

[224] GOODMAN, BEING OSCAR, at 269-70.

[225] Colvin, *Anatomy of a Criminal Lawyer*, 10 CRIM. DEF. at 8.

[226] Quoted in Fredric Dannen, *The G-man and the Hit Man*, THE NEW YORKER, 16 December 1996, reprinted at https://www.newyorker.com/magazine/1996/12/16/the-g-man-and-the-hit-man.

[227] For a recent illustration, see Richard Fausset et al., *Trump Shakes Up His Georgia Legal Team Ahead of Atlanta Booking*, N.Y. TIMES, 24 August 2023 (profiling flashy Atlanta criminal defense lawyer Steve Sadow).

[228] See generally Jacobs, *The Rise and Fall of Organized Crime*. While the Cosa Nostra crime families still persist in some form they "are shadows of their former selves" and no longer control entire industries or labor unions. One theory is that it was not RICO but the legalization of

several legal changes combined to make it riskier for lawyers to represent multiple members of the same criminal enterprise, or to work with the same crime boss over a long period of time. First, stricter conflict-of-interest rules eroded the "house counsel" role within criminal enterprises by making it more difficult for one lawyer to represent co-conspirators.[229] Second, federal prosecutors also deployed mechanisms for removing particular defense lawyers from particular trials; the final John Gotti trial in 1991 exemplified the success of prosecutorial efforts to disqualify crime family "house counsel" from appearing at trial; the judge disqualified both Gotti's longtime lawyer, Bruce Cutler, and Jerry Shargel, who had been retained by Gotti's codefendant and underboss Salvatore "Sammy the Bull" Gravano.[230]

Finally and more generally, federal prosecutors created new headaches for lawyers who represented organized criminal enterprises, as they used RICO itself, as well as other statutory tools provided by Congress, to investigate criminal defense lawyers' finances.[231] By the mid-1980s, federal prosecutors increasingly sought to freeze allegedly tainted assets early in the course of criminal prosecutions, including assets that defendants had set aside for attorney's fees.[232] Asset forfeiture proved particularly effective in clipping the wings of the Miami drug bar; by 1995, the *New Yorker* magazine's Fredric Dannen, who had written several interesting articles on the criminal defense beat, could publish a kind of postmortem. "For most Miami attorneys who specialized in drug cases," Dannen wrote, "the boom times ended" circa 1990. Drug lawyers "had antagonized the federal government for too long; as the drug war intensified, so,

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gambling and Internet porn that lessened the profitability of the mafia's standard industries and protection rackets. See Gopnik, *Why New York's Mob Mythology Endures* (discussing the theory that "[a] more permissive society—with gambling, sex, and debt regularized—was a less Mafia-friendly one").

[229] See, e.g., Wheat v. United States, 108 S. Ct. 162 (1988) (holding that trial judge may disqualify defense counsel from representing multiple codefendants if there is "serious potential" for a conflict of interest, even when defendants are prepared to waive any conflict-of-interest claims); see generally Bruce A. Green, *Through a Glass, Darkly: How the Court Sees Motions to Disqualify Criminal Defense Lawyers*, 89 COLUM. L. REV. 1201 (1989) (discussing the shift toward more restrictive ethics rules regarding conflicts of interest).

[230] Arnold H. Lubasch, *Judge Disqualifies Gotti's Lawyer from Representing Him at Trial*, N.Y. TIMES, 27 July 1991, at 1; for an article giving Shargel's perspective on the disqualification motions, see Dannen, *Defending the Mafia*.

[231] For an overview of how factors such as these contributed to the decline of the Miami drug bar by the mid-1990s, see Booth, *High Life's High Price*; see also Lynch, *RICO I*, at 707-10 (discussing the forfeiture provisions of RICO and the Controlled Substances Act).

[232] See Winick, *Forfeiture of Attorneys' Fees*, 43 U. MIAMI L. REV. at 770.

apparently, did the government's hostility toward lawyers."[233] Between the government's antagonism and the more general dangers of proximity to the drug trade, several of the most prominent drug lawyers began shifting their clientele toward a more conventional white-collar criminal defense practice.[234]

The story of this final clash between high-priced defense lawyers and the U.S. government is beyond the scope of this article to recount in full. As criminal defense lawyers themselves told the tale, these tactics represented a concerted campaign by federal prosecutors to decimate their ranks, undermine the right to counsel, and rig the game by disarming their most experienced courtroom foes. As early as 1982, the NACDL expressed umbrage at "harassment of defense advocates, especially in the Federal system," through tactics such as grand jury subpoenas, search warrants for attorney's offices, and even indictments.[235] Prosecutors, not surprisingly, defended their actions as part of the larger battle against organized crime. Whatever one's normative view of how that battle impacted defense lawyers, the result was clear. In Pamela Karlan's terminology, many defense lawyers shifted their emphasis towards "discrete" (one-off) rather than "relational" (long-term) representation of mobsters and drug traffickers.[236] Accordingly, by 2012, an article touting the fun of representing mafia defendants included the important caveat: lawyers must "be very deliberate in establishing a relationship with only the individual as a client, not 'the family.'"[237]

The 1970s through the early 1990s represented a high point of media prominence for mob lawyers and their professional cousins, such as drug lawyers. While their status may have been low within the legal profession, their profile was high in the public eye. As the federal government pursued high-profile

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[233] Dannen, *The Thin White Line*, at 30; for a similar report from the same year, see Jonathan P. Decker, *Risks Rise, Rewards Shrink for the "White-Powder Bar*," CHRISTIAN SCIENCE MONITOR, 22 June 1995.

[234] See, e.g., Booth, *High Life's High Price*; Waldman et al., *The Drug Lawyers*, at 44 ("Hischhorn says the threat of seizures has forced him to drop most of his drug practice"); *"Diamond Joel" Hirschhorn's Drug Cases Segued into White-Collar Practice*, LAW.COM, 11 August 2017. Although asset forfeiture was mainly an issue for drug lawyers, the federal government's pressure on defense lawyers also pushed some mob lawyers to diversify their practices. Barry Slotnick shifted towards more of a transactional practice, representing, among other clients, Melania Knauss in her prenuptial agreement with Donald Trump. PATTERSON, THE DEFENSE LAWYER, at 273, 394-95.

[235] *Prosecutorial/Judicial Harassment Source Book Under Way*, 9 CRIM. DEF. 44 (1982).

[236] Karlan, *Discrete and Relational Criminal Representation*, 105 HARV. L. REV. at 670.

[237] Alch, *Reflections on the Experience of Representing Organized Criminals*, 38 NEW ENG. J. CRIM. & CIV. CONFINEMENT at 226.

convictions against organized crime defendants, these defendants' lawyers were often in the news, whether they were getting profiled in a magazine, giving an interview to *60 Minutes*, or delivering a soundbite on the courthouse steps after a trial. By stitching together the hundreds of soundbites and clichés that they injected into the collective American mind, it is possible to discern a set of ideas and beliefs about the proper balance of power between the individual and the state. In this vision, state power tended to expand indefinitely, unless checked; all uses of the prosecutorial power were equally suspicious, whether against a low-level drug runner or a mafia don; and criminal defense lawyers therefore constituted the most important check against state power.

Although this lawyerly vision can be pieced together through pop-culture and media sources, it is more difficult to measure how the general public received the mob lawyer's version of popular constitutionalism. Certainly, this rhetoric circulated widely and resonated with the libertarian direction of American political culture in the late twentieth century. For better or worse, it likely had some impact in shaping or reinforcing popular conceptions of the law as an individualistic and commodified domain—not despite the soundbites' hackneyed quality, but precisely because they were simple and memorable. Such tropes could appeal to many constituencies for different reasons, all the more so because mob lawyers traded in the same trappings as celebrities: charisma, cars, boats, and jewelry.

Thus, the legal historian is left with multiple interpretive possibilities for how to make sense of the media heyday of the mob lawyer. Some members of the general public likely found the mob lawyer's constitutional vision alluring, blending as it did high-minded constitutional diction with a kind of risqué mystique. One historian of the 1980s drug wars, David Farber, has observed how drug kingpins came to be viewed by some (certainly not all) as "figures of resistance in a corrupt society," "tricksters who had figured out how to put one over on [a] hypocritical society[.]"[238] They wore luxury clothing and precious jewelry, amassed luxury automobiles, and thereby "reinvent[ed] the Horatio Alger self-made-man myth" for the late twentieth century.[239] In many cases, similar observations might be made about their lawyers. But it is also likely that many members of the public were repelled by mob and drug lawyers—and it is possible that this aversion helped to reinforce tough-on-crime attitudes. Legal ethicist William Simon hypothesized as much in 1993, worrying that "outside

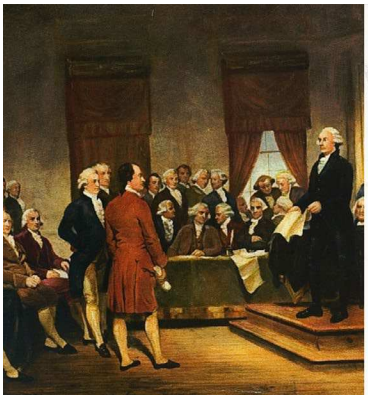
[238] David Farber, *Drug Dealers*, *in* THE WAR ON DRUGS: A HISTORY 39 (David Farber, ed., 2022).

[239] Farber, *Drug Dealers*, at 52.

the bar, the ideological appeal of [defense lawyers'] libertarian liberalism has waned, and indeed crime control demagoguery seems to have profited from popular revulsion at its apparent antinomian contempt for responsibility and punishment, its paranoid antistatism, its indifference to victims, and its obsession with the procedural at the expense of substantive justice."[240]

A final possibility is that the mob lawyer's bombastic invocations of the Constitution had cultural more than legal significance—that they were recognized at the time, and should be understood in retrospect as well, as a kind of joke, part of the expected public performance of a particular type of lawyerly character, all conveyed with a wink. This possibility is perhaps the most intriguing, because it raises the question of whether or how constitutional history should make space for invocations of the Constitution that circulate widely in popular culture, yet are offered in the service of something other than constitutional argumentation—a business proposition, a marketing pitch, or the cultivation of a professional persona.

[240] Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. at 1728.



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# Thomas Burke and State Sovereignty, 1777

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