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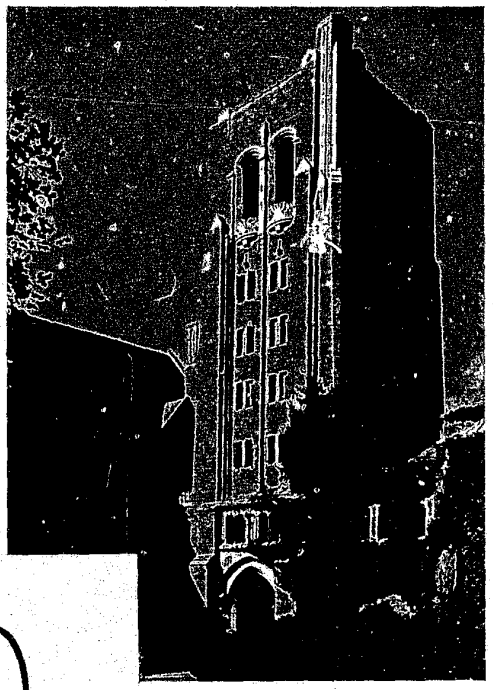
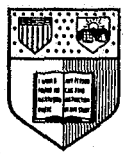


Perspectives on the Investigation and Prosecution of Organized Crime

Extortionate and Usurious Credit Transactions: Background Materials

RONALD GOLDSTOCK • DAN T. COENEN



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EXTORTIONATE AND USURIOUS CREDIT TRANSACTIONS:

BACKGROUND MATERIALS

by

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August, 1978
Ithaca, New York

The authors, potential defendants in an action for violation of maximum-hour and minimum-wage laws, wish to thank the tireless and talented troop of students who assisted in researching the indicated sections of this monograph: Michael Banks (I), Steve Blow (IV C), Karsten Boone (VI A), Gerard Bradley (II, IV A-B), Lawrence Brann (Appendices), Margaret Clancy (I), Kate Fitzgerald (I), Bruce Garren (II, III, V A), Jody Healy (V C), Edward LaRose (IV C-D), Doris Long (V A, VI B), James McFarland (VI A-B), John Sander (III, IV D), William Stern (V B, VI C). In addition, the authors are grateful to Peter Reuter for valuable observations on the first section of this paper.

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A caveat to the reader: the footnotes in section I direct the reader to the most important sources on loansharking, a body of scholarship far short of adequate. In preparing this material, however, the authors did not rely exclusively on existing literature. These pages also reflect the first-hand experience of one of the authors in investigating and prosecuting illicit lenders and conversations with observers of and persons engaged in organized criminal activity. Moreover, in citing the literature, the authors do not wish to vouch for its unwavering accuracy. The study of any illegal activity poses severe problems. For this reason and others, existing materials tend to be sketchy, speculative, unduly sensationalized, and largely out of date. Nonetheless, the vast majority of statements made in the text (including those for which outside materials are cited) reflects the views of the authors; equivocal phrasing, on the other hand, generally indicates the authors' uncertainty as to the truth of the matter asserted.

Notwithstanding this caveat, the authors believe that the first section taken as a whole accurately describes the realities of loansharking.

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I.

CONTEMPORARY LOANSHARKING: ORIGINS, EFFECTS, AND METHODS OF OPERATION

In 1596, Shakespeare depicted the unsavory creditor in the person of Shylock,[1] who demanded a pound of flesh of a desperate borrower as collateral for his loan.[2] Slurred by illiterate street hoodlums in the early part of this century, "shylock" became "shark."[3] Thus was born the word "loanshark," denoting the lender who demands the borrower's body as security for repayment.

The term "loanshark" lacks a precise definition; neither linguists nor lawyers have concentrated on the term,[4] and laws

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[1] W. Shakespeare, The Merchant of Venice, in Shakespeare: The Complete Works 579 (G.B. Harrison ed. 1948).

[2] Shakespeare, The Merchant of Venice, supra note 1, at Act I, Scene III, lines 147-52:

> If you repay me not on such a day,
> In such a place, such sum or sums as are
> Expressed in the condition, let the forfeit
> Be nominated for an equal pound
> Of your fair flesh, to be cut off and taken
> In what part of your body pleaseth me.
> (Shylock to Bassanio)

[3] Impact of Crime on Small Business: Hearings Before the Senate Select Comm. on Small Business, 90th Cong., 2d Sess. 94 (1968) (statement of Charles Siragusa, Executive Dir., Ill. Crime Investigating Comm'n) [hereinafter cited as Small Business Hearings].

[4] Neither Black's Law Dictionary (4th ed. 1968) nor Ballentine's Law Dictionary (3d ed. 1969) define the word "loanshark." The Random House Dictionary of the English Language (1967) defines loanshark as, "Informal. a person who lends money at

aimed at "loansharking" proscribe on a host of varying practices.[5] Moreover, loansharking has had a checkered history, and different generations have assigned the term differing connotations.[6] In current usage, however, "loansharking" plainly embodies two central features: the assessment of exorbitant interest rates in extending credit and the use of threats and violence in collecting debts.[7]

However defined, contemporary loansharking exacts significant social costs. Estimates ten years ago placed loansharking as the fifth-ranking crime in financial cost to society.[8] In addition

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excessive rates of interest; usurer," and "shark" as, "a person who preys greedily on others as by cheating or usury." Webster's Third International Dictionary (3d ed. 1963) defines loanshark as, "one who lends money to individuals at extortionate rates." The Oxford English Dictionary (Supp. 1971), quoting from the Daily Telegraph, defines the term as "[one] who exacts usurious rates of interest from the person of small means."

[5]Relevant laws prohibit criminal usury, extortionate lending, extortionate collecting, receiving profits of illicit credit transactions, and financing illicit loans. See Appendix A infra.

[6]See notes 48-80 and accompanying text infra.

[7]John Seidl, in his dissertation "Upon the Hip"--A Study of the Criminal Loan-Shark Industry 30 (Dec. 1978) (unpublished Ph. D. thesis on file in Harvard University Library) [hereinafter cited as Seidl], cites the three major elements of modern loansharking as:

(1) the lending of cash at very high rates of interest;
(2) a borrower-lender agreement based on the borrower's willingness to put up his own and his family's physical well-being as collateral; and
(3) the borrower's belief that the lender is connected with organized crime.

[8]Note, Loan-Sharking: The Untouched Domain of Organized Crime, 5 Colum. J.L. & Soc. Probs. 91, 92 (1969) [hereinafter cited as Columbia Journal].

to the transfer of wealth to criminal elements and the expenditure of law enforcement efforts and dollars, economic inefficiencies result from loansharking.[9] Moreover, loansharking feeds upon and reinforces the climate of violence and fear perpetuated by organized crime.[10] In many cases, especially among the poor, the offspring of loansharking is hopelessness, which fuels the fires of inner city unrest and breeds additional crime.[11]

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[9]There is undoubtedly some element of monopoly power, possibly transient, in most loansharking transactions. This leads to interest rates that are higher than would obtain in a more perfect market, even allowing for the risky nature of most of the loans involved. Profits are too high, credit is misallocated, and there is "deadweight" economic loss. See E. Gellhorn, Antitrust Law and Economics 94-97 (1976).

[10]One of the few sources of information on loanshark activities is the case law. Recent decisions are replete with examples of loanshark threats ranging from subtle "encouragement" to graphic descriptions of the price of nonpayment. See United States v. Natale, 526 F.2d 1160, 1166 (2d Cir. 1975) (when debtor fell behind in payments, told "he had better come up with the money . . . or . . . Natale 'will just waste you, and not worry about the money at all.'"); United States v. Bowdach, 501 F.2d 220, 224 (5th Cir. 1974) ("[we are] going to bring him back and shoot him and cut his balls off and hang them in [a local bar]"); United States v. Nakaladski, 481 F.2d 289, 293 (5th Cir. 1973) ("you better have our money there at one o'clock or I'll feed you your eyeballs"); United States v. Palmieri, 456 F.2d 9, 11 (2d Cir. 1972) (threats to "hang [them] from the rafters" if borrowers did not pay; and, you're a "nice guy," wouldn't "want to see [him] get hurt"); United States v. Keresty, 465 F.2d 36, 39 (3d Cir. 1972) (to collect gambling debt, introduced friend to debtor as "a syndicate enforcer," made blatant, threatening demands for repayment).

[11]A report entitled "Study of Organized Crime and the Urban Poor," submitted by a group of Congressmen to the House of Representatives, alleged that loansharks take over $350 million a year from the American poor. 113 Cong. Rec. 24460, 24461 (1967), cited in Perez v. United States, 402 U.S. 146, 154 (1971). See also United States v. Zito, 467 F.2d 1401 (2d Cir. 1972) (borrower forced to assist in truck hijacking and bank robbery to pay off loan).

A. The Dominant Role of Organized Crime

Contemporary loansharking is marked by the dominance of organized crime. This pervasive influence is hardly surprising. Syndicate access to rich stores of capital allows the underworld to pour substantial amounts of cash into the credit market.[12] The strength and reputation of organized operations lends credence to threats of reprisals, thus augmenting the aura of fear critical to success in the loansharking business.[13] Moreover, organized crime's aversion to competition militates strongly against successful independent operations.

Yet another crucial factor ensures the preeminence of organized crime in the loansharking market: underworld

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[12] See Seidl, supra note 7, at 33-34.

[13] Thus, creditors who would ordinarily appear to be incapable of collection can successfully instill fear in the debtor. A recent edition of the Chicago Tribune reported:

> Prosecutors have played dramatic tape recordings in which a blind reputed mobster threatened to cut out the eyes and tongue of a man who owed him $18,000.
> "I will have your tongue. That's all I want is your tongue and maybe your eyes. And I'll teach you how to walk as a blind man," shouted a voice identified as that of Louis "Blind Louie" Cavallaro, 36, who lost his eyesight because of diabetes 13 years ago.
> "And they're gonna bust your f_____ face. Not kill you, just bust your f_____ face," the voice identified as that of Cavallaro warned. The speaker later said he would like to wear the victim's teeth "around my neck."

Chi. Tribune, June 23, 1978, §2, at 1.

criminals frequently seek, as well as provide, illegal credit. Organized loansharks are likely to have contacts with these prospective borrowers, who thereby generate a ready market for syndicated loansharking services.[14] More importantly, such borrowers are unlikely to repay loans obtained from independent operators; indeed syndicate-connected loansharks may use this tactic to squeeze competitors out of business.

Organized crime's infatuation with loansharking rests on both its inherent profitability and its potential for supporting or facilitating other illicit activities. Loansharking itself is lucrative business. A decade ago, the President's Commission on Law Enforcement and Administration of Justice pegged loansharking as the second largest profit-producer of organized crime,[15] an industry viewed as skimming off as much as two percent of the Gross National Product.[16] Other observers estimated that the loansharking business takes in over $10 billion a year on a $5 billion investment.[17] Current income from loansharking is uncertain, but there is

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[14] See N.Y. Comm. of Investigation, An Investigation of the Loan-Shark Racket 13 (1965) [hereinafter cited as N.Y. Commission] (noting strong connection between loansharking and illicit operations in need of quick financing).

[15] President's Comm. on Law Enforcement and the Admin. of Justice, The Challenge of Crime in a Free Society 441 (1968).

[16] Note, Columbia Journal, supra note 8, at 92 n.8.

[17] R. Salerno and J. Tompkins, The Crime Confederation 228 (1969) [hereinafter cited as Salerno and Tompkins].

no indication that the growth of illegal lending has abated. Indeed, increased law enforcement efforts to control other criminal activities may be increasing underworld loansharking income.[18]

In addition to providing direct income, loansharking increases the scope and profitability of the underworld's other illicit enterprises. A distinguishing feature of organized crime is the ability of syndicate members to capitilize on opportunities as a result of connections with diverse actors and activities.[19] Loansharking expands and reinforces syndicate contacts with illegitimate and quasi-legitimate businesses and individuals, for such borrowers can seldom turn to licit lenders when in need of credit.

More importantly, loansharking allows the mob to extract profits from a variety of illicit businesses while syndicate members avoid the ownership or control that previously exposed them to prosecution. Insulation and security

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[18]President's Comm. on Law Enforcement and Admin. of Justice, Task Force Report: Crime and Its Impact--An Assessment 100 (1967) [hereinafter cited as Task Force Report].

[19]An example set forth before the National Wiretap Commission serves to illustrate this point. A New York mob figure who had obtained counterfeit United States currency printed in Canada (the connection was an out-of-town associate of the subject's boss):

(1) used it to purchase drugs smuggled from South America (the connection was a European forger with whom the subject had personal dealings);
(2) arranged to sell it on the Japanese black market (the connection was a Californian who dealt in stolen credit cards with an acquaintance of the subject); and
(3) distributed it within the United States (the connection was a Philadelphian who had been involved with the subject in security swindles).

are thus increased while profits remain high. In fact, a monopoly on financing may provide the syndicate with most of the profits that would be available through monopolistic operation of the underlying business.[20]

Extortionate credit transactions also provide underworld elements with an ideal vehicle for infiltrating legitimate businesses and gaining control over "outside" individuals.[21] Once in the grip of organized crime, businesses may be run

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1 National Comm. for the Review of Fed. & State Laws Relating to Wiretapping & Electronic Surveillance, Commission Hearings 413-74 (1976).

Compare this scheme to the very limited opportunities available to the "unconnected" criminal. For a discussion of the relationship of enterprises to syndicate see G. Blakey and R. Goldstock, Techniques in the Investigation and Prosecution of Organized Crime: Manuals of Law and Procedure (Uses of the Phrase "Organized Crime") ¶¶4-13 (1977).

[20]Phillip Areeda explains how monopolists can "reach through" an intervening vertical level of distribution:

> [c]onsider the cost of producing ingot and pipe . . . The cost of producing an ingot is $40 and the cost of fabricating it into pipe is $35. If the profit-maximizing price for a monopolist producing both ingot and pipe is $100, the monopoly profit is $25. Observe that the sole seller of ingot can sell ingot for $65 to fabricators who, if they are numerous, will compete vigorously, thereby forcing pipe prices down to their $100 production cost.

P. Areeda, Antitrust Analysis 675, n.35 (1974).

[21]It appears that organized crime is increasingly trying to gain more power in the legitimate business field. According to one newspaper report, organized crime has a strong influence in over 10,000 legitimate businesses, including construction companies, bakeries, and banks.

legitimately as fronts, run for profit with illegal competitive advantages, or stripped of assets at the expense of unsuspecting creditors.[22] Individuals may be forced to commit common crimes, abuse their discretion as public servants, or provide the loanshark with other useful services.[23]

B. The Economics of Loansharking

As with all products, economic analysis of lending focuses on the dynamics of supply and demand. In most simple terms, loansharking exists because a demand for the loanshark's services exists. This demand results at least in part from legally imposed interest-rate ceilings that preclude licit lenders from satisfying the demand of high-risk borrowers.[24] A free market would respond to such demand by generating high-interest loans; indeed this is precisely what the loanshark does. Usury laws, however, prohibit financial institutions from supplying such products.

Factors other than the sheer inability to obtain legal credit may help explain the intensive demand for loanshark

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The account cites two reasons for this development. First, profits from organized crime's other illicit activities are too great to merely reinvest in those activities. Second, organized crime wants to become involved in legitimate businesses involving less possibility of detection by the law. Wall St. J., April 19, 1978, at 48, col. 1. See also notes 160-63 and accompanying text, infra.

[22] See notes 154-59, 164-69, and accompanying text infra.

[23] See notes 120-24, 155-63, and accompanying text infra.

[24] See Seidl, supra note 7, at 88-89.

services. For example, complexity, formality, and a lack of secrecy may drive potential customers from rigid financial institutions to uncomplicated, convenient transactions with loansharks.[25] Only in rare cases, however, does avoidance of these factors override the monopolistic rates and implicit threats that accompany loanshark transactions. Desperation, rather than convenience, accounts for the prosperity of the "juice man." As one former loanshark stated:

> People who borrow from a juice operator do so only because they really need it after they have been frozen out of other sources of money. They mostly figure that the only time you can get a bank to loan you money is when you can prove you don't need it.[26]

In this analysis inheres the central irony of usury laws which are commonly justified as useful weapons in the fight against illicit lending.[27] While the desirability of usury laws depends on more than their causal relation to criminal activity,[28] there can be little doubt that such laws, at least in part, have created a black market for

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[25] Id. at 90-95. The author cites four characteristics as important to the loanshark's success: secrecy of the transaction, informality, speed and convenience, and regular availability of funds. Id.

[26] The Confessions of a 6 for 5 "Juice Man," Burroughs Clearing House, April, 1965, at 40.

[27] See N.Y. Commission, supra note 14, at 82-83; Columbia Journal, supra note 8, at 105-06; 66 Col. L. Rev. 170 (1966).

[28] See Nugent, The Loan Shark Problem, 8 L. & Contemp. Prob. 3, 12-13 (1941) (usury laws help equalize bargaining power between lender and borrower; protect borrower's family, employer, and community from ripple effect created by his imprudent indebtedness).

credit dominated by organized crime.[29]

The rates charged by loansharks vary considerably--from less than 52% to in excess of 1000% per year. The absence of a well-defined market in which supply and demand functions can be reasonably ascertained in part explains this wide variation. The credit market is really a set of submarkets, each defined by the status of the borrower, his ability to repay, his planned use for money, and assorted other variables. Since the loanshark's customer generally needs credit desperately, and is unable to obtain it from licit lenders, demand for loansharked funds tends to be inelastic. The loanshark thus has a substantial range within which to set his price.

Other more subtle factors may also be at work in determining loanshark interest rates. For example, territorial allocations or spheres of influence within certain industries often give the loanshark a quasi-monopoly position. Variations in loanshark interest rates may therefore result from price discrimination facilitated by monopoly power. In addition, interest assessments may reflect goals other than mere monetary return on investment. The loanshark may, for example, adjust interest charges to increase his chances of infiltrating the business of a borrower.

C. The History of Loansharking

1. Early History of Interest Assessments

Since the earliest codes of the ancient Babylonians,

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[29] See generally, North and Miller, The Economics of Usury Laws, in An Economic Analysis of Crime 193 (L. Kaplan and D. Kessler eds. 1976) [hereinafter cited as North and Miller].

interest ceilings[30] have attempted to protect debtors from overbearing moneylenders.[31] Although the Old Testament

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[30]The terms "interest" and "usury" have not always had their modern meanings. The following excerpt from T. Divine, Interest 3-4 (1959) [hereinafter cited as Divine] serves to clarify this semantic issue.

> In Roman law, interest (id quod interest) meant the compensation for damage or loss suffered by the creditor resulting from the debtor's failure to return the loan (itself gratuitous in principle) at the date specified by the contract. This payment of compensation might be agreed upon in the original contract or be made the subject of a lawful claim after the contract had expired. Such was the usage until the close of the Middle Ages. "Usury" (Latin usura sometimes also called foenus and in Greek tokos, i.e., "issue" or "produce," after Artistotle's designation of "breed of barren metal"), on the other hand, signified a payment for the "use" of money itself. In its broader sense, "usury" included a charge for the loan of any good that fell within the class of mutuum, i.e., a loan of a consumption or "fungible" good. But as a loan of money was classified as a mutuum, and in practice became the most common form of this type of loan, the term generally expressed in popular usage its narrower signification of a charge for the use of money. Only after the repeal of the prohibitions of interest (i.e., of "usury" in the above sense) and the establishment of a legal rate, did "usury" receive its present meaning of an exorbitant charge for a money loan or a charge that exceeds the legal rate. Meanwhile the former usage has been superseded by an extension of the original concept of "interest" which now means a price for the loan of money (or of any present goods) or a premium or deviation from par of the price of present money in terms of future money.

In the text above, the term "interest" is used in its modern sense. In order to avoid confusion, the term "usury" is not used in this section until its meaning (in the excessive interest sense) is clear.

[31]J. Pritchard, Ancient Near Eastern Texts Relating to the Old Testament 169 (1969):

contained prohibitions against the charging of interest,[32] the New Testament apparently countenanced the practice at a commercial level.[33] The Greeks allowed the taking of interest while sometimes establishing maximum rates,[34] despite Aristotle's protestations that the practice was unnatural and debasing.[35] The Romans similarly tolerated the practice while regulating permissible rates.[36]

Early Christian teaching uniformly condemned the charging

> If a merchant lent grain at interest, he shall receive sixty "quo" of grain per "kur" as interest. If he lent money at interest, he shall receive one-sixth "shekel" per "shekel" of silver as interest. If the merchant increased the interest beyond sixty "quo" per "kur" of grain or one-sixth "shekel" per "shekel," he shall forfeit whatever he lent.
>
> (from the Code of Hammurabi)

[32] Exodus 22:25, Leviticus 25:35, Deuteronomy 23:20, 21.

[33] Matthew xxiv:27.

[34] For a table of interest rates charged at various times in the history of the world, see R. Johnson, The Realities of Maximum Ceilings on Interest and Finance Charges 8 (1969) [hereinafter cited as Johnson].

[35] This was based in part on the theory that money was barren, i.e., unlike a flock or a field, it produced nothing; it was merely a medium of exchange. For a more complete analysis of Aristotle's view on this subject, see Divine, supra note 30, at 11-19.

[36] An attempt at prohibition of interest was instituted in 342 B.C. but was uniformly evaded through the use of non-Roman "fronts." After corrective legislation failed to end abuses, a legal rate was again established in 88 B.C. Id. at 20.

of interest, and clerics who ignored the ban risked excommunication.[37] In the Eighth Century, Charlemagne implemented church policy by making assessment of interest a criminal offense.[38] Papal pronouncements through the 12th and 13th centuries repeatedly declared interest transactions legally void and provided for restitution.[39] In 1311, Pope Clement V authorized the excommunication of any civil authority who enacted legislation authorizing the charging or collection of interest.[40]

Clerical condemnation, however, gradually gave way to economic forces. By the twelfth century the emergence of a commercial class and the development of banking and money markets had changed the character and perception of credit.[41] Traditionalists could no longer condemn capital as "barren" since it was frequently used for productive purposes. As loans became less personal, and were viewed as crucial to the advance of trade, toleration of interest assessments increased. The Church, keeping abreast of these trends, in 1515 formally authorized low-interest charges to cover the operating costs

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[37] Id. at 34.

[38] A. Birnie, The History and Ethics of Interest 4 (1952).

[39] Divine, supra note 30, at 60-62.

[40] Id. at 63.

[41] Johnson, supra note 34, at 10-11.

of lending to the poor,[42] and by the 1700's explicitly refused to interfere in civil decisions regarding commercial assessments of interest.[43]

The modern distinction between "usury" and "interest"[44] emerged in the sixteenth and seventeenth centuries, and by the eighteenth century, economists began to question the soundness of any usury laws.[45] Nevertheless, English law recognized the offense of usury.[46] The American colonies took cognizance of, and enforced, the English rules, eventually enacting their own legislation imposing interest ceilings.[47]

2. Loansharking in America

The history of loansharking in the United States comprises three evolutionary stages.[48] Although the types of loansharking activities that characterize each period shade into one

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[42]Divine, supra note 30, at 58.

[43]Johnson, supra note 34, at 10.

[44]See note 30 supra.

[45]Skeptics included Bentham, Turgot and Hume. See Divine, supra note 30, at 98-102; Kaplan and Matteis, The Economics of Loansharking, in An Economic Analysis of Crime 178, 180 (L. Kaplan and D. Kessler eds. 1976) [hereinafter cited as Kaplan and Matteis].

[46]J. Murray, The History of Usury 68 (1866).

[47]Id. at 68-69.

[48]The section on the history of loansharking in the United States draws heavily on Haller and Alviti, Loansharking in American Cities: Historical Analysis of a Marginal Enterprise, 21 Amer. J. Legal Hist. 125 (1977) [hereinafter cited as Haller and Alviti].

another, this three-stage model reflects logical distinctions and historical reality. The three-tiered breakdown also corresponds with the three most significant efforts to explore and control loansharking activity in the United States: the Russell Sage Foundation's investigatory and reform efforts from 1905 to 1915; the pre-World War II prosecution of New York loansharks by Thomas E. Dewey; and the investigatory efforts of congressional and state committees as well as a presidential task force during the early 1960's. At each of these junctures, loansharking in the United States has had a distinct coloration.

a. The Salary Lender

In the post-Civil War period, the forces of industrialization, urbanization, and immigration changed the face of the American economy. With this transition came an unprecedented demand for credit. Consumers, as well as businessmen, fueled this demand, seeking credit for purposes other than investment in profit-generating enterprises.

Against this backdrop, two major forces catalyzed the development of loansharking in America. First, long-standing religious and social beliefs continued through the post-bellum period to condemn consumer borrowing. The public viewed such activity as immoral or indicative of the borrower's inability to manage his budget.[49] Second, low-limit usury laws pervaded state statute books.[50] Since

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[49]Haller and Alviti, supra note 48, at 127.

[50]See Murray, supra note 46, at 70-91, for a discussion of usury statutes in each of the states in the 1800's.

financial institutions found consumer lending neither respectable nor profitable,[51] numerous upstanding citizens who constituted sound risks found themselves foreclosed from legitimate sources of credit. The market responded to this unsatisfied demand with "salary lending," a new and unique credit device that prospered from about 1880 through 1915.[52] The salary lender in no way resembled the loanshark of today. Rather than running patently illegal, covert businesses, salary lenders operated publicly on the fringe of the law. Advertisements of salary lending services commonly appeared in urban newspapers,[53] and salary lenders screened their customers carefully, requiring references and employing detailed application and agreement forms.[54]

Unlike the present-day loanshark, the salary lender relied on legal artifices and bargaining superiority to exploit customers and to generate profits. To avert the reach of state usury laws, salary lenders often structured transactions so as to "purchase" a portion of the borrower's future salary--thus

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[51] Haller and Alviti, supra note 48, at 127.

[52] Id.

[53] Id. at 129. Salary lenders placed newspaper ads that resembled those of regular small businesses:

> The City Credit Company will advance money to salaried people on their note without security. Lowest rates--strictly confidential.

Id.

[54] Id. at 131.

the name "salary lending."[55] In addition, lenders often required wage assignments from "guarantors," usually friends or relatives of the borrower.[56]

Once in the salary lender's net, the borrower was unlikely to escape. Salary lenders, like contemporary loansharks, relied heavily on fear to ensure collection of debts. Unlike modern-day sharks, however, salary lenders rested their threats on predicted consequences other than physical violence. Salary lenders threatened to sue for breach, garnish the debtor's wages, or simply contact the debtor's employer.[57] Such threats impressed upon the hapless debtor the disastrous specter of being fired; employers--solicitous of their employees' moral standing, averse to the expense and risks of handling wage assignments, and fearful of resulting embezzlements--often adopted a policy of releasing all employees discovered to be in debt.[58]

Other factors supported these threats in rendering customer defaults uncommon. First, the quasi-legal nature of salary-

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[55]Nugent, The Loan Shark Problem, 8 L. & Contemp. Prob. 3, 10-11 (1941) [hereinafter cited as Nugent].

[56]Haller and Alviti, supra note 48, at 132.

[57]See Birkhead, Collection Tactics of Illegal Lenders, 8 L. & Contemp. Prob. 78, 83-84 (1941). [hereinafter cited as Birkhead].

[58]See Haller and Alviti, supra note 48, at 134 ("[T]he borrower's chief fear, quite often, was that an attempt by the lender to enforce the wage assignment would cause the employer to fire him . . . ."). But see Birkhead, supra note 57, at 83 ("Few employers, however, will knowingly aid an outlaw lender. When an anti-loan shark campaign exposes the money-lending racket preying on working people, almost all companies give whole-hearted support to the drive and help the oppressed employees every way they can.").

loan transactions and the seeming propriety of salary-lender operations provided the debtor with the sense of a legal and moral obligation to repay.[59] Second, despite the dubious legality of their enterprise, salary lenders could frequently invoke judicial processes with success:

> Much of the success of the salary lender in court resulted from the advantages that he wielded as a legal adversary. The lender produced complicated forms signed by the borrower; he often had a power of attorney, so that he could appear for the borrower and confess judgment; and the borrower, already unable to make payments on a small loan, was seldom able to hire an attorney. Indeed, in those few cases in which a borrower had legal representation, the lender would normally withdraw the suit and negotiate a settlement. Secondly, the success of salary lenders reflected the structure of the lower courts, which were staffed by justices of the peace or magistrates who seldom had legal training and whose incomes derived from fees for handling cases. Justices who found for salary lenders could often attract a good deal of business and thus earn tidy sums, so that it was in the economic interest of justices to look with favor upon suits by lenders. Hence, salary lenders, as regular and experienced users of the courts, often enforced illegal contracts against their customers who, as inexperienced and unrepresented defendants, were unable effectively to assert their legal rights.[60]

Finally, salary lenders frequently provided debtors with refinancings or extensions rather than demanding immediate payment upon default.[61] In this way too the salary lender exploited

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[59] Haller and Alviti, supra note 48, at 134.

[60] Id. at 134-35.

[61] Nugent, supra note 55, at 5: "However high its rates of charge, the loan-shark business would not have created as much distress if borrowers had been able to pay off their loans when due. But lenders seeking volume, encouraged renewals or made it difficult for borrowers to repay the principal."

the luckless borrower. Imposition of hefty penalties, accumulation of interest into principal, and "chain debts" whereby the debtor continued to pay interest with little hope of retiring the principal debt commonly entangled short-term borrowers in long-term obligations.[62]

Reform efforts aimed at salary lending--largely the product of the Russell Sage Foundation[63]-- commenced at the beginning of the twentieth century. The principal result of reform was the widespread adoption of small loan acts. Massachusetts adopted the first such act in 1911. New York passed a comprehensive bill in 1914, and Illinois followed suit three years later. By 1933, a majority of states had adopted similar legislation, requiring licensing of small lenders, proscribing charges exceeding stated interest, and raising the legal ceiling on small loans, commonly to a monthly rate of 3-1/2 percent.

Passage of small loan acts tolled the death knell of salary lending. As reformers predicted, such laws generated new and legal sources of consumer credit; credit unions, savings banks, fraternal organizations, and commercial banks soon sought to satisfy consumer credit demand.[64] But notwithstanding the best efforts of reformers, adoption of small loan acts contributed

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[62]Haller and Alviti, supra note 48, at 133.

[63]The Russell Sage Foundation undertook extensive studies of the loansharking problem and drafted a model small loan law to encourage passage of such laws in the states. See Kaplan and Matteis, supra note 44, at 182; Nugent, supra note 55, at 6-7.

[64]Newspapers ran the following headlines when the National City Bank of New York entered the personal loan field in 1928:

to a disastrous development in the history of loansharking: the entry of organized crime into the illicit credit business.[65]

b. Organized Crime and Consumer Credit

Small loan acts, in states where passed, eliminated salary lending. No longer could the salary lender rely on the legal ambiguities that previously had lent him credence. Moreover, public opinion now held him in disfavor, and heightened penalties for illegal extensions of credit deterred brushes with the newly extended reach of the law. The lending institutions spawned by the small loan acts, however, only partially filled the void left behind by salary lenders. A number of related factors accounted for this result. First, the fixed costs of making any loan--such as labor costs associated with investigation and collection--reduced incentives to provide loans as the amount

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> Loan Sharks Doom Sounded by Big Bankers
> Nation's Biggest Bank Fights Loan Sharks
> Usury Dealt Heavy Blow by Bank's Action

Miller, The Impingement of Loansharking on the Banking Industry, in An Economic Analysis of Crime 198, 198 (L. Kaplan and D. Kessler eds. 1976) [hereinafter cited as Miller].

[65]There are indications, however, that some variation of organized crime was involved with early loansharking activities prior to the adoption of small loan acts. See F. Ianni, A Family Business 66 (1972). Guiseppe, an immigrant from Sicily, set up a "bank" in his home in New York's lower East Side, lending money to neighbors.

> No one talks directly about what occurred when someone defaulted, but there are suggestions that Guiseppe was tied in with one of the Sicilian Black Hand gangs, and those unfortunate immigrants who were unwilling to repay him would themselves be repaid with physical violence and in some cases even death.

sought to be borrowed grew smaller.[66] Second, small loan acts precluded lenders from compensating for these disproportional costs by charging service fees or profitable interest rates.[67]

Thus, even after enactment of small loan legislation, large numbers of consumer borrowers remained without access to credit. Above-board lenders restricted consumer credit to "a newly-created, somewhat more affluent class of borrowers who desired larger loans and had the financial stability to make repayments. . . . Because the needs of small borrowers were often unmet by legal lenders, the small loan market remained in major cities."[68] This market gave rise to a breed of creditor wholly unlike the salary lender. No longer did illicit lending wear the trappings of legality. Nor did openness or threats of mere legal sanctions characterize consumer lending. Loansharking had become the province of organized crime,[69] and fear of physical reprisals for nonpayment had become its pre-

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[66]North and Miller, supra note 29, at 195.

[67]Haller and Alviti, supra note 48, at 140.

[68]Id. at 141. See also Nugent, supra note 55, at 7 (discussing how enactment of small loan acts in certain states increased loansharking activities in unregulated areas).

[69]For a questionable explanation of the limited effect of small loan laws on the emergence of organized crime, see Columbia Journal, supra note 8, at 103 ("[T]hese laws have two shortcomings. First, the amount of a loan which is subject to the statutory prohibition is limited. Second, the penalties for making small loans in violation of the statute are light.").

dominant feature.[70]

In 1935, then-special-prosecutor Thomas E. Dewey initiated a wave of prosecutions aimed at racketeer loansharks providing illegal credit--and often bloody beatings--to consumer borrowers.[71] Despite Dewey's efforts, organized loansharking proliferated.

c. The Maturation of Organized Loansharking

Historians have documented incidents of underworld loans

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[70]Thomas Dewey, in his autobiography of the "racket-busting" 1930's, described the violence used by the new breed of loansharks:

> The loan sharks organized their racket into a big business. The gangsters broke heads and cut men with knives and made their victims lose their jobs. . . . [A] man had paid $40 on a $20 loan and was still $8.00 behind in the payments. The loan shark walked right into the apartment with two thugs. He took the man's pants off the bed and took the money right out of the pocket. When the man's wife tried to stop him the shark threatened to cut her throat.

T. Dewey, Twenty Against the Underworld 181 (R. Campbell ed. 1974) [hereinafter cited as Dewey].

[71]Dewey's own account is informative:

> In our first sudden swoop, in a field nobody knew we were even looking into, our rackets investigation arrested twenty-two loan sharks in New York City. We held them on 252 counts in 126 meticulously prepared indictments . . . . With the cases parceled out among several deputy assistants, we brought the loan sharks to trial one by one. Within a month they had all been convicted, save one who escaped on a minor technical mistake. . . . During the trials, more complaints were brought in against more loan sharks, and we went out and made more arrests. Before we were through, thirty-six of the sharks had been convicted and sentenced to terms ranging from two to five years' imprisonment.

Id. at 180, 182-83.

to legitimate businesses and criminal borrowers as early as the 1920's.[72] Such loans, however, appear to have been far less significant than the large-scale illicit consumer lending that marked the early 1930's. Once established, however, consumer-oriented loansharking enterprises expanded into new markets. Increased aggregations of capital facilitated larger, and therefore more profitable, loans. The repeal of prohibition in 1933 and the proliferation of gambling and narcotics trafficking increased the pool of capital--and personnel--available for carrying on the loansharking activities of organized crime.[73] Finally, the Depression resulted in both a scarcity of capital for licit loans and a staggering demand for credit, particularly among undercapitalized small business.[74]

This cluster of factors allowed organized crime to make substantial inroads into markets other than consumer credit. Most importantly, racketeer loansharks began pouring cash into legitimate businesses. In addition, the rise of gambling provided two additional classes of customers for loanshark operations:

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[72] See Haller and Alviti, supra note 48, at 141; N.Y. Commission, supra note 14, at 7.

[73] N.Y. Commission, supra note 14, at 7. Richard Hammer has also recognized this point. R. Hammer, Playboy's Illustrated History of Organized Crime 136 (1975) [hereinafter cited as Hammer] ("[T]he underworld during the depression probably had the biggest stash of liquid assets in the nation. It was money waiting to be put to work to earn even more money in an upward-spiraling cycle.").

[74] Hammer, supra note 73, at 137 ("[A]fter the Wall Street debacle, the shylock's clientele expanded to include many respectable men in business and industry who had nowhere else to turn . . . .").

unlucky bettors and unlucky (or unskilled) bet-takers.[75] Thus, syndicate members began lending to each other, and this too significantly changed the nature of loansharking in the United States.

Depression-era loansharking operations sometimes simultaneously served an assortment of customers. The candy store racket of Sam "The Dapper" Siegel and Louis "Tiny" Benson illustrates such an operation.[76] Siegel, working for underworld boss Abe Reles,[77] established a loansharking front in the candy store of his mother, Rose Gold. Benson, stationed at crap games, referred unfortunate debtors to the candy store. In addition, loans were readily granted to neighborhood businesses and individual borrowers. The terms of candy-store loans demanded that the borrower issue to Rose Gold six checks, post-dated one week apart, totaling the principal of the loan plus 20%. Simultaneously, the debtor received a check from the candy store for the full amount of the loan. Including compounding, the effective annual interest rate amounted to 262 percent.[78]

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[75] See N.Y. Commission, supra note 14, at 7; Hammer, supra note 73, at 133.

[76] J. H. Amen, Report of Kings County Investigation, 1938-1942, at 178-80 (1942). See also Haller and Alviti, supra note 48, at 146-47.

[77] Abe "Kid Twist" Reles was a member of Murder, Incorporated, a band of Brooklyn mobsters responsible for a number of gangland slayings. This group had strong connections with the Cosa Nostra. P. Maas, The Valachi Papers 172 (1968) [hereinafter cited as Maas].

[78] See Small Business Hearings, supra note 3, at 38 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County).

By the 1950's substantial loansharking operations existed in numerous American cities,[79] and in 1964 one state investigation commission concluded that loansharking had become "a major and most lucrative operation of the criminal underworld."[80]

D. Loansharking Operations

The classic street transaction is the six-for-five loan in which a "steerer" refers a prospective customer to the local loanshark. Bartenders, doormen, cab drivers, and others in daily contact with potential borrowers receive a small fee for this service.[81] The borrower, upon receiving the loan, is instructed to return one week later with the amount borrowed plus 20 percent interest.

The six-for-five is an example of a "vig" loan, requiring payment of a weekly interest charge, with principal to be repaid in a single lump sum. The other common type loan, the "knock-down," involves a specified schedule of repayment, including both interest and principal; a $1,000 loan, for example, might be repaid in 13 weekly installments of $100.[82]

As previously noted, interest rates vary widely for both types of loans. A favorable relationship with the loanshark

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[79] See Seidl, supra note 7, at 62-79.

[80] N.Y. Commission, supra note 14, at 7.

[81] Id. at 27.

[82] See also United States v. Annoreno, 460 F.2d 1303, 1305-06 (7th Cir. 1972) (two types of loans--juice loan, with specified interest per week of 5-10%, and "package deal," usually 50-100% interest).

or a reputation for punctual payments may entitle the borrower to special consideration. Sizeable loans to businesses or prominent individuals bear lower rates, and the loanshark will frequently consider the intended use of the money when assessing interest on substantial loans.[83]

On the whole, however, credentials and collateral are secondary considerations to the loanshark, who holds the physical well-being of the borrower and his family as security for the loan.[84] One loanshark frankly advised a prospective customer that "your body is your collateral."[85] A confessed mob hitman described his own technique of collection; after cutting off a portion of the debtor's ear, he would explain: "If you pay me you can keep the rest of your ear. If you don't pay me I'll have to take it with me. Then the next day I'll take your other ear. Then we'll start on your fingers."[86]

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[83] See D. Cressey, Theft of the Nation 81 (1969) [hereinafter cited as Cressey]. But see Joey, Killer: Autobiography of a Hit-Man for the Mafia 111 (1973) [hereinafter cited as Joey]: "When you borrow money from a shy he doesn't ask you what it's for, he couldn't care less. You use it for whatever you want. All he's interested in is how is he going to be paid back, and how fast."

[84] See United States v. Marchesani, 457 F.2d 1291, 1293 (6th Cir. 1972) (loanshark gave examples of fate of others who failed in repaying loan, "[w]orse things can happen to you. You've got a nice family and a couple of kids."); United States v. DeStafano, 429 F.2d 344, 346 (2d Cir. 1970) (debtor fled, loanshark threatened father, get son to return or he "would be killed so that his son would come home for the funeral. . . . I'll come back here and make you both look like a sieve.").

[85] Cook, Just Call "The Doctor" for a Loan, N.Y. Times, Jan. 28, 1968, § 6 (magazine), at 19.

[86] Joey, supra note 83, at 113.

Such graphic expressions provide effective tools for increasing the likelihood of repayment. In most instances, however, loansharks need rely only on threats and innuendo. Usually the lender's reputation for violence suffices to ensure prompt repayment. Alternatively, the loanshark's physique, weapons, or accomplices may instill the necessary fear in borrowers reluctant to repay.[87]

Loansharks also protect themselves by requiring the equivilent of a cosigner for loans to first-time borrowers. The cosigner is often the individual who introduces the borrower to the loanshark; he vouches for the borrower and becomes liable to the loanshark in the event of default. This approach reflects the business-like trend in loansharking techniques. As Joseph Valachi stated in describing his loansharking enterprise, "I tried to run it as a business. I'm not looking to beat up somebody."[88]

Threats of violence, more than beatings or murders, protect the financial interests of the loanshark; borrowers are far more likely to repay their loans if kept alive and working. Although

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[87] Id. at 111-12:

> If you lend money out you'd better be strong enough to collect it. The ability to apply the proper amount of muscle is what separates the amateurs from the professionals. . . . Once a customer is convinced the muscle is there he'll almost always pay. It's only when he doubts that it is there that muscle has to be applied.

See also Seidl, supra note 7, at 51 n.3.

[88] Maas, supra note 77, at 159-60.

occasional violence secures the reputation of the loanshark and discourages defalcation,[89] excessive force intimidates prospective borrowers and increases the likelihood of police investigations.[90] Rather than inflict serious physical damage, the loanshark prefers to impose financial penalties on the delinquent borrower.[91] By adding missed interest payments to the principal outstanding, the loanshark increases both the regular interest due and the amount of the loan to be repaid.[92]

The loanshark customer unable to meet his obligation may on occasion be able to renegotiate his loan through the device of a "sit down." Although "sit-downs" are used primarily to resolve intra-syndicate disputes,[93] outsiders unable to pay

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[89]Loanshark Sam DeCavalcante discussed the problem of a borrower who had refused to repay. He told his cousin that he "might shoot a couple of blanks . . . in an effort to scare him." DeCavalcante also admitted that he had previously "hit [the borrower] across the face, breaking his teeth." Transcripts of the conversations of Samuel DeCavalcante, Nov. 11, 1964. See also United States v. Benedetto, 558 F.2d 171, 174 (3d Cir. 1977) (debtor threatened with pistol, punched in head, "smacked around," house ransacked).

[90]Fred Graham highlights this point. Saperstein, a victim of loansharks wrote two letters to the F.B.I. after receiving threats that he and his family would be killed or maimed if he failed to pay. F. Graham, The Alias Program 19 (1970) [hereinafter cited as Graham].

[91]See United States v. Zito, 467 F.2d 1401, 1402-03 (2d Cir. 1972) (interest rate of 5% per week, late charges of 1% per day; after payment missed, amount treated as new loan with new interest added on).

[92]Valachi explained, "You find, as you go along, that most of these people get in the habit of reborrowing before they pay up." Mass, supra note 77, at 101. This reloan is called a "sweet" loan. See notes 915-916 and accompanying text infra.

[93]See M. Hellerman, Wall Street Swindler 178 (1977) [hereinafter cited as Hellerman].

their debts have sometimes been directed to this forum to be "let off the hook."[94] In such cases, the syndicate arbitrator establishes a figure for full settlement. According to one account, this figure normally exceeds the initial loan, often ranging as high as three to four times that amount.[95]

In lieu of a final-settlement sit-down, the loanshark who has stripped the borrower of cash reserves, may agree to "stop the clock."[96] By temporarily suspending vigorish payments, the loanshark allows the borrower to improve his financial position; after a pre-determined period of time, however, the borrower must resume repayment. If the loanshark is generous, he will not compound interest during the leniency period.[97] Frequently, however, the loanshark adds missed vigorish to the principal, thus increasing both future installments and the balance of the loan.[98]

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[94] But see United States v. DeCarlo, 458 F.2d 358, 361 (3d Cir. 1969) (victim beaten at sit down, told "to pay $5,000 every Thursday and the entire $200,000 by December 13, 1968 or [he] 'would be dead.'").

[95] N.Y. Commission, supra note 14, at 13. See also Graham, supra note 90, at 18.

[96] Small Business Hearings, supra note 3, at 6 (statement of Ralph F. Salerno, Consultant, Nat'l Council on Crime and Delinquency).

[97] Cressey, supra note 83, at 84.

[98] Organized crime figures in Massachusetts do not appear to believe in "stopping the clock." Says Charles Rogovin, expert on organized crime for the Massachusetts attorney general,

Profits produced by loansharking and other illicit underworld operations provide organized crime with a large portion of its lendable funds. Loansharks, however, may also utilize legitimate lending institutions, including banks, to generate additional capital.[99] The New York State Commission of Investigation disclosed a racket whereby John "Gentleman Johnny" Massiello used at least $1.5 million from a single branch bank to finance his loansharking operations.[100] A representative borrower, shunned by commercial creditors, sought a business loan from Massiello. Massiello, in exchange for a $6,000 loan, demanded a promissory note for $8,000. This note was taken to the bank, where, with the assistance of a corrupt bank officer, the note was discounted at a rate of six percent. Massiello gave $6,000 to the borrower, and pocketed $2,000. Thus Massiello received instant repayment of principal plus a generous rate of interest; meanwhile collection was deferred to the bank. In

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> All other Mafia families have a tradition which they call "stopping the clock." That is, when you're bled dry, they stop the clock on the interest, and just let you give back the principal. They stop short of killing, on the theory that a dead man can't pay. But not here. They're totally ruthless about loanshark debts.

E. Reid, The Grim Reapers 66 (1969).

[99]Working with the cooperation of a corrupted bank officer, the loanshark secures credit for the borrower at a commercial bank or thrift institution. A service fee, the loanshark's instant vigorish, is deducted from the top. The borrower is responsible only to the bank, and the loanshark has completed his transaction at no personal risk. See Seidl, supra note 7, at 33-34; N.Y. Commission, supra note 14, at 73-75.

[100]N.Y. Commission, supra note 14, at 72-73.

addition to discounting third-party notes, Massiello and the corrupt loan officer, using dummy corporations and a variety of names, engineered over $750,000 in loans, thus vastly expanding the capital base of their loansharking enterprise.[101]

Unlike some organized criminal activities, loansharking does not necessarily require an extensive operational organization; nor does it require an established facility, a marked degree of experience, or specialized training. Mere access to capital generally suffices to operate a loansharking business. Even for small operators, however, organized crime contacts or affiliations are helpful and frequently necessary to ensure collection of overdue accounts. Moreover, most substantial loansharking enterprises involve hierarchical allocations of function and authority and established entitlements to a percentage of the take.

As in almost all sophisticated syndicated crime, the major underworld figures who profit from loansharking are well-insulated. The boss receives a substantial return at minimum risk by entrusting money to his lieutenants, commonly assessing interest of one percent per week.[102] In larger corporate loans,

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[101] Id.

[102] See Salerno and Tompkins, supra note 17, at 229, 232.

> The Boss invited ten of his trusted lieutenants to a Christmas party at his home. After an excellent dinner he had a suitcase brought into the dining room and counted out $100,000 in cash for each of the ten men. He said: "I want 1 percent a week for this. I don't care what you get for it . . . ."

lieutenants often deal directly with the ultimate borrower. More often, however, lieutenants serve only as middlemen, passing money along to soldiers and street distributors at 1-1/2 percent to 2-1/2 percent weekly.[103] Street loans are handled solely by this "third echelon," which is free to charge whatever rate of interest it finds the market will bear.[104]

Each participant in the hierarchy of distribution is an independent contractor, responsible for full repayment of financial obligations. By lending a boss's money, however, the loanshark benefits from his superior's backing and position of authority and influence should an intrasyndicate dispute arise. Such support may not exist when a syndicate loanshark lends his own money and fails to share the profits with his bosses.[105]

> He did not record any names; they were all old friends. He did not have to record the amount given out. His only problem at the next party will be finding more good men to lend out the money that he will earn during the year.

Id.

[103] Columbia Journal, supra note 8, at 94.

[104] Salerno and Tompkins, supra note 17, at 229.

[105] Some underworld figures like to have it both ways. Michael Hellerman relates the following example:

> Lombardo . . . lied to Buster constantly about the loan-shark money they had on the street together. He'd put out forty shylock loans at say $5,000 apiece and then he'd call Buster up and tell him he'd just put out ten loans at $5,000. Buster would mark it down in his book since he was supposed to get a percentage of all of Lombardo's business. Now if any of the forty loans

At the lowest levels of loansharking, distributors sometimes use borrowers to solicit business; debtors in arrears may be asked to generate new business as part of their debt obligation.[106] Alternatively, loansharks may utilize contacts in the community to track down borrowers. These "runners," frequently employed in factories or in service industries, work for the loanshark on a part-time basis. A working man, temporarily in need of cash, will seek out the familiar runner. For his part in the transaction, the runner receives a small percentage of the profit.[107]

There is strong evidence of specialization by loansharks. While some deal only with legitimate businessmen, others prefer illegal entrepreneurs. One medium-level loanshark dealt mainly with fur dealers. Another lent funds almost solely to bookmakers. The reasons for this phenomenon probably relate to the loanshark's connections (persons tend to refer new customers from their own industry), his geographical domain (for example, the waterfront), and his area of expertise (which facilitates evaluation, and possible disposition, of collateral).

> went bad, Lombardo would tell Buster that the bad loans were among the ten he'd told him about.

Hellerman, supra note 93, at 219.

[106]One heavily indebted borrower, Nathan Sackin, agreed to become a "frontman" for his loanshark John Sonny Franzese. Sackin recruited Gerald Wolff, an employee of a stock brokerage house. When Wolff fell behind in his payments he was forced to recruit new customers for Sackin. Small Business Hearings, supra note 3, at 40 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County).

[107]Kaplan and Matteis, supra note 45, at 183.

E. Loansharking Customers

1. The Legitimate Individual

Driven from legitimate credit sources as poor risks, respectable members of the community may be compelled to turn to the loanshark. Usually considered a "victim" rather than a "customer," the individual borrower surprisingly tends to be unaware that illicit activities provide the source of the loanshark's capital.[108] Similarly, the customer frequently fails to recognize that the extortionate interest he surrenders contributes to the capital base used to provide further illicit loans.[109]

Typically, the individual borrower seeking limited non-business credit is a lower class urban laborer.[110] For years, the waterfront has provided a haven for loansharks dabbling in this market for small, personal loans. Underworld financiers provide a "book," or operating capital, to pier guards, checkers, hiring agents, or other longshoremen who have easy access to workers on the docks.[111] The pier operator, known as the "pusher," must account to the financier on a weekly basis for profits on the established book. The pusher charges a standard interest

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[108] Small Business Hearings, supra note 3, at 9-10 (statement of Ralph F. Salerno, Consultant, Nat'l Council on Crime and Delinquency).

[109] ITT Research Inst. & the Chicago Crime Comm., A Study of Organized Crime in Illinois 142 (1971).

[110] Columbia Journal, supra note 8, at 97. The other two identifiable classes of borrowers cited by the Note's author are small businessmen and heavy gamblers.

[111] N.Y. Commission, supra note 14, at 77.

rate and is fully responsible for the collection of payments.[112] Late fees and penalty charges add to the woes of the borrower; pushers also employ strong arm tactics to curb defalcations.

Another collection technique draws directly upon the salary of the longshoreman. Due to the transient nature of his job, the longshoreman is known to his employers primarily by social security number. Employers credit earnings to this number, and the worker collects his wages at the end of the pay period by presentation of a payroll identification card. By obtaining the card from the worker, the loanshark can extract payments directly from the payroll envelope.[113]

The docks have proven especially lucrative for the loanshark. Although individual loans are small, a large volume of pushers generates sizeable profits.[114] Customer access to cargo may also attract the loanshark since pilfered goods are frequently accepted in settlement of overdue debts. The longshoreman forwards stolen merchandise to the loanshark who credits the goods at a fraction of their legitimate market value toward the borrower's overdue account.[115]

Other non-business loans are the result of gambling debts

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[112] Id.

[113] Id. at 78.

[114] Two brothers working as dock watchmen in New York were estimated to have operated a $150,000/year racket. When the brothers were arrested, they had close to $4,000 in their pockets--a significant sum for men earning only $4,400 a year in their legitimate employment. N.Y. Times, Nov. 14, 1958, at 54, col. 6.

[115] N.Y. Commission, supra note 14, at 79.

incurred by more affluent citizens. After absorbing inevitable losses against the odds, the gambler who plays on credit may be compelled to seek out illicit lenders. Indeed, operators of bookmaking rings enter into ongoing relationships with loansharks[116] whereby losers, unable to pay, are referred for immediate credit. Other loansharks are stationed at dice and card games to assist unlucky rollers. Resulting on-the-spot loans, usually payable within 24 hours, involve interest rates as high as ten percent.[117]

Tactics in collecting non-business loans are often ruthless. One man who borrowed $1,900, paid $14,000, and still owed $5,000 in late fees and penalties.[118] The victim, hopelessly in arrears on a staggering debt, was offered a solution by the loanshark. Following the accidental electrocution of the borrower's son in a railroad yard, the loanshark suggested that the borrower sue the property owner; damages recovered in the suit were assigned to the shark.[119]

Loansharks frequently coerce delinquent customers into committing criminal acts to satisfy their debts. Individuals seeking employment are sent to brokerage houses, from which they can steal negotiable securities. In one case, a loanshark forced

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[116] Seidl, supra note 7, at 46-47.

[117] Cressey, supra note 83, at 80.

[118] Small Business Hearings, supra note 3, at 53 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County).

[119] Id.

an attorney to serve as a bookmaker in repayment of his debt.[120] A sportscaster unable to meet his loan obligations, was asked to steer affluent associates to a fixed dice game.[121] A hairdresser with a wealthy clientele provided inside information--such as descriptions of a customer's jewelry, her maid's day off, and her husband's working hours--to an organized burglary ring.[122] A city commissioner awarded lucrative public contracts to a loanshark's designee.[123] A businessman offered to burn down his establishment in order to collect the insurance proceeds to satisfy his debt.[124]

2. The Criminal Borrower

Joseph Valachi in explaining his technique for choosing among potential customers, stated a preference for lending to fellow criminals: "At one time I had around 150 regular customers. I got rid of the ones that were headaches and kept the ones that were no trouble--bookmakers, numbers runners, guys in illegal stuff."[125]

The loanshark provides necessary working capital and emergency funds to the criminal, who, unlike the legitimate business-

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[120] Cressey, supra note 83, at 85.

[121] Id.

[122] N.Y. Commission, supra note 14, at 42.

[123] United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969).

[124] Transcripts of the conversations of Samuel DeCavalcante, June 3, 1965.

[125] Maas, supra note 77, at 160.

man, is, for the most part, foreclosed from obtaining capital from licit lenders.[126] This monetary web, woven among loansharks and criminal borrowers, supports a vast array of criminal ventures, bolstering and stabilizing the underworld economy.

Bookmakers in particular depend heavily on the loanshark. Despite his edge, the bookmaker may absorb periodic losses of tens of thousands of dollars.[127] At three to four percent interest per week, the cost of negotiating a sizeable loan may ultimately channel the long-term gambling profits into the pockets of the loanshark.[128]

Drying up illicit capital supplies through concerted investigation and prosecution of organized loansharks may thus have significant impacts on other criminal activities; indeed prosecutorial efforts aimed at other activites may increase loanshark business.[129] Moreover, successful investigation of loansharks can provide valuable leads and evidence for prosecuting other criminals.[130] In one case, records confiscated from a Chicago

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[126] See Columbia Journal, supra note 8, at 98-99 ("The loanshark also provides capital and emergency funds to professional criminals not directly connected with the organized crime family for purposes including purchase of tools, bribery of officials, and payment of bail and legal costs.").

[127] Joey, supra note 83, at 105-06.

[128] Goldstock, Letting the Loan Shark off the Hook, Newsday, Sept. 9, 1977, at 67.

[129] Task Force Report, supra note 18, at 100.

[130] See Dewey, supra note 70, at 183: "Our sudden foray into loan sharking also gave us valuable leads into our chosen major target areas of organized crime and political corruption."

loansharking operation listed 25 previously unknown criminals among customers with outstanding obligations.[131]

3. The Legitimate Businessman

Conventional credit markets, with the assistance of the Small Business Administration, serve the financing needs of most of the nation's small businesses. As in the consumer context, however, restrictions on legitimate credit foster loansharking incursions into business markets. Entrepreneurs seeking venture capital, and small businessmen in need of operating funds may secure a usurious loan by providing as collateral the very businesses they seek to advance.

Businesses characterized by chronic cash flow problems are particularly vulnerable to loanshark predation. Garment manufacturers, for example, produce seasonal goods well in advance of sales. The volatility of fashions renders the goods unattractive collateral for conventional loans. Large orders and incoming shipments require significant cash outlays.[132] Each day from 1:30 to 2:30 p.m., the "panic hour" causes consternation among many garment merchants; at this hour, previously written checks are posted for collection. Cash-short dealers may not qualify for a legitimate loan to cover outstanding checks, and even creditworthy merchants may be hampered by time constraints. Rather than ruin relationships with sup-

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[131] Chicago Tribune, March 6, 1974, at 7, col. 2.

[132] Small Business Hearings, supra note 3, at 66 (statement of Louis C. Cottell, Chief, Central Investigation Bureau, N.Y. Police Dep't).

pliers and legitimate creditors, the merchant turns to a loanshark to obtain the working capital necessary to complete the business transaction.[133]

This extension of credit usually satisfies both parties to the loan. When the merchant sells his newly purchased goods, his revenues amply cover the principal and interest. Trends in fashion or business fluctuations, however, may delay disposal of merchandise and preclude timely repayment. Scissored by exorbitant interest rates and an inability to move his merchandise, the overextended businessman may find himself unable to avoid becoming an unwilling partner of the loanshark.

Regardless of his creditworthiness, any businessman may meet with unexpected capital demands. Often these demands are urgent; the businessman may therefore seek temporary services from the loanshark while arranging for long-term legitimate financing. In an illustrative case, a manufacturer of double-knit clothing had purchased eight machines for $128,000. The seller provided temporary financing, issuing notes payable on demand. As the double-knit business prospered, the machines depreciated in value. The seller, probably contacted by a potential buyer, demanded immediate payment of the notes or return of the machines. The manufacturer, an honest businessman desperately in need of another $80,000, faced two unpleasant alternatives: to employ the services of a loanshark or to submit to the ruination of his business.

At five percent interest, or $4,000 per week, the loan-

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[133]Miller, supra note 64, at 202-03.

shark was expensive. In two weeks, however, the manufacturer was able to secure legitimate bank financing and eliminate his debt. He was fortunate; his calculated gamble culminated in satisfaction of all parties.[134]

For three brothers in business together, financial obligations to a loanshark proved less productive. After borrowing $150,000 from a loanshark for a business venture, they allowed the interest to accumulate. Within a year, after paying $165,000 in principal and interest, the brothers still owed $124,000. After one of the brothers was kidnapped, the loanshark demanded and received an additional promissory note for $200,000.[135]

Business susceptibility to the loanshark is not confined to companies confronting cash-flow difficulties. Personal loans to owners, officers, or key employees may provide the stepping stone for infiltration of unsuspecting enterprises. Money borrowed from loansharks for gambling debts, hospital bills, or other personal reasons can precipitate business disaster.

F. Loanshark Infiltration of Businesses

Syndicates dabble in a wide range of businesses for a wide range of reasons. In 1951, the Kefauver Committee of the United States Senate identified approximately 50 industries infiltrated by organized crime.[136] This list runs the gamut of American

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[134] Joey, supra note 83, at 108-09.

[135] Small Business Hearings, supra note 3, at 114-19 (statement of Robert J. Walker, Chief Investigator, Ill. Crime Investigation Comm'n).

[136] Senate Special Comm'n to Investigate Organized Crime in Interstate Commerce, Final Report, S. Rep. 725, 82d Cong., 1st Sess. 152 (1951).

businesses, including manufacturing, services, finance, entertainment, and media. The business affiliations of criminals attending the 1957 meeting at the Apalachin estate of underworld figure Joseph Barbara illustrates the scope of legitimate business infiltration. Nine men present operated coin-machine businesses; sixteen were in the garment industry; ten owned grocery stores; seventeen ran bars or restaurants; eleven were in the olive oil and cheese importing business; nine were in the construction business; others held interests in automobile agencies, coal companies, entertainment, funeral homes, horses and racetracks, linen and laundry enterprises, trucking, waterfront activities, and bakeries.[137]

Clearly, the national scope of organized crime's business operations constitutes a sizeable intrusion into the marketplace. Indeed, some observers contend that the gains to organized crime from legitimate operations surpass profits generated by illegitimate activities.[138]

While this monograph focuses on extortionate and usurious credit transactions, loansharking is only one organized crime tool employed to penetrate the business community. Organized crime has infiltrated the marketplace through legitimate purchases of ongoing businesses. Less amicable infiltration tac-

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[137] Cressey, supra note 83, at 100; Report on the Activities and Associations of Persons Identified as Present at the Residence of Joseph Barbara, Sr., at Appalachin, New York, on November 14, 1957, and the Reasons for Their Presence (1958) (Report to the Governor of the State of N.Y. by the Comm'r of Investigations).

[138] Grutzner, How To Lock Out the Mafia, 48 Harv. Bus. Rev. 49 (1970).

tics, however, appear more often. In part, these techniques depend on the characteristics of the "target" business. The following includes several important factors that may facilitate organized crime infiltration:

(1) Unorganized, inaccurate bookkeeping and records invite embezzlement, theft, and pilferage. Using these techniques, employees connected with organized crime can siphon off business assets. Stock brokerage houses, plagued by internal security problems, fall into this category.[139]

(2) Businesses with difficulties of inventory or cash control, such as discotheques, restaurants, and bars, also facilitate "skimming" of profits through pilferage and fraud. This quality renders these businesses especially attractive to organized crime.

(3) Dependence upon a single supplier often invites organized crime infiltration. By establishing localized monopolies, syndicates may "tie" other goods or services to the monopolized product. In addition, businessmen may have to turn to criminal monopolists to obtain products unavailable in legal markets.

(4) Small businesses forced to deal with powerful unions are particularly vulnerable to syndicate infiltration. By dominating local unions, syndicates can force profitable concessions from businesses eager to avoid labor problems.[140]

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[139] W. Mullan, The Theft and Disposition of Securities by Organized Crime 24 (1975) [hereinafter cited as Mullan].

[140] Terry and Gene Catena, owners of the Best Sales Company, attempted to market a detergent product to the Great Atlantic and Pacific Tea Company. Best Sales, a brokerage

(5) Businesses that engage in substantial credit buying attract organized crime by providing excellent vehicles for bankruptcy schemes and other frauds.[141]

(6) Businesses suited as fronts for illegal activities --such as hotels, bars, nightclubs, and small storefronts-- facilitate a variety of organized crime activities. Central locations and numerous patrons render these facilities well-suited for gambling, loansharking, and narcotics operations.[142]

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firm for manufactured products, attempted to sell the detergent to A&P which would have retailed the soap under its own labels. Commissions for the transaction totaling one and one-half million dollars over ten years were to be granted to Best Sales in consideration of its promotional efforts.

"Sales agents" Joe Pecora and Irving Kaplan negotiated for Best Sales. Pecora, an organized crime figure and boss of Teamster Local 863, and Kaplan, the head of Amalgamated Meat Cutter's Local 464, supervised contracts with A&P. Kaplan advised A&P officials that the meat cutters' contract, soon to be renegotiated, might encounter hindrances if the detergent were not purchased. Pecora asserted that Teamsters would not cross meat cutters' picket lines.

While A&P tested soap samples, the Catena brothers opted for more persuasive techniques. During a period of a few months, two A&P store managers were murdered, and sixteen A&P stores and warehouses were burned. At this point, the Justice Department interceded in the case, and the Catena brothers abandoned the detergent business. A&P was spared from using the detergent. Melvin, Mafia War on the A&P, Readers Digest, July, 1970, at 71-76.

[141]For example, the seasonal nature of the garment industry, the rapid turnover of cash and merchandise, as well as sudden demands of style changes, often create situations where immediate cash financing is necessary, over and above ordinary credit limits. Due to its unique character, this industry is a fertile field for the usurer. Legitimate garment manufacturers often turn to loansharks for ready cash to tide them over a transition period. N.Y. Commission, supra note 14, at 68.

[142]K. Bers, The Penetration of Legitimate Business by Organized Crime 31 (1970) [hereinafter cited as Bers].

1. Methods of Loanshark Infiltration

Using ostensibly legitimate means, the loanshark may simply assume ownership of the business in satisfaction of the businessmans's debt. Joseph Valachi, in need of a tax cover to explain his affluent lifestyle, entered the dress manufacturing industry following a loan to a Bronx factory owner. The owner, a regular customer of Valachi's loansharking operation, was delinquent in his weekly payments. Valachi, eager to assume partnership in the operation, supplied additional investment capital and labor "counseling";[143] these contributions, plus the cancellation of the manufacturer's debt, entitled Valachi to full partnership status.[144]

The loanshark may infiltrate a business through advantageous placement of a confederate. In the million-dollar Murray Packing bust-out,[145] Joseph Pagano played this role for syndicate boss Joseph Castellana.

In other cases, loansharks infiltrate businesses clandestinely. An employee of a "target" business may steal company property or secretly provide company services to satisfy his obligation to the loanshark.[146] Stacks of securities

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[143] Maas, supra note 77, at 166-68. Valachi's "counseling" included preventing union workers from entering the shop.

[144] Id.

[145] Salerno and Tompkins, supra note 17, at 235.

[146] An employee of the Gillette Safety Razor Company regularly paid off his debt by setting up weekly thefts of razor blades.

in brokerage houses provide a prime target.[147] To satisfy his debt, the brokerage house employee delivers stolen securities to the loanshark, who reduces the borrower's obligation by a small percentage of the securities' value.[148] A more invidious form of infiltration occurs when the insider deals in the manipulation of securities markets.[149]

Gillette's practice of "dumping" obsolete blades at sea when the company introduced a new model led to a major coup by the loansharks. Informed by the inside man that the blades had been shipped to a salvage company in Boston Harbor, the shark arranged to buy the millions of blades for a half a cent each. He eventually sold them for 2.5 cents each, a 400% profit. In the words of the loanshark: "The razor-blade operation was a helluva good score, and we would never have pulled it off it that kid hadn't owed me money and come in to tell me what was happening at Gillette." V. Teresa, My Life in the Mafia 135-36 (1973) [hereinafter cited as Teresa].

[147] Organized Crime and Stolen Securities: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 92d Cong., 1st Sess. 74 (1971) [hereinafter cited as Senate Hearings on Organized Crime].

[148] Bull Market on Thievery, Forbes, Dec. 15, 1968, at 34-37.

Former Attorney General John Mitchell estimated that in 1969 and 1970, $400 million worth of securities were stolen from brokerage houses. Mullan, supra note 139, at 22. In one case, for example, an employee working for an organized crime figure walked out of his company's offices with $2.5 million worth of securities in his briefcase. Senate Hearings on Organized Crime, supra note 147, at 74.

[149] Mob figure Arthur Tortorello, using a loan to an indebted broker as leverage, arranged for the brokerage house to sell stock in a worthless company. The potential loss to the public within the first year of operation was estimated at $1.5 million. N.Y. Commission, supra note 14, at 59-65. Such schemes are, unfortunately, not rare.

> The mob's shylocks for years have had a field day on the Street lending money to clerks and brokers who can't get money from banks or who

Infiltration is the product of keen opportunism, and other criminal activities may set the stage for loanshark takeovers. The Nylo-Thane Plastics infiltration, coupling an old-fashioned kidnap-extortion plot with a sophisticated loansharking operation, illustrates how the loanshark can capitalize on other criminal maneuvers.[150] Maurice Minuto, the president of Nylo-Thane Plastics Corp., required capital for a business expansion.[151] Minuto contacted Julius Klein, who had been identified to Minuto as a possible investor. At a restaurant meeting between the prospective business parties, Klein and his assistants confronted Minuto with knives and a gun. Klein announced, "We're going to kill you unless you give us $25,000."[152]

After a night's confinement in a motel room, Minuto issued a $25,000 company check to his captors. To arrange for the reimbursement of Nylo-Thane, Minuto visited John "Gentleman Johnny" Masiello, a major loanshark. Masiello directed Minuto to the Royal National Bank whose president and board chairman was a friend of Masiello. Masiello received more than half of Minuto's

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> have their credit stretched too thin to make ends meet. How else do you think the mob was able to steal billions of dollars' worth of securities from Wall Street in the last decade? How else could a swindler like myself move stocks, get them placed on the pink sheets, and manipulate the prices?

Hellerman, supra note 93, at 363.

[150]The description of the Nylo-Thane Plastics infiltration is taken from Bers, supra note 142, at 18-19.

[151]Id.

[152]Id.

$50,000 loan in payment for his services. Induced by Masiello, Minuto borrowed additional funds from Royal National eventually assuming obligations to the bank for $515,000, of which he received only $13,500. In the meantime, Minuto had given to Masiello, and pledged to the bank, Nylo-Thane stock worth $1.3 million.[153]

2. Purposes of Syndicate Infiltration of Businesses

Syndicate goals in moving into legitimate businesses are numerous. This monograph isolates the four most common reasons for syndicate infiltration: establishing a "front" to conceal illicit activities, obtaining specific services or concessions from employees or other insiders, "skimming" pre-tax dollars from company profits, and "busting out" the business to profit at the expense of company creditors.

a. Operating a "Front"

Frequently the loanshark will continue the legitimate operations of an infiltrated business as a "front" for illegitimate activities. By maintaining an interest in a legitimate enterprise, the loanshark generates a legal income to display to the Internal Revenue Service.[154] Should the IRS question bank accounts or expensive living habits, the loanshark can point to his ownership of, or employment by, a legitimate company.

Moreover, a "legitimate" company run for profit with unfair

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[153] Id.

[154] See R. A. Nossen, The Seventh Basic Investigation Technique, Analyzing Financial Transactions in the Investigation of Organized and White-Collar Crimes (Appendix D of Law Enforcement Assistance Administration, The Investigation of White Collar Crime (1977)).

competitive advantages, such as control of well-placed labor officials[155] and access to stolen property for inventory,[156] may prove highly profitable in and of itself. Operation of legitimate businesses can conceal illegality in other ways. Loansharks and other racketeers use legitimate businesses to launder illegally obtained cash. Similarly, by serving as high-paid "consultants," organized crime figures can collect loansharked debts or receive extorted payments with ostensible legitimacy.[157]

Contact with a legitimate business also creates an air of respectability for the organized crime figure. By acquiring

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[155]Access to the right person may prove extremely beneficial to a businessman--as the following story suggests. In 1970, the T. W. Bateson Company, a general contractor, hired members of Union Local 210 of the International Hod Carriers, Building, and Common Laborers of America to construct a federal office building in Buffalo, New York. Labor problems plagued the construction. Absenteeism, padded payrolls, pilferage, time-clock cheating and slow work were rampant. Bateson's efforts to mitigate the problems resulted in a labor walk-out. At the insistence of union members, Bateson hired John Camillieri, a reputed "capo" in Buffalo's Maggadino crime family. Camillieri was paid $7.10 an hour for his assistance as a "job coordinator." Almost immediately, the laborers resumed their places at the site, working with greater efficiency than even the Bateson officials had anticipated. Time, Aug. 30, 1971, at 21.

[156]"Hijacking is big business for the mob. Most of the hijack loads, whether it's cigarettes, liquor, furs, appliances, or food, are shipped by the mob to discount stores they own or have connections with." Teresa, supra note 146, at 137.

[157]A restaurant owner, who took out a 5%/week loan, was required to employ SGS Associates, a labor relations firm fronting for Carlo Gambino. Despite the absence of any labor problems, the owner paid $1,000 a month for this service. Small Business Hearings, supra note 3, at 48-49 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County).

the Lido, a fashionable restaurant, Joseph Valachi joined the flow of syndicate criminals to the suburbs. Valachi, describing his status as a respectable businessman, said, "As far as the neighbors are concerned, I was always a gentleman. . . Mildred [Valachi's wife] told them that I had the Lido, so they figured I was just a guy who ran a restaurant."[158]

Most importantly, a legitimate business gives the racketeer a place to hang his hat and a reason for engaging in otherwise suspect activities. As a "front" in the broadest sense, a legitimate operation provides the loanshark with an office to conduct his business, a secure location to hold meetings, and an explanation for contacts with businessmen, other criminals, or public officials.

The "legitimate" business also may provide a headquarters for carrying on unrelated criminal operations. The infiltration of a small luncheonette exemplifies this problem. The luncheonette, started by a middle-aged couple in 1960, prospered until a nearby construction project cost the owners a substantial part of their trade.[159] The proprietors, desperately in need of working capital and spending money, borrowed from a local loanshark, Max, "The Wiesel" Lowenstein. Lowenstein, a former member of the Dutch Schultz Mob and "Murder Incorporated," charged the luncheonette owners as much as twenty-five percent interest per week. Felix "Phil" Vizzari, an underling of John "Sonny" Franzese,

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[158]Maas, supra note 77, at 206.

[159]The description of the infiltration of a small luncheonette in Long Island is taken from N.Y. Commission, supra note 14, at 45-50.

replaced Lowenstein as the couple's creditor. At the time, Vizzari was helping Franzese expand his bookmaking and loansharking activities in the area. Predictably, Vizzari began to use the luncheonette as a front for his bookmaking and loansharking business, forcing the proprietors to handle bets.

b. Obtaining Services and Concessions

Like complete takeovers of legitimate businesses, small-scale infiltrations can generate large-scale profits for the loanshark. Such arrangements involve neither racketeer ownership nor racketeer control; rather, the legitimate businessman grants special concessions to the loanshark involving the use or operation of his company's facilities.[160] Examples of small-scale infiltration are numerous. A Louisiana man loaned money to restaurant and tavern owners, who in turn accepted cigarette machines, jukeboxes, and pinball machines from organized crime.[161] The owner of a warehouse, deeply in debt to a loanshark, allowed the shark to use his facility to store hijacked trucks and merchandise.[162] A Philadelphia restaurant owner, asked why he bought

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[160] One restaurant owner quickly fell into arrears on his loanshark debt (see note 157 supra). At the suggestion of the loanshark, the owner purchased his meat and liquor from new suppliers, who raised prices well above competitive standards. The restaurant became an outlet for stolen and diseased meat, as well as hijacked liquor shipments. A new headwaiter, the son of one of the "investors," was used as a lookout for the restaurant's newly established bookmaking operation. Small Business Hearings, supra note 3, at 48-49 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County).

[161] Id. at 20 (statement of Henry S. Ruth, Jr., Prof., Univ. of Pa. Law School).

[162] Id. at 11 (statement of Ralph F. Salerno, Consultant, Nat'l Council on Crime and Delinquency).

a particular brand of food product, noted his debt to the loanshark, saying, "If I bought another brand, my restaurant would be a parking lot tomorrow morning."[163]

c. "Busting Out" a Legitimate Business

Syndicates will sometimes infiltrate a business intending to pirate the company's assets and send it into bankruptcy.[164] Such schemes to defraud company creditors are known as "bust-outs" or "scams." Loansharking may provide the requisite toehold for initiating a "bust-out."

Murray Packing supplied meat, poultry, and eggs to New York area supermarkets.[165] The company, procuring supplies on credit, purchased goods above the level of its cash resources, and within a year of its incorporation, the business stood on the brink of bankruptcy. A salesman for Murray Packing, Joseph Pagano,[166] proposed a solution to the company's financial problem. Pagano steered the principals of Murray Packing to Peter

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[163] Id. at 20 (statement of Henry S. Ruth, Jr., Prof., Univ. of Pa. Law School).

[164] Id. at 49 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County).

[165] The description of the Murray Packing bust-out is taken from Salerno and Tompkins, supra note 17, at 235-36, and E. DeFranco, Anatomy of a Scam: A Case Study of a Planned Bankruptcy by Organized Crime (1973).

[166] Pasquale "Patsy" Pagano was identified by Valachi as a "soldier" in the Geneovese family. Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Government Operations, 88th Cong., 1st Sess. (1963).

Castellana,[167] a lieutenant in New York's Gambino family.

To "save" the faltering company, Murray's principals took out a $8,500 loan from Castellana. The one-percent weekly interest rate, relatively modest by loansharking standards, nonetheless proved unduly burdensome for the cash-strapped company. Unable to meet their financial obligations to either Castellana or other creditors, Murray's principals acceded to an imposed settlement. Joseph Pagano, the company employee who arranged the loan, became one-third owner and president of the company. Pagano, a pawn for the loanshark, Peter Castellana, received authority to write checks and transact company business.

In January and February of 1961, immediately after the Castellana takeover, Murray Packing began to increase its purchases of meat and expand its sources of supply. The company promptly paid suppliers, thus establishing its credit. Murray Packing channeled purchased meat to Pride Wholesale Meat and Poultry Company, a concern owned and operated by Peter Castellana. Pagano, at the insistence of Castellana, transferred the Murray Packing bank account to the bank where Pride Wholesale transacted its business, thus accelerating transfers of funds between the two companies.

In March of 1961, using its favorable credit relations with suppliers, Murray Packing drastically increased its meat and poultry purchases. The new supplies were quickly funneled to Pride Wholesale at prices below the cost to Murray Packing.

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[167] Castellana and his partner Carmine "The Doctor" Lombardozzi were identified by Valachi as caporegines of the Gambino family. Id.

As revenues entered the Murray Packing account, Pagano withdrew them from company use, issuing personal notes to the company.

By May, 1961, Murray Packing was adjudicated bankrupt. The company's liabilities totaled approximately $1,300,000, representing debts to 85 creditors. Assets amounted to $1,060,422, including $750,000 in promissory notes from Joseph Pagano. Pagano and Castellana--as well as the principals in the original business--were all convicted of conspiracy to violate bankruptcy laws.[168]

The Murray Packing "bust out" illustrates the perils to the small businessman of taking usurious loans. It also illustrates the potential profitability of such transactions; from a small loan generating $85 a week interest, organized crime figures were able to bankrupt a company and defraud legitimate businesses of over one million dollars.

Even if loansharking does not provide the initial entry in a bust-out, it may prove useful in consummating the fraud. In the case of the Falcone Dairy,[169] for example, loansharking supplied a source for disposing of "skimmed off" products.

Joseph and Vincent Falcone operated Falcone Dairy Products as a wholesale distributor of soft cheeses in Brooklyn. The Falcones were associates of the New York's Bonnano and Gambino families; these families controlled most of the city's warehouses, factories, and distributorships for mozzarella cheese.

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[168]United States v. Castellana, 349 F.2d 264 (2d Cir. 1965).

[169]The description is based on Kwitny, Pizza Putsch: Vermont's Dairymen Won't Soon Forget the Mafia's Arrival, Wall St. J., Mar. 3, 1977, at 1, col. 1.

In 1959, the Falcones and Joseph Curreri opened a soft cheese factory in Alburg, Vermont. From its formation until 1969, the factory operated within the corporate structure of Falcone Dairy, the sole distributor for the factory's output.

In 1969, the Alburg Creamery became an independent corporation. Nonetheless, Alburg ostensibly held its former course; it continued to purchase milk from Vermont farmers and to ship its products to the Falcone Dairy in Brooklyn. The reorganization, however, worked one significant change in procedure; farmers' cooperatives now billed Alburg directly for milk purchased on credit, while Alburg billed Falcone for cheese shipments.

By 1973, Alburg owed $500,000 to dairy cooperatives for milk purchases. Shortly after the farmers demanded payment, the Alburg plant burned to the ground, and the corporation declared bankruptcy. Creditors examining Alburg's books noted annual cheese shipments to Falcone Dairy valued at an average of about $1,500,000 a year. Accounts receivable indicated that Falcone Dairy had never paid for a large portion of the purchased cheese.

When the creditors, during bankruptcy proceedings, demanded payment of Falcone, its proprietors asserted that 400,000 pounds of cheese, about half the total purchased from Alburg in 1971, had been rancid. Indeed, Falcone's claim of $905,474 in spoilage reversed its position from an accounts receivable debtor to a $48,000 creditor.

Falcone and Curreri had perpetrated a classic "skim-off." Receiving periodic shipments of the uncontrolled company's product for insufficient consideration, the racketeers were

able, over a period of time, to convert the business's assets.

Making the caper work, however, required more than merely obtaining free cheese. Falcone Dairy also had to dispose of the "rancid" cheese without showing a sale on its books. Organized crime's dominance in the pizza industry and standard loanshark tactics facilitated this process. Illegal aliens using loansharked funds had established pizza parlors in New York and New Jersey. Financiers collected usurious rates of interest by charging exorbitant prices for cheese. Pizza parlor borrowers, however, paid other "interest" as well; in this case the controlled businesses provided perfect outlets for hidden shipments of cheese.

d. Skimming Company Profits

Organized crime figures will frequently permit a controlled business to continue operations while using sham transactions to "skim off" its income or assets.[170] Commonly, such schemes presage a bust-out that sends the business, such as Alburg Cheese, into bankruptcy thus defrauding legitimate creditors. Other cases, however, involve more limited incursions. A syndicate figure who has gained control of a business may put himself on the payroll or bill the company for phantom services or supplies.[171]

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[170] See, for example, the recent charges leveled against the principals of the Westchester Premiere Theatre, Wall St. J., June 8, 1978, at 19, col. 3.

[171] One investigation involving a wholesale provision business turned up two hoodlums on the payroll for $200 a week as "truck spotters." When questioned, they had absolutely no idea of what their duties were supposed to be. The owner of the business was drawing only $150 a week. Small Business Hearings, supra note 3, at 65 (statement of Louis C. Cottell, Chief, Central Investigation Bureau, N.Y. Police Dep't).

Such payments provide the syndicate member with a steady flow of income and the business with tax deductions. Loansharks commonly use "skim off" devices, such as collecting payments for "consulting services," to obtain repayment from legitimate businesses.[172] Instead of supplying cash, however, a controlled company may channel its products to the loanshark's designees for nonexistent or inadequate consideration. The operation of the Alburg Creamery exemplifies use of a "skim off" to effectuate a "bust-out."

A classic "skim off" involved the Progressive Drug Company.[173] Pawnee Drug Company purchased Progressive, a legitimate family enterprise, following the death of its founder. Pawnee, created exclusively for the acquisition of Progressive, was owned by Twentieth Century Industries, a conglomerate whose officers were associates of known organized crime figures.

The new ownership quickly switched the company's labor contract from a reputable AFL-CIO union to a local of the Teamsters Union. The owners ordered the vice president of Progressive to add Dominick "Nicky" Bando to the payrolls of the company. Bando received $150 a week as a "warehouse guard," and an additional $100 per week for maintaining labor peace. In addition, the new management required Progressive's vice president to authorize periodic and irregular cash disbursements for merchandise never delivered and services never rendered. Progressive

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[172] See note 157 supra.

[173] The description of the Progressive Drug Company "skim-off" is taken from Grutzner, supra note 138.

"was milked dry for the benefit of underworld figures and other subsidiaries of Twentieth Century Industries" with suppliers who had sold Progressive merchandise on credit eventually left to absorb the losses.

These examples of infiltration reflect a pattern of ever-increasing importance in loanshark operations.

> Today the professionals clearly prefer the quiet rustle of exchanging deeds and titles to the crunch of bones and the explosion of gunpowder. "Why beat the guy to death," says one Baltimore loan shark, "when we can beat him for his business?"[174]

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[174] T. Plate, Crime Pays! 147 (1975).

II.

THE LAW OF LOANSHARKING

A small but growing body of state and federal substantive law specifically addresses the problem of loansharking. Recently enacted laws prohibit extortionate loans and collection practices, while other provisions seek to reach the criminal hierarchy that finances and profits from illegal credit transactions. In some states these fresh attempts at controlling the loanshark complement well-aged criminal usury and extortion statutes. This array of provisions, where in force, is well-adapted to the variations among and practical difficulties of prosecuting illicit lending activities.

A. Extortionate Credit Transaction Laws

1. Historical Development and Basic Principles

Extortionate credit transaction [hereinafter, ECT] laws, a relatively recent innovation, aim directly at the modern loanshark.[175] The ECT approach first surfaced in the federal Consumer Credit Protection Act of 1968;[176] since then, six states have enacted similar statutes.[177]

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[175] See United States v. Perez, 426 F.2d 1073, 1075 (2d Cir. 1970), aff'd, 402 U.S. 146 (1971) (upholding the constitutionality of the federal ECT and companion provisions as "permissible exercise by Congress of its [Commerce Clause] powers . . . ").

[176] 15 U.S.C. §§ 1601-1691 and 18 U.S.C. §§ 891-894, 896 (1976).

[177] Ariz. Rev. Stat. § 13-2302 (Supp. 1977); Colo. Rev. Stat. § 18-15-102 (1973); Conn. Gen. Stat. § 53-390 (1977); Fla. Stat. Ann. § 687.071(4) (West Supp. 1978); 18 Pa. Cons. Stat. Ann. app. § 4806.2 (Purdon 1973); Wis. Stat. Ann. § 943.28(2) (West Supp. 1977).

All existing ECT laws share a distinguishing element: an extortionate "understanding" with regard to an extension of credit. The core of the provision is the definition of this understanding; formulations differ slightly among jurisdictions,[178] but the federal version is typical:

> An extortionate extension of credit is any extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.[179]

The ECT statute is not a usury law in any sense;[180] indeed its forbears, if any, are generic laws proscribing extortion, threats, and coercion. Criminal usury statutes forbid loans accompanied by excessive interest; ECT laws, on the other hand, proscribe any loan consummated against a backdrop of violence.

ECT laws usually accompany kindred provisions proscribing the financing of extortionate credit transactions and the collection of extensions of credit by extortionate means.[181] Some states reinforce this triple threat against

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[178] The states' definitions of "understanding" are found in Ariz. Rev. Stat. § 13-2301(A)(3) (Supp. 1977); Colo. Rev. Stat. § 18-15-102 (1973); Conn. Gen. Stat. § 53-389(6) (1977); Fla. Stat. Ann. § 687.071(1)(e) (West Supp. 1978); 18 Pa. Cons. Stat. Ann. app. § 4806.1(f) (Purdon 1973); Wis. Stat. Ann. § 943.28(1)(b) (West Supp. 1977).

[179] 18 U.S.C. § 891(6) (1976).

[180] H.R. Rep. No. 1397, 90th Cong. 2d Sess., reprinted in [1968] U.S. Code Cong. & Ad. News 2021, 2029 [hereinafter cited as Conference Report].

[181] See, e.g., 18 U.S.C. §§ 893, 894 (1976); Colo. Rev. Stat. §§ 18-15-105, -107 (1973).

the loanshark with straightforward criminal usury laws.[182]

One commentator has called the ECT statute "curious,"[183] and federal courts have encountered considerable difficulty in deciphering its meaning. Surprisingly, no reported decisions apply--or even mention--state ECT provisions.

Because of the absence of state cases, the following discussion will refer only to decisions construing the federal ECT statute. Striking statutory similarities and the federal provision's progenitor role, however, render federal decisions directly relevant to unearthing the meaning of state ECT statutes.

2. Elements of the Offense

Cases dissecting the crime of making an extortionate extension of credit usually identify three elements: (1) making an extension of credit, (2) with the requisite extortionate understanding, while (3) acting intentionally and knowingly.[184] Although the statute aims mainly at loansharks, courts have found its language and legislative history broad enough to bring all lenders within its sweep.[185]

a. Conduct

All ECT laws establish a conduct requirement of making

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[182]Ariz. Rev. Stat. § 13-2208 (Supp. 1977); Colo. Rev. Stat. § 18-15-104 (1973); Conn. Gen. Stat. §§ 37-4, -7 (1977); Fla. Stat. Ann. § 687.071(2), (3) (West Supp. 1978); 18 Pa. Cons. Stat. Ann. app. § 4806.3 (Purdon 1973).

[183]Kripke, Gesture and Reality in Consumer Credit Reform, 44 N.Y.U. L. Rev. 1, 10 (1969).

[184]United States v. Benedetto, 558 F.2d 171, 176-77 (3d Cir. 1977).

[185]United States v. Keresty, 465 F.2d 36, 40-41 (3d Cir.), cert. denied, 409 U.S. 991 (1972).

an extension of credit. The federal definition is typical: "To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred."[186]

The courts have emphasized the words "any debt . . . valid or invalid . . . however arising"[187] in expanding the application of the law beyond typical loans. Gambling debts are included,[188] as are obligations arising from unauthorized use of credit cards [189] or the misappropriation of partnership funds.[190]

In the recent case of United States v. Bufalino,[191] the Court of Appeals held that an "extension of credit" arose when the "victim," Jack Napoli, obtained $25,000 worth of diamonds "in exchange for a series of promises and a worthless check."[192] In the court's opinion "Congress took an

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[186] 18 U.S.C. § 891(1) (1976). Florida defines "Extension of Credit" as the "mak[ing] [of] a loan of money or any agreement for forbearance to enforce the collection of such loan." Fla. Stat. Ann. § 687.071(1)(d) (West Supp. 1978). The Wisconsin ECT provision provides no definition. Wis. Stat. Ann. § 943.28 (West Supp. 1977).

[187] E.g., United States v. Annerino, 495 F.2d 1159, 1166 (7th Cir. 1974).

[188] E.g., United States v. Mase, 556 F.2d 671, 674 (2d Cir. 1977).

[189] United States v. Annerino, 495 F.2d 1159, 1166 (7th Cir. 1974).

[190] Id. at 1166.

[191] Nos. 77-1438, 77-1444, 77-1445 (2d Cir. May 2, 1978).

[192] Id.

exceedingly broad view of what it is 'to extend credit,' . . . . Napoli's diamond swindle certainly gave rise to a claim [within the meaning of the statute]."[193]

The broadest reading of the statutory language, however, appears in United States v. Totaro,[194] where the consideration for the loan failed entirely:

> There is no doubt that [the defendants] entered into an agreement to make the extortionate loan of $2,500. Although the loan may have been invalid because the check was not paid, nevertheless the credit agreement was entered into. We think that is all the statute requires, and that when the agreement was made the crime was complete so that the fact the check delivered to Pickett was bad would not serve to exonerate [the defendants].[195]

b. Attendant Circumstances: The Creditor's "Understanding"

The most unusual and problematic aspect of ECT laws is their requirement that there be an "understanding of the creditor and debtor" at the time of the loan that delaying or failing to make repayment "could result" in violent or "other criminal" reprisals harming "the person, reputation, or property of any person."[196]

As the statutory language indicates, and as the cases have verified, the "understanding" element requires an inquiry into the state of mind of both parties to the trans-

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[193] Id.

[194] 550 F.2d 957 (4th Cir.), cert. denied, 431 U.S. 920 (1977).

[195] Id. at 959 (emphasis added).

[196] 18 U.S.C. § 891(6) (1976).

action.[197] The primary difficulty with the statute rests in shaping and defining that inquiry.

Although the statutory language does not specifically require a "threat" by the creditor, it is tempting to think of the creditor's "understanding" in terms of that classic component of extortion.

Indeed, the Congressional Findings and Declaration of Purpose supports this view: "Extortionate credit transactions are characterized by the use, or the express or implicit threat of the use, of violence or other criminal means. . . "[198] Furthermore, the statute's definition of "extortionate means,"[199] although technically applicable only to the federal prohibition on extortionate collection of loans,[200] uses identical "threat" language, thereby casting light on the elusive "[creditor's] understanding . . . [that violence] could result."[201] Further support for this view comes from the cases, in which courts sometimes characterize the creditor's understanding in terms of "threats."[202]

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[197] United States v. Benedetto, 558 F.2d 171, 177 (3d Cir. 1977).

[198] Consumer Credit Protection Act, Pub. L. No. 90-321, § 201, 82 Stat. 159 (quoted after 18 U.S.C. § 891 (1976)) (emphasis added).

[199] 18 U.S.C. § 891(7) (1976).

[200] Id. § 894 (1976).

[201] Id. §891(6) (1976).

[202] United States v. Annoreno, 460 F.2d 1303, 1309 (7th Cir.), cert. denied, 409 U.S. 852 (1972).

Reading a threat requirement into the ECT statute, however, is at best disingenuous; this is not an archetypal extortion law and far less in terms of creditor behavior is required. In United States v. Annoreno,[203] the defendants argued that since no government witnesses had testified as to express threats, there could be no conviction. The court's response was direct: "Clearly, Congress could not have intended to punish only those loansharks foolish enough to make the terms of the loan explicit and to exempt those who convey the nature of the transaction by subtle hints and innuendo."[204]

> Thus, the inquiry into whether the borrowers had a factual basis for their comprehension of the consequences of default need not be restricted to a search of the record for explicit threats. On the contrary, the inquiry should be whether the record as a whole discloses a reasonable basis upon which the borrowers might have [understood that harm could result].[205]

Annoreno is correct. Had Congress intended to require a full-blown "threat," it could have employed that familiar word; rather it chose the term "understanding" in an obvious effort to catch the many loansharks who operate purely on the basis of implication and veiled suggestion. The Annoreno approach comports with the broad directive of the legislature;[206] requiring an express threat would in large part neutralize companion ECT provisions permitting use of the defendant's

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[203] Id.

[204] Id. at 1309.

[205] Id. at 1308-09 (emphasis added).

[206] See generally Conference Report, supra note 180.

reputation and prior acts to prove the requisite "understanding."[207] Moreover, the court's policy argument has much to recommend it; the most sophisticated and successful loansharks avoid violence and minimize explicit threats.[208]

c. Result: The Debtor's "Understanding"

The normal counterpart to the creditor's "threat" is the debtor's "fear"; many extortion statutes specifically employ both terms.[209] While fear may be a common consequence of extortionate loans, it seems contrary to the language and intent of Congress to read a full-blown "fear" requirement into ECT provisions.

Such statutes require "understanding," rather than "fear," and reading the latter into the former may produce undesirable results. The unflinching borrower, for example, may fully anticipate reprisals, yet feel no fear. More importantly, a government agent doubling as a borrower may "understand" that nonrepayment "could result" in violence, yet experience no fear due to the likelihood of the lender's impending arrest.[210]

Moreover, one should view the fear question within the framework of the entire provision. While some courts have distilled the concepts of "threat" and "fear" out of the

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[207] The federal ECT evidentiary provisions are contained in 18 U.S.C. § 892(b)-(c) (1976).

[208] See, e.g., note 174 and accompanying text supra.

[209] For a list of such statutes, see Appendix B infra.

[210] Under these circumstances, fear may be impossible as a matter of law. See note 338 and accompanying text infra.

understanding requirement, the statute really requires neither; it requires instead a diluted version of both.

The Annoreno court recognized this subtle distinction. Refusing to equate the term "understanding" with "agreement," the court stated: "it should be given its primary meaning of comprehension . . . . Where the threat of violence exists and is comprehended by the victim, the extortionate nature of the transaction is present and punishable under this statute."[211]

This interpretation comports with Congress's choice of the softer term "understanding," a word that suggests an effort to retreat from, rather than embrace, the well-aged but confining rubrics, "threat" and "fear." Moreover, reading the statute's substantive provisions as expanding upon concepts long associated with extortion corresponds with its liberalization of procedures available to prove the elements of the crime.

d. State of Mind

Perhaps because of the subjective inquiry required by the "understanding" element, the ECT statute fails to specify a state-of-mind requirement. Courts interpreting the federal provision, however, have held that the defendant must act "intentionally and knowingly."[212] In United States v. Nakaladski[213] the court fleshed out this standard in an ECT con-

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[211]United States v. Annoreno, 460 F.2d 1303, 1308-09 (7th Cir.), cert. denied, 409 U.S. 852 (1972) (emphasis added).

[212]United States v. Benedetto, 558 F.2d 171, 177 (3d Cir. 1977).

[213]481 F.2d 289 (5th Cir.), cert. denied, 414 U.S. 1064 (1973).

spiracy case: "[T]he government [must] prove . . . that [the] appellants had planned and intended that [the debtor] would understand the possibility that harmful consequences could [follow]."[214]

B. Laws Prohibiting the Collection of Credit by Extortionate Means

1. Historical Development and Basic Principles

Most ECT jurisdictions have complemented extortionate lending provisions with companion laws prohibiting the collection of debts by extortionate means [hereinafter, collection laws].[215] Such a provision first appeared in Title II of the federal Consumer Credit Code of 1968:[216]

> Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
> (1) to collect or attempt to collect any extension of credit, or
> (2) to punish any person for the nonrepayment thereof,
> shall be fined not more than $10,000 or imprisoned not more than 20 years, or both.[217]

Six states have since passed similar statutes.[218]

Whereas the ECT law operates as a modified extortion

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[214] Id. at 297.

[215] Ariz. Rev. Stat. § 13-2304 (Supp. 1977); Colo. Rev. Stat. § 18-15-107 (1973); Conn. Gen. Stat. § 53-392 (1977); 18 Pa. Cons. Stat. Ann. app. § 4806.6 (Purdon 1973); Wis. Stat. Ann. § 943.28(4) (West Supp. 1977). Florida has an ECT law (Fla. Stat. Ann. § 687.071(4) (West Supp. 1978)), but no collection law.

[216] 15 U.S.C. §§ 1601-1691 and 18 U.S.C. §§ 891-894, 896 (1976).

[217] 18 U.S.C. § 894(a) (1976).

[218] See note 215 supra.

or threat statute focused on the extension of credit, "it is the use of extortion in the course of loan collections which is . . . made unlawful by [this] statute. . . ."[219] Although the collection law has provided a valuable federal weapon against loansharking and organized crime,[220] it, like state ECT laws, has yet to surface in any reported state decision.

The following analysis of the elements of the crime will, again, focus on the only available body of decisional law--the cases interpreting the federal collection law.[221]

2. Elements of the Offense

The heart of the collection offense is the use, or threatened use, of force or violence as a means of collecting money lent. "It is the effort of usurious money lenders, or 'loansharks' to seek extralegal methods of enforcing their unconscionable agreements which this statute is designed to restrain."[222]

The elements of the offense are "(1) that there was principal or interest outstanding on the loans, (2) that the defendants actually collected or attempted to collect sums due, and (3) that the defendants employed extortionate means

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[219] United States v. Biancofiori, 422 F.2d 584, 585 (7th Cir.), cert. denied, 398 U.S. 942 (1970).

[220] In fact, there are considerably more reported cases under the federal collection law than under the companion ECT law.

[221] 18 U.S.C. § 894 (1976).

[222] United States v. Natale, 526 F.2d 1160, 1165 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976).

to collect [the] same."[223] Injecting a state-of-mind requirement into the statute, courts have insisted upon knowing participation by the defendant.[224] The statute applies not only to members of organized crime, but to anyone using extortionate means to collect an extension of credit.[225]

a. Conduct. The primary conduct prohibited by the statute is collecting, attempting to collect, or punishing for nonpayment.[226] Few cases have turned on the definitions of these terms; their meaning in this context is usually self-evident. In United States v. Papia,[227] for example, ample evidence suggested that the defendants conspired to burn down a restaurant, kidnap its owner, and break his wrists after he defaulted on a $5,000 loan.[228] The court found this evidence sufficient to support the charge of conspiracy to collect and punish the nonrepayment of the loan.[229]

b. Attendant Circumstances. Two attendant circumstances are prerequisite to conviction under the collection law: (1) the existence of an extension of credit, and (2)

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[223] Id. at 1166.

[224] United States v. Benedetto, 558 F.2d 171, 178 (3d Cir. 1977).

[225] United States v. Annerino, 495 F.2d 1159, 1164 (7th Cir. 1974).

[226] 18 U.S.C. § 894(a) (1976). 18 U.S.C. § 891(5) contains this definition: "To collect an extension of credit means to induce in any way any person to make repayment thereof."

[227] 560 F.2d 827 (7th Cir. 1977).

[228] Id. at 832-33.

[229] Id. at 834.

the participation "in any way . . . in the use of any extortionate means."

The extension-of-credit requirement is identical to that imposed by the ECT law;[230] thus it is extremely broad and flexible. In United States v. Briola,[231] where the evidence showed that the victim came away from a meeting with defendants with black eyes, loose teeth, and having been kneed in the groin, the defendants did not contest the fact that they punished the victim.[232] Instead, they contended that the beating was punishment for a theft rather than for nonrepayment of a loan.[233] The facts showed that the victim, an employee in a bookmaking operation, had placed bets of his own in someone else's name, had lost, and then had claimed that the bettor would not pay.[234]

The court stated that "extension of credit" was not limited to a loan "in the sense of money passing," but was "directed to the use of extortionate means . . . to collect monies [owed], regardless of whether the loan arose from a

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[230]For example, in the federal law "to extend credit" is defined by 18 U.S.C. § 891(1) (1976), and applies to both the ECT and collection provisions. See text accompanying notes 186-195 supra.

[231]465 F.2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973).

[232]Id. at 1021.

[233]Id.

[234]Id. at 1020.

traditional type of loan."[235] The loan itself need not have been extortionate at the outset;[236] in fact, it is not even necessary to prove that the alleged debtor admitted his liability for the obligation.[237]

The second attendant circumstance, participation in the use of "extortionate means," pivots on the statutory definition of that term: "any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."[238]

The cases suggest four ways to satisfy the "extortionate means" requirement: (1) by collecting or attempting to collect an extortionate loan, (2) by making an implicit threat, (3) by making an explicit threat, or (4) by the actual use of violence or other criminal acts.

(i) Collection of an Extortionate Loan. According to one court, if the collector of a loan knows that the loan was extortionate when made (i.e., that the requisite "understanding" existed), then he violates the law through any attempt to collect.[239] It is not necessary in this circumstance to show use or threatened use of violence; collection

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[235] Id. at 1021.

[236] United States v. Annerino, 495 F.2d 1159, 1165-66 (7th Cir. 1974).

[237] United States v. Nace, 561 F.2d 763, 770 (9th Cir. 1977).

[238] 18 U.S.C. § 891(7) (1976).

[239] United States v. Nakaladski, 481 F.2d 289, 298 (5th Cir.), cert. denied, 414 U.S. 1064 (1973).

of a loan known to be extortionate, by definition, constitutes an extortionate collection.[240]

(ii) Implicit Threats. In United States v. Curcio,[241] the court struggled with the statutory term "implicit threat" which was under attack as unconstitutionally vague.[242] Declaring that Congress, in using this term, "simply incorporated well established federal decisional law of extortion into the Act,"[243] the court concluded:

> [A]cts or statements constitute implicit threats only if they instill fear in the person to whom they are directed or are reasonably calculated to do so in light of the surrounding circumstances and there is an intent on the part of the person who performs the act or makes the statement to instill fear.[244]

In recognition of the obvious difficulty presented in showing an implicit threat, the statute provides for the introduction of evidence of the victim's knowledge of past extortionate collections by the defendant.[245] When direct evidence of the actual belief of the debtor is not available and the prosecution meets certain other conditions,[246] evi-

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[240] Id. at 298.

[241] 310 F. Supp. 351 (D. Conn. 1970).

[242] Id. at 356.

[243] Id.

[244] Id. at 357.

[245] 18 U.S.C. § 894(b) (1976).

[246] The federal provision, 18 U.S.C. § 894(c) (1976), is typical. It conditions admission of reputation evidence on a showing either that the extension of credit is unenforceable through

dence of the defendant's reputation in any community of which the victim was a member is admissible.[247] These provisions, although unwieldly in structure, successfully sweep within their reach most extortionate collections. The transactions in United States v. Spears[248] were typical; the court remarked that the "threat of violent consequences comes from the general nature of all the loan and collection transactions, and from defendant's reputation in the community."[249] The minimum requirement for an implicit threat is that "the actor knows that his words or act [sic] ought reasonably to be taken as a threat."[250]

(iii) Explicit Threats. In United States v. Sears,[251] the defendant approached the debtor at their place of work, demanded repayment and said, "[i]f you don't have that money by Friday, I am coming to your house with my piece and I am going to blow you away."[252]

The defendant, at trial, testified that he intended his words to have a "psychological effect on [the debtor] which would induce him to repay the loan."[253] He sought to escape

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the civil judicial process or that the annual rate of interest exceeds 45%.

[247] See notes 419-420 and accompanying text supra.

[248] 568 F.2d 799 (10th Cir. 1978).

[249] Id. at 802.

[250] United States v. DeStafano, 429 F.2d 344, 347 (2d Cir. 1970), cert. denied, 402 U.S. 972 (1971).

[251] 544 F.2d 585 (2d Cir. 1976).

[252] Id. at 586.

[253] Id. at 587.

conviction, however, by arguing that he never "owned a gun and [had] never intended to harm [the debtor]."[254] The court's response was predictable; the key, the court said, was whether or not the defendant "intend[ed] to put him in fear . . . [or] use his language . . . to force him to pay."[255] The fact that he intended no harm was immaterial. "Fear must be the intended result."[256]

It is possible to convict for a collection offense even if the alleged victim denies that the defendant ever made the threat, as long as there is sufficient other evidence.[257] "The silencing of a victim" by fear does not foreclose conviction.[258]

(iv) Actual Use of Violence or Other Criminal Means. The collection statute includes in its definition of extortionate means the "use . . . of violence."[259] Thus, the collection law goes beyond mere threats to encompass the actual causing of harm. In this respect, the law resembles unusual Massachusetts and Rhode Island statutes, which prohibit assault and battery committed for the purpose of collecting a loan.[260]

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[254] Id.

[255] Id.

[256] Id. at 588.

[257] United States v. DeLutro, 435 F.2d 255, 256 (2d Cir. 1970), cert. denied, 402 U.S. 983 (1971).

[258] Id. at 257.

[259] 18 U.S.C. § 891(7) (1976) (emphasis added).

[260] Mass. Ann. Laws ch. 265, § 13C. (Michie/Law. Co-op 1968); R.I. Gen. Laws § 11-5-6 (Supp. 1977).

c. Result. While it is necessary that fear be an intended consequence of a threat under this law, the statute, properly read, does not require that fear or even "comprehension" result. In this respect, the law differs from the ECT laws, although some courts have confused the two provisions.[261] Other courts have simply misread the statute or the decisions interpreting it to impose a fear result.[262] The statute, in fact, neither mentions fear nor requires an inquiry into the victim's state of mind, except insofar as it reflects on the defendant's intent.[263] "[I]t is the threat of harm which is prohibited [but] actual fear is not an element of the offense."[264]

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[261] United States v. DeCarlo, 458 F.2d 358, 367 and n.12 (3d Cir.), cert. denied, 409 U.S. 843 (1972). The DeCarlo court incorrectly applied the definition of extortionate extension of credit, applicable only to the ECT law, to the collection provision, thereby arriving at the erroneous conclusion that the victim's state of mind is "an essential element to be proved by the Government" under the collection provision.

[262] United States v. Nace, 561 F.2d 763, 768 (9th Cir. 1977). In Nace the court found that "fear is an essential element of the crime charged." citing United States v. Curcio, 310 F. Supp. 351 (D. Conn. 1970). Curcio, however, does not command this result:

> Acts or statements constitute implicit threats only if they instill fear in the person to whom they are directed or are reasonably calculated to do so in light of the surrounding circumstances and there is an intent on the part of the person who performs the act or makes the statement to instill fear.

Id. at 357 (emphasis added).

[263] See 18 U.S.C. § 894(b) (1976). See also note 405 and accompanying text infra.

[264] United States v. Natale, 526 F.2d 1160, 1168 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976) (emphasis added).

d. State of Mind. The collection statute explicitly requires that the defendant have "knowingly participate[d] . . . in the use of extortionate means."[265] The courts have read this language as requiring an intent to "put [the victim] in fear" and not the actual intent to harm.[266] The statute punishes only the knowing use of extortionate means . . . .[267] For a conspiracy prosecution, however, the jury need only find that "it was the intent of [the defendants] to use threats or actual violence . . . ."[268]

C. Criminal Usury

1. Historical Development and Basic Principles

Despite the ancient heritage of usury proscriptions, criminal usury laws lack common-law lineage.[269] The earliest systematic legislative efforts to criminalize usurious lending in America were the small loan acts passed in the early twentieth century.[270] Initially these provisions were primarily regulatory. More recently, however, states have supplemented or strengthened them with specific crimi-

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[265] See 18 U.S.C. § 894(a) (1976) (emphasis added).

[266] United States v. Sears, 544 F.2d 585, 587 (2d Cir. 1976).

[267] United States v. DeStafano, 429 F.2d 344, 347 (2d Cir. 1970), cert. denied, 402 U.S. 972 (1971).

[268] United States v. Nakaladski, 481 F.2d 289, 298 (5th Cir.), cert. denied, 414 U.S. 1064 (1973).

[269] Matlack Props., Inc. v. Citizens and S. State Bank, 120 Fla. 77, 80, 162 So. 148, 150 (1935); Crisman v. Corbin, 169 Or. 332, 341, 128 P.2d 959, 962 (1942).

[270] Haller and Alviti, supra note 48, at 137. See generally note 63 and accompanying text supra.

nal usury proscriptions. These laws responded to an obvious yet intransigent problem: "the creditor's power over the necessitous to extort oppressive terms . . . ."[271]

Some usury statutes impose felony penalties,[272] while others condemn criminal usury as a misdemeanor.[273] Some states have combined a criminal usury statute with laws prohibiting extortionate credit transactions and other loan-sharking activities;[274] federal law, however, does not contain a criminal usury provision.

2. Elements of the Offense

While existing statutes vary in their formulations and have caused some confusion among the courts,[275] it is possible to generalize about the elements of the usury offense.

The Florida Supreme Court recently gave the following synopsis of the requisites of a usurious transaction: "(1) There must be a loan express or implied; (2) An understanding between the parties that the money lent shall be returned;

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[271] Benson v. First Trust & Savings Bank, 105 Fla. 135, 148, 134 So. 493, 498 (1931) (quoting 1 Sutherland on Damages § 318, at 997-1000 (4th ed. 1916)). But see notes 25-29 and accompanying text supra (suggesting self-defeating effect of usury laws due to economic factors).

[272] Thirteen states fall into this category. See Appendix A infra.

[273] Eight states punish criminal usury as a simple misdemeanor. See id. Others, though without special criminal usury laws, treat usury as a misdemeanor under small loan acts. See note 921 infra.

[274] See, e.g., statutes cited in notes 177 & 182 supra.

[275] See, e.g., Owens v. State, 63 Fla. 26, 33 58 So. 125, 127 (1912) ("The question of usury generally has given the courts much trouble.").

(3) That for such a loan a greater rate of interest than is allowed by law shall be paid or agreed to be paid, as the case may be; and (4) There must exist a corrupt intent to take more than the legal rate for the use of the money loaned."[276]

a. Conduct. The typical criminal usury statute contains a two-fold conduct requirement: (1) making a loan and (2) charging, taking, agreeing to take, or receiving interest.[277] While some statutes contain detailed definitions of "extension of credit,"[278] most simply refer to a "loan or forbearance of any money or other property."[279] However the term is defined, the statutes do not usually reach sales transactions; as long as a sale is legitimate and not used to camouflage a usurious loan, even a great disparity between purchase price and actual value will not qualify as usury.[280]

The law is alert, however, to condemn the many possible disguises usurious transactions might take. As one court, in a burst of poetic flair, has stated, "the concealment of the needle of usury in a haystack of subterfuge will not

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[276] Dixon v. Sharp, 276 So. 2d 817, 819 (Fla. 1973).

[277] See Appendix A infra.

[278] See, e.g., Fla. Stat. Ann. § 687.071(1)(d) (West Supp. 1978).

[279] See, e.g., N.Y. Penal Law § 190.40, 190.42 (McKinney Supp. 1977).

[280] See, e.g., Elder v. Doerr, 175 Neb. 483, 487, 122 N.W.2d 528, 532-33 (1963), cert. dismissed, 377 U.S. 973 (1964) (automobile sale not usurious though interest may have exceeded legal rate); Levine v. Nolan Motors, Inc., 169 Misc. 1025, 8 N.Y.S.2d 311 (Bronx County Sup. Ct. 1938) (citing other cases).

avail to prevent its pricking the body of the law into action."[281]

The typical criminal usury statute, by including conduct terms such as "charging" or "agreeing to take" with the result-oriented terms "taking" or "receiving," reach any usurious agreement whether or not the interest or principal is actually collected. As observed by one court, "Clearly, the ordinary meaning of 'charge' [does not require] actual payment."[282]

In determining the interest rate charged, courts normally look to the total benefits that could accrue to the lender as of the date of the contract's inception.[283] The exception to this rule, in most states, is acceleration clauses, which the courts consider usurious only if the accelerated interest is actually received by the lender.[284] Although this interpretation may be just and, under some provisions, comport with statutory language, in most cases it appears to impose an additional conduct requirement or disregard language sufficiently broad to subsume "contingent usury."

b. Attendant Circumstances. The critical attendant circumstance for usury statutes is the designated interest

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[281]Key v. Amendola, 129 So. 2d 170, 173 (Fla. Dist. Ct. App. 1961).

[282]American Acceptance Corp. v. Schoenthaler, 391 F.2d 64, 74 (5th Cir.), cert. denied, 392 U.S. 928 (1968).

[283]See, e.g., Jenkins v. Dugger, 96 F.2d 727, 729, cert. denied, 305 U.S. 623 (1938).

[284]See generally Annot., 66 A.L.R.3d 650 (1975). Florida is an exception to this rule, treating the clause as usurious if it is exercised "whether or not the complaint in fact seeks recovery of all such sums." Home Credit Co. v. Brown, 148 So. 2d 257, 260 (Fla. 1962).

ceiling. Prohibited interests levels vary greatly from state to state, ranging from 6% in Tennessee[285] and 10% in Arizona[286] to 50% in New Jersey.[287] Moreover, some statutes specifically exclude from the sanctions those authorized or permitted by law to charge what otherwise would be usurious interest rates.[288]

c. Result. In keeping with the liberal conduct requirement, the typical usury statute requires no result. If the original agreement is usurious, repayment of it is immaterial.[289]

d. State of Mind. Usury is "largely a matter of intent . . .";[290] its proof therefore necessarily involves a determination of the subjective state of mind of the lender. The lender must, in some states, intentionally charge interest knowing that it exceeds the legal rate.[291] Courts have, however, created what amounts to a rebuttable presumption in this area: if a lender willfully and knowingly charges excessive interest, then knowledge is presumed.[292] This presumption

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[285]Tenn. Code Ann. § 39-4601 (1975).

[286]Ariz. Rev. Stat. § 44-1202(A) (Supp. 1977).

[287]N.J. Stat. Ann. § 2A:119A-1 (West Supp. 1977).

[288]See, e.g., N.Y. Penal Law § 190.40, 190.42 (McKinney Supp. 1977).

[289]See text accompanying notes 282-284 supra.

[290]Dixon v. Sharp, 276 So.2d 817, 820 (Fla. 1973).

[291]Id.

[292]River Hills, Inc. v. Edwards, 190 So. 2d 415, 424-25 (Fla. Dist. Ct. App. 1966).

may be negated by evidence of good faith on the part of the lender.[293]

New Jersey has taken a different approach, placing less of a burden on the state. In State v. Tillem,[294] the court stated:

> There are areas where the evil or danger sought to be prevented is so great that the legislature may, as a matter of public policy, declare an act unlawful without proof of a wrongful intent. . . . We believe the legislature felt loansharking is of that invidious caliber. We would have to be very naive to believe that one who loans money to individuals at annual interest rates in excess of the lawful rates (here it was 200-300%) does not know he is violating the law.[295]

The court's approach appears reasonable in light of New Jersey's high (50%) interest-rate threshold for criminal usury and may have made sense in the particular fact situation facing the court. This interpretation, however, will occasionally condemn "good faith" transactions between innocent parties.[296] Furthermore, a rebuttable presumption approach will invariably provide the same result. Therefore, to the extent that New Jersey's approach applies to "innocent" parties, it is unnecessarily limiting.

D. Other Loansharking Laws

There are several other statutory provisions available

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[293]Dixon v. Sharp, 276 So. 2d 817 (Fla. 1973) (loan was personal favor to friend; creditor's suggestion of legal counsel rejected by debtor).

[294]127 N.J. Super. 421, 317 A.2d 738, cert. denied, 419 U.S. 900 (A.D. 1974).

[295]Id. at 426, 317 A.2d at 741.

[296]See Dixon v. Sharp, 276 So. 2d 817 (Fla. 1973).

to fight loansharking, although few of them have yet surfaced in the reported decisions.

1. Laws Prohibiting Financing Extortionate Extensions of Credit

A provision prohibiting the financing of extortionate extensions of credit [hereinafter, financing laws] was included as part of Title II of the federal Consumer Credit Protection Act of 1968.[297] Most states that have enacted ECT provisions modeled on that statute have also adopted the financing law.[298] A few states have enacted laws applicable to the financing of criminal usury as well as extortionate credit transactions.[299]

Each of the financing provisions is similar to the federal statute:

> Whoever willfully advances money or property, whether as a gift, as a loan, as an investment, pursuant to a partnership or profit-sharing agreement, or otherwise, to any person, with reasonable grounds to believe that it is the intention of that person to use the money or property so advanced directly or indirectly for the purpose of making extortionate extensions of credit, shall be fined not more than $10,000 or an amount not exceeding twice the value of the money or property so advanced, whichever is greater, or shall be imprisoned not more than 20 years, or both.[300]

The goal of the financing laws is ambitious. The federal legislative history shows a Congressional intent

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[297] 18 U.S.C. § 893 (1976).

[298] See, e.g., Ariz. Rev. Stat. § 13-2303 (Supp. 1977); Colo. Rev. Stat. § 18-15-105 (1973). See also Appendix A infra.

[299] See, e.g., Ariz. Rev. Stat. § 13-2208 (Supp. 1977); Colo. Rev. Stat. § 18-15-106 (1973). See also Appendix A infra.

[300] 18 U.S.C. § 893 (1976).

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"to make possible the prosecution of the upper levels of the criminal hierarchy."[301] The legislators recognized the "immense practical difficulties which attend [this] effort" but, nonetheless, hoped that the law would be "a worthwhile weapon to add to the government's arsenal."[302]

There is no case law on federal or state financing provisions, but the legislative history highlights the potentially troublesome state-of-mind element of the crime:

> [N]o case is made out where it is shown that funds were advanced to a lender who subsequently collected an indebtedness by criminal means. To come within the prohibition of section 893, the financier must have had reasonable grounds to believe that it was the intention of the lender to use the funds for extortionate extensions of credit; that is, extensions of credit whose extortionate character is known to both the borrower and the lender at their inception.[303]

There are obvious inherent difficulties in proving beyond a reasonable doubt the defendant's "reasonable grounds to believe that it [was] the intention of [the lender to use the funds for] extortionate extensions of credit . . . ."[304] This problem, compounded by the increased degree of insulation in "the upper levels of the criminal hierarchy" makes enforcement under such provisions difficult at best.

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[301] Conference Report, supra note 180, at 30, reprinted in [1968] U.S. Code Cong. & Ad. News at 2027.

[302] Id. at 30, [1968] U.S. Code Cong. & Ad. News at 2027.

[303] Id. at 30, [1968] U.S. Code Cong. & Ad. News at 2028.

[304] E.g., 18 U.S.C. § 893 (1976).

2. Laws Prohibiting Receipt of Loansharking Proceeds

Unique to Pennsylvania is the criminalization of receiving proceeds of extortionate extensions of credit, collections of extensions of credit by extortionate means, and criminal usury.[305]

Like financing provisions, the receiving laws aim at the higher echelons of organized crime. Theoretically, the law facilitates prosecution of those insulated by one or more layers from the street-level loanshark. As with financing laws, however, the total absence of reported cases suggests the ambitiousness of this task.

3. Laws Proscribing the Possession of Records of Loansharking Transactions

Six states have enacted laws prohibiting the possession of records of loansharking transactions.[306] None of the states, however, has a reported decision applying its possession law.

The Florida possession law is typical; like most of the others it makes possession a misdemeanor offense:

> Books of account or other documents recording [loansharking transactions] are declared to be contraband, and any person, other than a public officer in the performance of his duty, and other than the person charged such usurious interest and person acting on his behalf, who shall knowingly and willfully possess or maintain such books of account or other documents,

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[305] 18 Pa. Cons. Stat. Ann. app. §§ 4806.7-.8 (Purdon 1973).

[306] Colo. Rev. Stat. § 18-15-108 (1973); Fla. Stat. Ann. § 687.071 (5) (West Supp. 1978); N.J. Stat. Ann. § 2A:119A-4 (West 1969); N.Y. Penal Law § 190.45 (McKinney 1975); 18 Pa. Cons. Stat. Ann. app. § 4806.9 (Purdon 1973); R.I. Gen. Laws § 6-26-9 (Supp. 1977).

or conspire so to do, shall be guilty of a misdemeanor of the first degree.[307]

The actual capture of loanshark records is not a common occurrence.[308] Where the government does obtain such records their real value is not as great in a possession prosecution as it is as evidence for a usury or ECT prosecution.

4. Miscellaneous Provisions

Two other laws merit mention in a survey of loansharking statutes: small loan laws and general racketeering laws.

Most states have enacted small loan laws making it a misdemeanor to engage in the business of making small loans without first obtaining a license or to charge more than a certain interest rate.[309] Although at least one case involves use of a small loan law in a loansharking prosecution,[310] these statutes generally have a narrow application. There is, however, no reason to limit small loan laws to their regulatory function, especially in the many states that have no loansharking provisions.

A few states[311] have enacted Racketeer Influenced and Corrupt Organizations laws patterned after a similar federal provision.[312] These laws prohibit certain use or investment of

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[307] Fla. Stat. Ann. § 687.071(5) (West Supp. 1978).

[308] See notes 779-780 and accompanying text infra.

[309] See note 921 infra.

[310] Commonwealth v. Douglas, 354 Mass. 212, 236 N.E.2d 865 (1968), cert. denied, 394 U.S. 960 (1969).

[311] See, e.g., Fla. Stat. Ann. § 943.46-.464 (West Supp. 1978).

[312] 18 U.S.C. §§ 1961-1968 (1976).

income derived "from a pattern of racketeering activity or through collection of an unlawful debt."[313] "Racketeering activity," as defined by the federal statute, includes any act in violation of the ECT, financing, or collection laws,[314] and "unlawful debt" includes any debt "unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury."[315]

Although Congress designed RICO to control all facets of organized crime,[316] in passing the Act it specifically recognized that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as . . . loansharking."[317]

E. Extortion

1. Historical Development

At common law, the crime of extortion focused on official misbehavior, rather than private wrongdoing.

> [A]ny officer's unlawfully taking by color of his office, from any man, any money or thing of value that is not due to him, or more than is due, or before it is due[318]

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[313] 18 U.S.C. § 1962(a) (1976).

[314] 18 U.S.C. § 1961(1) (1976).

[315] 18 U.S.C. § 1961(6) (1976).

[316] Id. "It is the purpose of the Act . . . to seek the eradication of organized crime in the United States by strengthening the legal tools" (emphasis added).

[317] Congressional Statement of Findings and Purpose, Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1, 84 Stat. 922-23 (Quoted following 18 U.S.C. § 1961 (1976)).

[318] 4 W. Blackstone, Commentaries on the Laws of England § 141

constituted the common-law misdemeanor of extortion.[319] Modern statutes continue to outlaw such conduct by public officials. Although more accurately described as an offense against public administration, "public extortion," in most jurisdictions, is classified as a crime against property.[320] Bastardized by common-law courts, the official-oriented misdemeanor of extortion was extended to plug loopholes in the law of larceny. Thus, the term "extortion," in current usage, applies to private citizens as well as public officers, and denotes a form of aggravated theft.

Robbery, the oldest kind of aggravated theft, was a larceny accomplished by violence or threat of immediate violence to the person of the victim.[321] In time, lawmakers swept within the compass of robbery two additional threats sufficiently likely to precipitate a conversion. Some English cases held robbery to embrace a threat to destroy the victim's home.[322] Bishop thought this wholly rational, since "one without habitation is

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(2d ed. 1765).

[319]Simply stated, had the common law governed biblical Palestine, St. Matthew would have been an extortionist; his "salary" as a tax collector consisted of whatever he collected over and above what the governor demanded. In addition to criminalizing such official misconduct, parliament published precisely how much was due an officer performing a particular function. 2 E. Coke, Institutes of the Laws of England 467 (1817 ed.).

[320]Examples of the two basic drafting techniques for classifying "public" extortion as a property crime are the Hobbs Act, 18 U.S.C. § 1951 (1976), and Model Penal Code § 223.4(d) (Proposed Official Draft 1962).

[321]Note, A Rationale of the Law of Aggravated Theft, 54 Colum. L. Rev. 84 (1954).

[322]2 J. Bishop, Commentaries on the Criminal Law 648-49 (6th ed. 1877).

exposed to the inclement elements, so that to deprive a man of his house is equivalent to inflicting personal injury upon him."[323] In 1776, the court in Rex v. Jones also recognized threats to accuse a man of "unnatural practices" as sufficient to sustain a conviction for robbery.[324] That extortion embraced threatened allegations of sodomy confounded Bishop, who commented that the rule was without explanation, and an "excrescence on the law."[325]

Paralleling these developments, several statutes passed during the reigns of George I and George II punished attempts to extort money by sending a letter threatening accusation of a crime.[326] Threatening to expose a clergyman as having "known" a woman of ill-fame, to his own bishop, to all other bishops, and to the Archbishop of Canterbury, and also to publish his shame in the newspapers, was held indictable under a later provision.[327] The threat was one that a man of "ordinary firmness" could not be expected to resist. These "blackmail" statutes did not, however, encompass verbal threats.[328]

This curious mix of threats to injure person or property, accuse of a crime, and expose a shameful act, forms the core of modern extortion law. The frailty (and creativity) of human nature,

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[323] Id. at 649.

[324] 3 J. Stephen, History of the Criminal Law of England 149 (1883).

[325] 2 J. Bishop, supra note 322, at 649.

[326] See, e.g., statutes listed at 3 J. Stephen, supra note 324.

[327] 2 F. Wharton, Criminal Law 2321 (12th ed. 1932).

[328] 3 J. Stephen, supra note 324, at 149.

however, has wrought still further concessions. Modern statutes typically proscribe threats to expose any secret tending to lower a person's esteem in the community or impair his business reputation.[329] Moreover, threats of personal injury are not necessarily limited to the person of the victim,[330] and some completely novel suggestions of harm have been recognized as extortionate.[331] To paraphrase Stephen, the whole subject has been elaborated in a way shown by experience to be necessary.[332]

2. Elements of the Offense

a. Conduct and Result

Most extortion statutes fall into two main categories. A bare majority of jurisdictions require that the defendant actually appropriate the victim's property.[333] The minority proscribe the mere making of a threat with the intent to appropriate.[334] Some of the majority complicate the offense by requiring that the threats instill a fear that compels delivery of property by

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[329] See, e.g., Cal. Penal Code § 519 (West 1970); Mo. Ann. Stat. § 570.010(4) (Vernon Pamphlet 1978); Mont. Rev. Codes Ann. § 94-6-302 (1976).

[330] See, e.g., Neb. Rev. Stat. § 28-513 (Supp. 1977); N.Y. Penal Law § 155.05(2)(e) (McKinney 1975); 18 Pa. Cons. Stat. Ann. § 3923 (Purdon 1973).

[331] See text accompanying note 343 infra.

[332] 3 J. Stephen, supra note 324, at 150.

[333] Twenty-nine jurisdictions require appropriation (e.g., "obtains," "exerts control"). Two more (Colorado and Florida) punish, by separate statutes, both appropriation and mere threatening. See Appendix B infra.

[334] See id.

the victim.[335] Where the victim's state of mind thus becomes an element of the crime, it is unclear whether the scope of punishable conduct expands or contracts. It may expand to embrace most conduct which in fact induces fear;[336] alternatively, it may contract the ambit of punishable behavior by "protecting" otherwise extortionate threats that fail to inspire fear in the alleged victim.[337] The latter result is more likely and more significant since it excludes threats that do not instill fear because the victim is uncommonly steely-nerved or (more probably) cooperating with the authorities. In jurisdictions requiring fear, such transactions may, as a matter of law, constitute at most attempted extortion.[338]

In jurisdictions proscribing mere threats accompanied by the intent to appropriate, the victim's state of mind is immaterial.[339] At least for purposes of determining the alleged

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[335] Hobbs Act, 18 U.S.C. § 1951 (1976); Cal. Penal Code § 518 (West 1970); Conn. Gen. Stat. Ann. § 53a-119(5) (West Supp. 1978); Del. Code tit. 11, § 846 (1975); Idaho Code §§ 18-2801, 2802 (1948); Miss. Code Ann. § 97-3-77 (1973); N.Y. Penal Law § 155.05 (2)(e) (McKinney 1975); Okla. Stat. Ann. tit. 21, §§ 1481, 1482 (West 1958); Or. Rev. Stat. § 164.075 (1977).

[336] This is particularly likely where the statute (e.g., the Hobbs Act) does not enumerate a list of harms which must be threatened to constitute extortion. See text accompanying notes 343-344 infra.

[337] See, e.g., People v. Rollek, 280 A.D. 437, 439, 114 N.Y.S.2d 85, 86 (4th Dept. 1952), aff'd, 304 N.Y. 905, 110 N.E.2d 734 (1953). Where the victim's state of mind is an element of the offense, it may dominate the entire analysis by becoming the chief "circumstance" from which the other elements of extortion are inferred. See note 405 infra.

[338] See id.; United States v. Quinn, 514 F.2d 1250, 1266-67 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976).

[339] People v. Percin, 330 Mich. 94, 47 N.W.2d 29 (1951).

victim's fear, "[t]he jury will not inquire into the probable force and power of the threat . . . even though the threat is not of the type to produce terror."[340] This should also be true where appropriation (but not fear) is required, at least so long as delivery results from the defendant's threats.[341]

Almost every statute enumerates discrete harms that must be threatened to give rise to the offense of extortion.[342] Universally proscribed are threats of injury to person or property, to accuse of a crime, and to expose a secret injuring another's reputation. Most jurisdictions go beyond these common-law staples and approximate the Model Penal Code, which also prohibits threats to:

> 1. take or withhold action as an official, or cause an official to take or withhold action; or
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> 2. to bring about or continue a strike, boycott or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or
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> 3. testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

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[340] Note, supra note 321, at 88.

[341] Although analytically sound, this point is mainly of theoretical interest; it is difficult to hypothesize a case in which appropriation results from a threat that does not inspire actual fear. The government-agent case, however, poses an interesting possibility. If the agent delivers property after a threat is made, despite the absence of actual fear, the delivery arguably "results" from the threat in that but for the extortionate conduct delivery would not have occurred.

[342] See generally Appendix B infra. Exceptions include Ark. Stat. Ann. §§ 41-2202, 2203 (1977); Colo. Rev. Stat. § 18-4-401 (1974); Me. Rev. Stat. tit. 17A, § 355 (1977); N.C. Gen. Stat. § 14-118.4 (Supp. 1977).

4. inflict any other harm which would not benefit the actor.[343]

The practice of enumerating specific harms springs from the belief that a "law which included all threats made for the purpose of obtaining property would embrace a large portion of accepted economic bargaining."[344] On the other hand, catch-all provisions, such as the Model Code's "any other harm" prohibition,[345] belie any optimism about the ability of legislators to ferret out all condemnable forms of threats.

The Model Penal Code and most extortion provisions approximating it recognize an affirmative defense based on threats to accuse, expose, or take or withhold official action, where the property sought was honestly claimed as restitution or indemnification for harm done in circumstances to which the threats pertain, or as compensation for property or lawful services.[346]

The threat is the core of any extortionate transaction. Whether one of the enumerated harms has been threatened is frequently difficult to prove, and requires close scrutiny of all relevant circumstances to determine whether the defendant's words or acts were likely to intimidate the victim.[347] Courts have shown a willingness to search for implicit threats in ap-

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[343]Model Penal Code § 223.4 (Proposed Official Draft 1962).

[344]Id. § 296.3, Comment (Tent. Draft No. 2 1954).

[345]See text accompanying note 343 supra.

[346]Model Penal Code, supra note 24. See, e.g., N.Y. Penal Law § 155.15(2) (McKinney 1975); Mo. Ann. Stat. § 570.010(4) (Vernon Pamphlet 1978); 18 Pa. Cons. Stat. Ann. § 3923(b) (Purdon 1973).

[347]See generally note 202 and accompanying text supra.

parently innocent circumstances.[348] For example, a Michigan court, grappling with the distinction between an "intelligible" and "unintelligible" threat, affirmed the extortion conviction of an individual who, during an assault trial involving a friend, told a female witness that "somebody needs to beat your butt."[349] Under the federal statute, threats may be inferred if the defendant's conduct would have induced fear in a reasonable person.[350]

b. Attendant Circumstances

Where the requisite conduct is "obtains," "property of another" is the specified object of acquisition.[351] Defining "property" and "another" have posed few difficulties; many codes specifically define these terms.[352] The former is ordinarily "anything of value." "Another" may or may not include the defendant's business partner or spouse.[353]

If "threatening" alone satisfies the statute, some formu-

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[348] See, e.g., People v. Dioguardi, 8 N.Y.2d 260, 168 N.E.2d 683, 203 N.Y.S.2d 870 (1960). See generally notes 241-250 and accompanying test supra.

[349] People v. Atcher, 65 Mich. App. 734, 238 N.W.2d 389 (1976).

[350] United States v. Quinn, 514 F.2d 1250, 1267 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976). Federal courts have recognized the saliency of a reasonableness analysis in another setting, by apparently requiring that the victim's fear be both actual and reasonable. United States v. Rastelli, 551 F.2d 902, 905 (2d Cir.), cert. denied, 98 S. Ct. 115 (1977).

[351] It is possible to view "obtains" as a result, rather than a conduct, requirement.

[352] See, e.g., Ala. Code tit. 13A, § 8-1(10) (1978); Ariz. Rev. Stat. § 13-105(24) (Supp. 1977); N.Y. Penal Law § 155.00(1) (McKinney 1975).

[353] Compare N.Y. Penal Law § 155.00, Practice Commentary at 104 (McKinney 1975) with People v. Morton, 308 N.Y. 96, 123 N.E.2d 790 (1954).

lations recognize that it may be effectuated either verbally or in writing.[354]

Several jurisdictions requiring fear limit violations to its "wrongful" use.[355] In United States v. Enmons,[356] random acts of violence punctuated an otherwise bona-fide labor dispute. In holding that "wrongful," as used in the Hobbs Act, modified the entire acquisitive scheme and not solely the use of fear, the Supreme Court limited the federal statute's reach to instances where the defendant had no lawful claim to the property obtained.[357] "[T]he use of force to achieve legitimate collective-bargaining demands" is therefore not a federal offense.[358]

c. State of Mind

Bespeaking its larcenous heritage, extortion necessarily involves an intent to deprive another of his property. Precise statutory formulations vary. The broadest accounts are found in laws punishing mere threats, and include the intent to compel another to act against his will.[359] Some jurisdictions

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[354] See, e.g., Fla. Stat. Ann. § 836.05 (West 1976); Mass. Ann. Laws ch. 265, § 25 (Michie/Law.Co-op 1968).

[355] See, e.g., Hobbs Act, 18 U.S.C. § 1951 (1976).

[356] 410 U.S. 396 (1973).

[357] Id. at 399-400.

[358] Id. at 408. The holding is apparently confined to the labor dispute context. See United States v. Quinn, 514 F.2d 1250, 1266 n.18 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976). The Senate Judiciary Committee "has proposed in effect to overturn the Enmons result by treating the parties engaged in a labor dispute no differently from other persons" under Criminal Code Reform Act of 1977, S. 1437, 95th Cong., 1st Sess., § 1722 (1977). S. Rep. No. 95-605, 95th Cong., 1st Sess., pt. 1, 625 (1977).

[359] See, e.g., Fla. Stat. Ann. § 836.05 (West 1976); Mich. Comp.

specify that the threat be made "maliciously";[360] others require that property be obtained "knowingly."[361] The state of mind requirement rarely necessitates a special inquiry since felonious intent is ordinarily inferred from the threat itself.[362]

No extortion statute expressly prescribes a mental state for attendant circumstances. General provisions governing culpability may identify the requisite state of mind. These provisions normally direct that the mental state specified in the statute be applied to all the elements of the offense unless a contrary purpose plainly appears.[363] In addition, the good-faith-claim-of-right defense operates as a surrogate for "knowingly" with respect to the "property of another" element of the crime.

3. Other Statutory Provisions

The basic extortion provisions may not exhaust a jurisdiction's treatment of the illicit use of threats. Where extortion entails actual appropriation, unavailing threats may constitute blackmail[364] or criminal coercion.[365] Threatening with the intent

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Laws § 750.213 (Mich. Stat. Ann. § 28.410 (1962)); Mass. Ann. Laws ch. 265, § 25 (Michie/Law.Co-op 1968).

[360] See, e.g., Fla. Stat. Ann. § 836.05 (West 1976); Mass. Ann. Laws ch. 265, § 25 (Michie/Law.Co-op 1968); R.I. Gen. Laws § 11-42-2 (1970).

[361] See, e.g., Colo. Rev. Stat. § 18-4-401 (1974); Ill. Rev. Stat. ch. 38, § 16-1 (1975); Ind. Code Ann. § 35-43-4-2 (Burns Supp. 1977).

[362] United States v. Duhon, 565 F.2d 345, 351 (5th Cir. 1978).

[363] See, e.g., Ariz. Rev. Stat. § 13-202(A) (Supp. 1977); Conn. Gen. Stat. Ann. § 53a-5 (West Supp. 1978); Me. Rev. Stat. tit. 17A, § 11(2) (1977).

[364] See, e.g., Alaska Stat. § 11.15.300 (1970); Kan. Stat. Ann. § 21-3428 (1974).

[365] See, e.g., Ky. Rev. Stat. Ann. § 509.080 (Baldwin 1975).

to compel behavior, even if not extortionate, may be punished as coercion,[366] or intimidation.[367] Mere threatening, without any specific intent, is a crime in some jurisdictions, aptly denominated as menacing,[368] criminal threatening,[369] or terroristic threatening.[370] Conduct less severe than threatening may constitute harassment.[371] Finally, a mixed bag of provisions--procuring prostitutes by threats,[372] "sending threatening letters"[373] and telephoning threats[374]--punishes particular forms of intimidation.

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[366] See, e.g., N.Y. Penal Law § 135.60 (McKinney 1975); Ohio Rev. Code Ann. § 2905.12 (Page 1975); 18 Pa. Cons. Stat. Ann. § 2906 (Purdon 1973).

[367] See, e.g., Mont. Crim. Code of 1973 § 94-5-203 (1977).

[368] See, e.g., Ohio Rev. Code Ann. §§ 2903.21, 2903.22 (Page 1975).

[369] See, e.g., Me. Rev. Stat. tit. 17A, § 209 (1977).

[370] Ky. Rev. Stat. Ann. § 508.080 (Baldwin 1975).

[371] See, e.g., N.Y. Penal Law § 240.25 (McKinney 1967).

[372] See Miss. Code Ann. § 97-29-51 (1973).

[373] See, e.g., Okla. Stat. Ann. tit. 21, § 1486 (West 1958).

[374] See, e.g., Fla. Stat. Ann. § 365.16 (West Supp. 1978) (eff. July 1, 1980).

III

PROOF OF THREATS, FEAR, AND UNDERSTANDING

A. Direct Evidence

The testimony of the victim provides the best means of proving "threats," "fear," or an extortionate "understanding." Plainly, the victim's recollections most persuasively recreate for the jury alleged criminal transactions. In a recent Georgia case, for instance, the victim testified that the defendant threatened to "blow my head off and burn down both of my houses."[375] The court found this evidence, corroborated by another witness, sufficient for conviction.[376]

Many jurisdictions require an objective showing that the defendant's conduct was threatening.[377] New Jersey, for instance, requires that the threat be "such as may reasonably be regarded as capable of moving an ordinarily 'firm and prudent' person to comply with the offender's extorsive demand."[378] By establishing the degree of harm threatened, the direct evidence may demonstrate that the threat would "move" the

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[375] Cagle v. State, 141 Ga. App. 392, 392, 233 S.E.2d 485, 486 (Ct. App. 1977).

[376] Id.

[377] See, e.g., Commonwealth v. De Vincent, 358 Mass. 592, 595, 266 N.E.2d 314, 316 (1971); State v. Morrissey, 11 N.J. Super. 298, 78 A.2d 329 (County Ct. 1951). The decisional law interpreting the Hobbs Act, 18 U.S.C. § 1951 (1976), also mandates this showing. See United States v. Tolub, 309 F.2d 286, 288 (2d Cir. 1962).

[378] State v. Morrissey, 11 N.J. Super. 298, 301-02, 78 A.2d 329, 330 (County Ct. 1951).

"firm and prudent person."

The victim also provides the best evidence of his own fear when fear is an element of the crime.[379] His testimony on his state of mind is obviously critical to the question of his actual fear, and his decription of the threat is valuable, though probably not sufficient, on the issue of the reasonableness of his fear.[380]

Similarly, in establishing an extortionate "understanding"--a modified version of "threat" and "fear"[381]--the victim provides the primary evidentiary source.[382] The extortionate

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[379]Under the Hobbs Act, 18 U.S.C. § 1951 (1976), the victim's testimony is sufficient evidence of actual fear. United States v. Tolub, 309 F.2d 286, 288-89 (2d Cir. 1962) (victim testified that he was "overwrought"). See United States v. Mazzei, 390 F. Supp. 1098, 1106 (W.D. Pa.) (dictum), modified on other grounds, 521 F.2d 639, cert. denied, 423 U.S. 1014 (1975).

[380]Gruesome threats can be made by people who are obviously in no position to carry them out. Evidence should be introduced showing that the defendant had the power to carry out his threats, or that the victim reasonably believed the defendant had the power. See United States v. Tolub, 309 F.2d 286, 288-89 (2d Cir. 1962) (business agent for local union demanded $100 per week to maintain victim's "good labor setup"); United States v. Bianci, 219 F.2d 182, 189-90 (8th Cir. 1955) (local labor representatives threatened "prolonged illegal strike" and destruction of equipment if not paid off).

[381]See notes 196-211 and accompanying text supra. The applicable provisions are: 18 U.S.C. § 891(6) (1976); Ariz. Rev. Stat. § 13-2302 (Supp. 1977); Colo. Rev. Stat. § 18-15-102 (1974); Conn. Gen. Stat. § 53-390(c) (1977); Fla. Stat. Ann. § 687.071(1)(e) (West Supp. 1978); 18 Pa. Cons. Stat. Ann. app. § 4806.1(f) (Purdon 1973); Wis. Stat. Ann. § 943.28(1)(b) (West Supp. 1977).

[382]"Where this offense can be proved by direct evidence it may be unnecessary for the prosecution to make use of [the special evidentiary sections]." Conference Rep., supra note 180, [1968] U.S. Code Cong. & Ad. News, at 2027.

credit transaction laws apply the term "understanding" to the creditor (defendant) as well as the debtor (victim).[383] As in proving the standard extortionate threat, the victim will often provide crucial testimony from which the jury may infer the existence of the creditor's "understanding."[384]

When direct testimony of the victim is unavailable or insufficient to prove these elements, the state must search for other evidence, and resulting problems have required a rethinking of basic evidentiary principles.

B. Equivocal Conduct and Circumstantial Evidence

In many loansharking and extortion cases threats are veiled, the defendant relying on implicit rather than explicit communication to induce fear.[385] Moreover, loanshark victims may be unable or unwilling to testify, the very fear which must be proved silencing the key witnesses and sabotaging the prosecution.[386] In either situation proof of criminal conduct requires heavy reliance on circumstantial

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[383] 18 U.S.C. § 891(6) (1976).

[384] United States v. Annoreno, 460 F.2d 1303, 1309 (7th Cir.) (prosecution presents 26 loanshark customers), cert. denied, 409 U.S. 852 (1972).

[385] "For example, if a known 'hit' man is used to secure money or property, express threats may be entirely unnecessary, the reputation of the 'hit' man (with the implicit threat carried by his presence) being sufficient to achieve the desired effect." S. Rep. No. 95-605, 95th Cong., 1st Sess., pt. 1, 629 (1977) (speaking of extortion statute).

[386] "The major difficulty which confronts the prosecution [in loansharking cases] is the reluctance of the victims to testify." Conference Report, supra note 10, at 2026.

evidence.

As long ago as 1884, the New York Court of Appeals recognized the potential difficulty of showing intimidation. Speaking of a letter which appeared friendly, but was alleged to carry a threat, the court said:

> No precise words are needed to convey a threat. It may be done by innuendo or suggestion. To ascertain whether a letter conveys a threat, all its language, together with the circumstances under which it was written, and the relations between the parties may be considered, and if it can be found that the purport and natural effect of the letter is to convey a threat, then the mere form of words is unimportant.[387]

More recently, the Supreme Judicial Court of Massachusetts allowed the jury to find a threat where the language was equivocal but where the defendant, ominously, brought with him to the meeting a "big, bald-headed man who looked like a wrestler."[388]

Perhaps the most devastating and significant circumstantial evidence results from the defendant's fear-inspiring character itself. The reputation of the loanshark or extorter, or knowledge of his prior criminal activities, has impressed upon the most courageous of men the potential consequences of a refusal to comply with his wishes. Nevertheless, the introduction of character evidence, even

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[387]People v. Thompson, 97 N.Y. 313, 318 (1884).

[388]Commonwealth v. De Vincent, 358 Mass. 592, 593, 266 N.E.2d 314, 315 (1971). In De Vincent, the "equivocal language" referred to count one, alleging that the defendant told his victim that failure to pay would result in his "crap[ing] out." The language charged in count two was far from equivocal: the bald-headed man "said he would cut out [the victim's] tongue and shove it up his rectum . . . ."

if relevant, entails a high risk of prejudice to the defendant. Courts have, therefore, often viewed it unfavorably.[389] Cases of loansharking and extortion, however, reveal greater judicial latitude in admitting character evidence.

C. Character Evidence

The Supreme Court in Michelson v. United States[390] rejected the use of character evidence to show the defendant's propensity to commit a crime:

> Courts that follow the common-law tradition almost unanimously have come to disallow resort by the prosecution to any kind of evidence of a defendant's evil character to establish a probability of his guilt. Not that the law invests the defendant with a presumption of good character . . . , but it simply closes the whole matter of character, disposition and reputation on the prosecution's case-in-chief. The state may not show defendant's prior trouble with the law, specific criminal acts, or ill name among his neighbors, even though such facts might logically be persuasive that he is by propensity a probable perpetrator of the crime. The inquiry is not rejected because character is irrelevant; on the contrary, it is said to weigh too much with the jury and to so over-persuade them as to prejudge one with a bad general record and deny him a fair opportunity to defend against a particular charge. The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice.[391]

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[389] McCormick, Handbook on the Law of Evidence, § 188, at 445 (2d ed. 1972) [hereinafter cited as McCormick]: "But in what are probably the greater number of cases when character could be offered for this purpose the law sets its face against it."

[390] 335 U.S. 469 (1948).

[391] Id. at 475-76. See also Fed. R. Evid. 403.

Character evidence may be admitted, however, if "substantially relevant for some other purpose than to show a probability that he committed the crime on trial because he is a man of criminal character."[392] There are three recognized methods to evidence character:

> (a) testimony as to the conduct of the person in question as reflecting his character [prior acts];
>
> (b) testimony of a witness as to his opinion of the person's character based on observation; and
>
> (c) testimony as to his reputation.[393]

This discussion is limited to the two types of character evidence most often utilized in loansharking and extortion prosecutions: prior-acts and reputation evidence.

1. Decisional Authority for the Introduction of Character Evidence

a. Reputation Evidence

The leading recent case on reputation evidence is United

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[392] McCormick, supra note 389, § 190, at 447. The quoted passage refers specifically to evidence of other crimes [prior-act evidence], but would apply to reputation evidence as well, since "[m]odern common law doctrine makes the neutral and unexciting reputation evidence the preferred type, which will usually be accepted where the character evidence can come in at all . . . ." Id., § 186, at 443. See also State v. Belisle, 79 N.H. 444, 445, 111 A. 316, 317 (1920).

An analogy can also be drawn to homicide cases in which the defendant pleads self-defense. Evidence of the deceased's reputation for violence or dangerousness is commonly admitted to show that the defendant reasonably believed that deadly force was necessary for his own protection. See 2 J. Wigmore, Evidence, § 246, at 44 (3d ed. 1940) [hereinafter cited as Wigmore]; Annot., 1 A.L.R.3d 571 (1965). The analogy is useful, however, only inasmuch as it demonstrates relevancy. Prejudice is not a factor in the homicide cases because it is not evidence of the defendant's reputation, but of the deceased's, that is introduced.

[393] McCormick, supra note 389, § 186, at 443.

States v. Carbo,[394] a Ninth Circuit opinion interpreting the Hobbs Act.[395] In Carbo, a group of defendants tried to obtain managerial control over a welterweight boxer through extortionate demands on his manager.[396] Defendant Joseph Sica, convicted of extortion and conspiracy to extort, appealed, claiming that evidence of his reputation as an "underworld man" and "strong arm" man was improperly admitted at trial.[397]

Rejecting Sica's claim, the court noted that while the usual reason for disallowing character evidence was the probability of undue prejudice to the defendant,[398] here the proof

> was not introduced into the case for the purpose of characterizing him as a bad man likely to resort to the conduct with which he is charged. This was not the source of its relevance.
>
> Instead the prosecution relied on the reputation of Sica as a probative fact enabling the jury to infer that Sica had intervened with [the victims] knowing that his presence would instill fear in them and intending to manipulate this fear . . . .
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> . . . .
>
> . . . . That [the victims] considered [Sica] to be dangerous and that fear reasonably resulted from his appearance because of his reputation constituted relevant facts upon this part of the prosecution's case.[399]

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[394] 314 F.2d 718 (9th Cir. 1963).

[395] 18 U.S.C. § 1951 (1976). This statute has no special evidentiary provisions; Carbo, therefore, is not a case of statutory interpretation, and should provide valuable guidance in jurisdictions in which the law of evidence i common-law-based or set out in broad strokes by rules or general statutes.

[396] 314 F.2d at 723.

[397] Id. at 740.

[398] Id.

[399] Id. at 740-41.

Carbo's importance rests in its close scrutiny of the classic balance between prejudice and probative value, and its conclusion that it is sometimes reasonable in extortion cases to risk the possibility that "the jury may [permit] this evidence to bear upon the probability of guilt."[400] It is reasonable because if reputation evidence is not admissible the prosecution

> is precluded from establishing part of its case.
>
> The question . . . is not whether the United States may use Sica's reputation as a sword against him, but whether he may himself make use of it as a shield to immunize himself from proof of the means by which the conspirators planned to frighten their victims into submission. If he may, then all who are known to live by violence are free to extort by the tacit threat of violence conveyed by their reputations; for the reasonableness of the resulting fear, as determined by its cause, may not be presented to the jury.[401]

Perhaps the most surprising aspect of the Carbo decision was its approval of the use of reputation evidence on the issue of the defendant's intent.[402] While there appears ample

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[400] Id. at 741.

[401] Id.

[402] See quote accompanying note 399 supra. The lower court seems also to have allowed the jury to infer the defendant's intent from the reputation evidence. The jury instruction read:

> Now, it is contended here by the Government that this witness . . . was put in fear of Mr. Sica and I think they are entitled to show or . . . tell why he was afraid and to look at the situation to see if it was one which was reasonably calculated to produce that fear. But the reputation of Mr. Sica per se is not before you, except in this limited way.

Id. at 742 n.35 (emphasis added).

evidentiary precedent for using prior acts evidence for this purpose,[403] this precise application of reputation evidence was unusual.[404]

The logic of this application, however, seems sound. If a man makes vaguely menacing statements, aware that he is commonly known as a violent man, then it is a reasonable inference that he intends to instill fear. If this were not his intention, we may infer that he would take special care to counteract the communication of an implied threat.[405]

The jury was also allowed to infer the co-conspirator's intent from Sica's reputation, which "enabl[ed] the jury to conclude that [they] had secured Sica's participation with full realization that his effectiveness was based upon the fear his reputation could inspire in the victims." Id. at 740 (emphasis added).

[403] See United States v. Palmiotti, 254 F.2d 491, 497 (2d Cir. 1958) and cases cited therein. See also Fed. R. Evid. 404(b).

[404] As a matter of general evidence law, there is a closer connection between a person's prior acts and his intent than between his reputation and his intent; in many instances, the law clearly recognizes the relevance of prior acts to intent. See McCormick, supra note 389, § 190(5), at 450; Fed. R. Evid. 404(b); United States v. Czarnecki, 552 F.2d 698, 701 (6th Cir.), cert. denied, 431 U.S. 939 (1977); United States v. Abraham, 541 F.2d 1234, 1240 (7th Cir. 1976), cert. denied, 429 U.S. 1102 (1977); United States v. Quinn, 514 F.2d 1250, 1254 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976); United States v. Stirone, 168 F. Supp. 490, 498 (W.D. Pa. 1957), aff'd, 262 F.2d 571 (1958), rev'd on other grounds, 361 U.S. 212 (1960). This principle, however, may not bear out in the loansharking and extortion context, where special considerations suggest a close linkage between reputation and intent. See note 405 and accompanying text infra. Of course, this observation does not imply that prior acts evidence is any less admissible in these cases; it merely indicates that courts should be more willing to admit reputation evidence to prove intent.

[405] See also United States v. Martorano, 557 F.2d 1, 8 n.3 (1st Cir. 1977): "[T]he victim's understanding is one of the factors from which the jury may infer the lender's intent . . . ." This conclusion, however, is hardly self-evident and warrants closer scrutiny.

It is unlikely that the defendant is unaware of his own reputation for violence; reputation, by definition, reflects general knowledge in the community, and, if anyone is a member of the relevant community, it is the defendant himself. In any event, reputation evidence may be rebutted and character evidence of itself is unlikely to establish the lender's intent.

Reputation evidence is used most often to help establish the victim's state of mind--"as proof of his fear and the reasonableness thereof."[406] The state may establish the existence of reasonable fear by showing the victim's knowledge of the defendant's reputation for a violent character or underworld association at the time the crime was committed; it is not necessary, however, to show a specific reputation for violence in connection with extortive schemes.[407]

b. Prior-Acts Evidence

The Second Circuit in United States v. Palmiotti[408] also faced the peculiar evidentiary problems posed by the extortion case. In Palmiotti, the business agent of the Granite Cutters

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[406] E.g., United States v. Tropiano, 418 F.2d 1069, 1081 (2d Cir. 1969) (defendants' bad reputations relevant to victim's fear), cert. denied, 397 U.S. 1021 (1970); United States v. De Masi, 445 F.2d 251, 257 (2d Cir.), cert. denied, 404 U.S. 882 (1971) (defendant's reputation for violence relevant to victim's fear); United States v. Billingsley, 474 F.2d 63, 65 (6th Cir.) (defendant's bad reputation relevant to victim's fear and its reasonableness), cert. denied, 414 U.S. 819 (1973).

[407] United States v. Carbo, 314 F.2d 718, 740 (9th Cir. 1963); United States v. De Masi, 445 F.2d 251, 257 (2d Cir.), cert. denied, 404 U.S. 882 (1971).

[408] 254 F.2d 491 (2d Cir. 1958).

Union had demanded a payoff from a construction firm, in return for overlooking union regulations requiring more workers on the job.[409] The court first addressed the broader evidentiary issue:

> [W]e hear so often in extortion cases [that] unless the threat which induces fear in the victim is spelled out in words of one syllable and in plain terms of a threat, there is no case for the jury. But common sense must be used in this class of cases as well as others. If the jury believed [the victim's] testimony of what appellant said to him, it was certainly within their province to infer that appellant intended [to commit extortion].[410]

The court then ruled on the admissibility of the victim's testimony that he knew the defendant was involved in a similar scheme two years earlier. It held this evidence "clearly admissible both to show the state of mind of [the defendant] and the state of mind of his victim,"[411] pointing out that the trial judge had instructed the jury that it "must not be considered by you as any proof of the acts charged in this indictment."[412] Subsequent cases have followed Palmiotti in admitting prior-acts evidence to show fear[413] and its reason-

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[409] Id. at 493-94.

[410] Id. at 495.

[411] Id. at 497. The trial court did not go this far, admitting the evidence "only for the purpose of showing the [victim's] state of mind as to why the payments were made . . . [not] for any other purpose." The use of this evidence to show the defendant's intent, however, has support. See, e.g., United States v. Blount, 229 F.2d 669, 671 (2d Cir. 1956) (evidence of similar acts properly admitted to show defendant's state of mind). See also note 404 supra.

[412] 254 F.2d at 497.

[413] See, e.g., United States v. Tolub, 309 F.2d 286, 289 (2d Cir. 1962).

ableness.[414]

The prior acts offered as evidence need not be identical to the acts feared. In Callanan v. United States,[415] the Eighth Circuit allowed the victim to testify that he knew the defendant was responsible for an assault on one of his employees;[416] the court ruled that this testimony was relevant to the victim's fear not only of a similar assault, but of economic loss and injury to his equipment.[417]

2. Statutory Authority for the Introduction of Character Evidence

Legislatures, as well as courts, have recognized the reasonableness and importance of character evidence as proof of extortionate activity.[418] The ECT laws,[419] for instance,

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[414]Callanan v. United States, 223 F.2d 171, 177-78 (8th Cir.), cert. denied, 350 U.S. 862 (1955).

[415]Id.

[416]Id. at 178.

[417]Id. Courts are, however, more likely to admit prior acts evidence when of the same type as the acts feared, United States v. Quinn, 514 F.2d 1250, 1254 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976); United States v. Adderley, 529 F.2d 1178, 1180 (5th Cir. 1976), and not too remote in time. Id. The courts, however, are less likely to admit evidence which may be especially influential in persuading the jury that the defendant is a bad man, such as a prior conviction for sodomy. See United States v. Cook, 538 F.2d 1000, 1003 (3d Cir. 1976).

[418]Conference Report, supra note 180, at 2026:

> The major difficulty which confronts the prosecution of offenses of this type is the reluctance of the victims to testify. That is, if they are in genuine fear of the consequences of nonpayment, they are apt to be equally or even more in fear of the consequences of testifying as a complaining witness.

[419]See note 381 supra.

contain detailed provisions for the admissibility of reputation and prior-acts evidence.[420]

The critical element of the ECT offense is the "understanding" that violence "could result" if repayment is not timely.[421] The law provides two alternatives to direct evidence in showing this "understanding." First, as part of a prima facie case, the state must show the debtor's reasonable belief that the creditor had used, or had a reputation for using, "extortionate means"[422] to collect or punish nonpayment.[423] Second, if direct evidence of this sort is unavailable (as when the victim is dead or too frightened to testify)

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[420] See, e.g., 18 U.S.C. §§ 892(b)-(c), 894(b)-(c) (1976).

[421] 18 U.S.C. § 891(6) (1976).

[422] 18 U.S.C. § 891(7) (1976) states: "An extortionate means is any means which involves the use, or an express or implicit threat of use, of violence or other criminal means to cause harm to the person, reputation, or property of any person."

[423] 18 U.S.C. § 892(b) (1976) provides:

> In any prosecution under this section, if it is shown that all of the following factors were present in connection with the extension of credit in question, there is prima facie evidence that the extension of credit was extortionate, but this subsection is non-exclusive and in no way limits the effect or applicability of subsection (a):
>
> (1) The repayment of the extension of credit, or the performance of any promise given in consideration thereof, would be unenforceable, through civil judicial processes against the debtor
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> (A) in the jurisdiction within which the debtor, if a natural person, resided or
>
> (B) in every jurisdiction within which the debtor, if other than a natural person, was incorporated or qualified to do business at the time the extension of credit was made.

and certain other prerequisites are met,[424] the court may "allow evidence tending to show the [creditor's] reputation as to collection practices" to show the "understanding" element.[425] Neither alternative changes the elements of the crime; instead

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> (2) The extension of credit was made at a rate of interest in excess of an annual rate of 45 per centum calculated according to the actuarial method of allocating payments made on a debt between principal and interest, pursuant to which a payment is applied first to the accumulated interest and the balance is applied to the unpaid principal.
>
> (3) At the time the extension of credit was made, the debtor reasonably believed that either
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> (A) one or more extensions of credit by the creditor had been collected or attempted to be collected by extortionate means or the nonrepayment thereof had been punished by extortionate means; or
>
> (B) the creditor had a reputation for the use of extortionate means to collect extensions of credit or to punish the nonrepayment thereof.
>
> (4) Upon the making of the extension of credit, the total of the extensions of credit by the creditor to the debtor then outstanding, including any unpaid interest or similar charges, exceeded $100.

Id. (emphasis added). See also note 381 supra. Florida and Wisconsin have omitted the prima-facie-case provision from their ECT laws.

[424]Under the federal ECT law, the state must first show that the extension of credit is unenforceable or that the annual rate of interest is over 45%. 18 U.S.C. § 892(c) (1976).

[425]While this section of the statute does not specifically authorize the introduction of prior acts evidence to show "understanding," it is unlikely that the statute excludes such evidence, when admissible under general evidence law. The lack of hearings or floor debate over these specific provisions, combined with the general congressional intent to ease the evidentiary burden on the government, argues against the negative implication that Congress wanted to be more restrictive than the common law with regard to prior-acts evidence.

they help illuminate the often subtle and complex criminal backdrop which the creditor exploits and help guide the court in its decision as to which inferences to allow.[426]

These provisions withstood constitutional challenge in United States v. Bowdach,[427] where the defendant "contend[ed] that the introduction of reputation evidence [was] so prejudicial that it deprive[d] him of Due Process of Law as guaranteed by the Fifth Amendment."[428] The court's response was unequivocal:

> Fear is the central element in crimes of extortion, and often the victim may reasonably be in fear without possessing knowledge of specific acts of the victimizer. This fear may extend beyond the act or transaction involved, and may even follow the victim to the witness stand . . . . The legislative history of the Act shows that Congress felt it was necessary to permit the use of reputation evidence under certain circumstances, due to the reluctance of loansharking victims to testify; otherwise, it might be virtually

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See 2 J. Weinstein & M. Berger, Weinstein's Evidence, ¶ 405[04] (1977) [hereinafter cited as Weinstein]:

> [T]he statute, read literally, would seem to limit the prosecutor's power to use reputation and could be read by implication to exclude other threatening acts of the defendant. Since Congress obviously had the intention of making proof easier rather than more difficult, such a restrictive reading seems unsound. Thus the statute seems to be without substantial effect in changing the rules of evidence.

[426]The ECT law language restricts the use of character evidence to certain limited situations (see 18 U.S.C. § 892(c) (1976)); nonetheless, some courts have shown little regard for the intricacies of the statute in admitting character evidence. See, e.g., United States v. Webb, 463 F.2d 1324, 1327-28 (5th Cir.) (reputation evidence admitted despite direct testimony of debtor's actual belief as to creditor's collection practices), cert. denied, 409 U.S. 986 (1972).

[427]501 F.2d 220 (5th Cir. 1974), cert. denied, 420 U.S. 948 (1975).

[428]Id. at 226.

> impossible to demonstrate the victim's state of mind toward the transaction . . . . Where such evidence is admitted [only to show the victim's state of mind], the Constitution is satisfied.[429]

In a similar constitutional challenge to the evidentiary provisions of an ECT companion provision,[430] another federal court seemed even less restrictive:

> When such evidence is relevant to and probative of the state of the victim's mind and the use of implicit threats, it is admissible for that purpose under the aforementioned established principles of the law of evidence. [citing Carbo]. Thus, the sections in question merely represent codification of these principles.[431]

By linking the ECT evidentiary provisions to the Carbo holding, the court moves toward an important goal: the liberal deployment of character evidence in all prosecutions involving threats, fear, or an extortionate understanding.

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[429] Id. at 226-27.

[430] 18 U.S.C. § 894 (1976).

[431] United States v. Curcio, 310 F. Supp. 351, 357 (D. Conn. 1970). (emphasis added).

IV

PROTECTING INFORMANTS AND WITNESSES-- THE PRACTICAL PROBLEMS OF DEALING WITH FEAR IN OBTAINING CITIZEN ASSISTANCE

A. The Duty To Report

The call to "accuse every offender, and to proclaim every offense"[432] has long been embodied in the crime of misprision, historically a criminal neglect "either to prevent a felony from being committed, or to bring to justice the offender after its commission."[433] At common law, if the individual knew a felony had been committed in his absence, yet neither disclosed it to the authorities, nor did anything to bring the offender to punishment, "he was guilty of a breach of the duty due to the community and the government."[434] Although modern jurisdictions criminally punish only the failure to report treason,[435] courts still recognize the moral obligation of citizens to advise authorities of criminal wrongdoing.[436] Complementing this moral duty is the legal duty of every citizen to testify when

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[432] Marbury v. Brooks, 21 U.S. 325, 334, 7 Wheat. 556, 575 (1822).

[433] 1 J. Bishop, supra note 322, at 390.

[434] Id. at 397.

[435] See, e.g., Fla. Stat. Ann. § 876.33 (West 1976); Mass. Ann. Laws ch. 264, § 3 (Michie/Law. Co-op 1968).

[436] Schuster v. City of New York, 5 N.Y.2d 75, 83, 154 N.E.2d 534, 538, 180 N.Y.S.2d 265, 271 (1958).

called upon to do so. The Supreme Court has endorsed Lord Chancellor Hardwicke's "pithy phrase" that "[t]he public has a right to every man's evidence."[437] Buttressed by immunity statutes and the court's contempt power, the duty to testify is not relieved even by fear of physical reprisal against the witness or to his family.[438]

Notwithstanding these lofty ideals, violence, threats, and fear take a relentless toll on the successful investigation and prosecution of organized crime. Professional informants may be hard to recruit or may balk at assuming "difficult" assignments. Fearful of violent reprisals, potential informants and witnesses may refuse to volunteer information or otherwise cooperate in law enforcement efforts. Intervening intimidation may silence citizens who intially supply information, or result in would-be prosecution witnesses "turning" in favor of the defendant at trial.

Although witnesses in all types of cases commonly experience fear, the fear factor rises dramatically in prosecutions involving organized crime. Moreover, violence-related crimes, such as loansharking and extortion, magnify this effect.

Pressures upon informants and witnesses are hardly chimerical. Coupled with actual threats communicated in specific instances, is the aura of fear borne of past mobster reprisals for cooperation with law enforcement agents. Horror stories are numerous. Informants and witnesses have been discovered in

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[437] Piemonte v. United States, 367 U.S. 556, 559 n.2 (1961).

[438] Id.

rivers wearing "concrete boots,"[439] while the bodies of others have been deposited in automobile junkyards to be crushed by hydraulic compactors.[440] After hanging one suspected informant from a butcher's hook, mobsters doused him with water, repeatedly shocked him with a cattle prodder, and left him to die three days later.[441]

Other forms of mobster terror aim directly at deterring future cooperation with authorities. The "stool pigeon," for example, may turn up with a bullet hole in his throat and a dime--the sign of an informer--resting on his chest.[442] One wiretapped conversation revealed an even more gruesome method of dealing with informants:

> Like I said, I don't want to be bloodthirsty. Leave a couple of fucking heads hanging on a fucking pole. The stool pigeons that are floating in our face, they'll think twice. They'll think fucking twice before going over to the law . . .
>
> . . .
>
> [H]ang him on the lamppost. You understand?. . . you got to give him a nice slash and leave him up there, that's

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[439] Invasions of Privacy: Hearings Before the Subcomm. on Administrative Practice and Procedure of the Senate Comm. on the Judiciary, 89th Cong., 1st Sess., pt. 3, 1158 (1965) (statement of Atty. Gen. Nicholas de B. Katzenbach) (hereinafter cited as Invasions of Privacy).

[440] N.Y. Times, Jan. 21, 1967, at 64, Col. 2.

[441] Hearings Before a Subcomm. of the House Comm. on Appropriations, 89th Cong., 2d Sess., 272 (1966) (statement of F.B.I. Director J. Edgar Hoover).

[442] Chicago Daily News, Feb. 22, 1967, at 1, Col. 4.

> what you gotta do. That will serve notice to every fucking rat stool pigeon what's gonna happen when and if he finks.[443]

Then-Attorney-General Nicholas Katzenbach testified in 1965: "We have lost more than 25 informants . . . in the past four years. We have been unable to bring hundreds of other cases because key witnesses [against organized crime members] would not testify for fear of the same fate."[444]

Through a cluster of interrelated rules, the law has responded to these harsh realities. Tort law imposes a duty on the government to provide reasonable protection to informants and witnesses. Similarly, the law often upholds prosecutorial refusals to release informant and witness identities. Together these rules provide protection to well-deserving citizens while supporting effective law enforcement.

B. The Duty To Protect

A humane society can neither capitulate to its criminal elements nor exact martyrdom as the price for performing basic civic duties. Courts have therefore responded to the problem of witness and informant fear with a tort doctrine aimed at neutralizing criminal intimidation. Recognizing a reciprocal obligation borne of citizen cooperation and the general goal of encouraging aid to law enforcement authorities, tort law imposes a duty to reasonably protect endangered informants and witnesses.

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[443] Intercepted conversation between Michael Scandifia and Petey "Pumps" Ferrara, March 1963, Brooklyn, N.Y. (on file with Cornell Institute on Organized Crime).

[444] Invasions of Privacy, supra note 8, at 1158.

At times, this duty corresponds directly with law enforcement interests. For example, the prosecution's desire to ensure the appearance of key witnesses at trial may result in pre-trial protective efforts. More often, however, the government has little immediate interest in providing protection. Informants who have "blown their covers" and witnesses who have already testified can generally provide little, if any, assistance to prosecutors and police. Notwithstanding these practical considerations, the law may mandate government protection and condemn failure to provide it as tortious.

1. Fact Patterns

In Schuster v. City of New York,[445] the initial and leading case on the duty to protect, the plaintiff's son recognized the notorious bank robber, Willie Sutton, from an FBI flyer posted in his father's store. Schuster supplied information leading to Sutton's apprehension, and his role in the arrest was highly publicized. After receiving threats on his life, he notified the police. Law enforcement officials initially provided partial protection, but soon withdrew it, assuring Schuster that the threats were not serious. Nineteen days after identifying Willie Sutton, Arnold Schuster was shot and killed while approaching his home.

The duty to protect government witnesses and informers arose for the second time in Gardner v. Village of Chicago Ridge.[446] Police officers asked the plaintiff to identify four men who had

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[445] 5 N.Y.2d 75, 154 N.E.2d 534, 180 N.Y.S.2d 265 (1958).

[446] 71 Ill. App. 2d 373, 219 N.E.2d 147 (1966), decision on remand rev'd in part on other grounds, 128 Ill. App. 2d 157, 262 N.E.2d 829 (1970), cert. denied, 403 U.S. 919 (1971).

assaulted him earlier in the evening. In the course of the identification, the officers left the assailants near the plaintiff, and the four men again attacked him, inflicting serious injuries.

In Swanner v. United States,[447] the plaintiff was a regular, paid informant for the Alcohol Tax Unit of the Internal Revenue Service and was scheduled to testify before a grand jury investigating an illicit whiskey operation. When Swanner learned of a threat on his life by the leader of the whiskey ring, he promptly notified federal officials who assured him there was no danger and afforded him no protection. Three days before he was to testify, a bomb exploded under the plaintiff's house injuring him and members of his family.

In each of these cases, the court upheld the plaintiff's action for damages against the government. While no other reported cases specifically involve the duty to protect informants and witnesses, numerous decisions recognize the existence of such a duty in dicta.[448]

2. Maturation of the Duty To Protect

At common law, no one was obliged to warn or rescue persons endangered by the conduct of third parties.[449] Courts, however, have carved out exceptions to this rule when the defendant stands in a "special relationship" to the foreseeable victim of harmful

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[447] 309 F. Supp. 1183 (M.D. Ala. 1970).

[448] See, e.g., Henderson v. City of St. Petersburg, 247 So. 2d 23 (Fla. Dist. Ct. App. 1971); Huey v. Town of Cicero, 41 Ill. 2d 361, 363, 243 N.E.2d 214, 216 (1968).

[449] Tarasoff v. Regents of Univ., 17 Cal. 3d 425, 435, 551 P.2d 334, 343, 131 Cal. Rptr. 14, 23 (1976).

conduct.[450] The causes of action[451] in Schuster, Gardner, and Swanner rested on the "special relationship" created when each of the plaintiffs (or his decedent), upon cooperating with the government in its efforts to apprehend criminals, became a foreseeable victim of third-party reprisals.[452] While services rendered as an informant or witness suffice to create a "special relationship," not all informants and witnesses have a right to police protection.

The duty to protect matures when it "reasonably appears" that an individual is in danger due to his cooperation with authorities.[453] A formal request for protection by the endangered person is not necessary;[454] it is enough that the government is aware of facts

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[450] Restatement (Second) of Torts §§ 315-320 (1965).

[451] Before a citizen may sue any governmental unit, he must determine if the government has waived its defence of sovereign immunity. The United States is amenable to most suits by virtue of the Federal Torts Claims Act, 28 U.S.C. §§ 2671-80 (1970). The states have consented to suit to varying degrees. W. Prosser, Law of Torts § 131, at 975 (4th ed. 1971).

[452] While neither Swanner nor Gardner specifically endorsed so broad a proposition, Schuster declared that the duty potentially applied to all persons collaborating in the arrest and prosecution of criminals. 5 N.Y.2d at 80, 180 N.Y.S.2d at 269, 154 N.E.2d at 537. The precise nature of the plaintiff's status may vary. Arnold Schuster was just the type of public-spirited citizen contemplated by the common law; the Willie Sutton episode was apparently the extent of his relationship with law enforcement officials. Swanner, on the other hand, was an undercover agent, a "special employee" of the federal government, and the opinion in that case proceeds on that assumption. 309 F. Supp. at 1187. The Gardner court indicated that the officers' request sufficed to sustain a duty to protect so long as Gardner was in their company at their behest. 71 Ill. App. 2d at 379, 219 N.E.2d at 150.

[453] 5 N.Y.2d at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269; 309 F. Supp. at 1187.

[454] 309 F. Supp. at 1187.

warranting a reasonable inference of danger.[455] In Gardner, for example, if more than the request to identify the assailants was necessary to activate the duty to protect, it was supplied by the policemen's knowledge that one of the attackers had previously been arrested in a tavern brawl, had a violent temper, and was generally prone to violence.[456] In Schuster and Swanner, the duty to protect arose when the victims told the authorities of threats upon their lives, although in both cases there were reasons for discounting the gravity of existing danger.[457]

The courts in Schuster and Swanner may have unduly enlarged the scope of the duty to protect by viewing the government's "heedless" assurances of safety as an indicator of negligence. If courts and juries choose to emphasize this factor, dismissing a witness's fears, even where there is no clear indication of danger, may invite potentially staggering liability; confirming them out of cautiousness, without providing protection, may well terminate continued witness cooperation or subject authorities to claims of estoppel if they assert the absence of reasonable danger in a subsequent damage action. To avoid these consequences, authorities may find themselves forced to provide protection even in cases involving remote possibilities of harm.

3. Scope of the Duty To Protect

Once a duty to protect arises, the government must exercise

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[455] Id.

[456] 71 Ill. App. 2d at 380, 219 N.E.2d at 150.

[457] In Schuster the authorities believed that the threats were not made seriously. 5 N.Y.2d at 79, 154 N.E.2d at 536, 180 N.Y.S.2d at 268. For a discussion of mitigating factors in Swanner, see text following note 465 infra.

"reasonable" care to protect the person or persons endangered,[458] including members of the informant's or witness's family.[459] In determining the reasonableness of precautions taken, courts have looked to the gravity of the foreseeable harm, the resources and other responsibilities of the police department, the probability of injury, and the extent of protection necessary to alleviate the threat.[460]

4. Practical Considerations

The decision in Schuster immediately engendered predictions of dire financial consequences; skeptics predicted frequent and substantial court awards[461] and burdensome outlays in providing protection.[462] For various reasons, these consequences have not materialized. First, protection is not mandated until it reasonably appears that the informant or witness is in danger. This requirement normally alleviates the duty to protect absent a credible showing of threats. Second, the protection need only be reasonable. Personal bodyguards are seldom required, and protection may be limited to a reasonable period of time.

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[458] 5 N.Y.2d at 80, 154 N.E.2d at 537, 180 N.Y.S.2d at 269; 309 F. Supp. at 1187.

[459] 309 F. Supp. at 1187.

[460] Comment, Municipality Liable for Negligent Failure To Protect Informer: The Schuster Case, 59 Colum. L. Rev. 487, 503 (1959).

[461] See 5 N.Y.2d at 80, 154 N.E.2d at 537, 180 N.Y.S.2d at 269. See also Massengill v. Yuma County, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969).

[462] 5 N.Y.2d at 94, 154 N.E.2d at 545, 180 N.Y.S.2d at 280 (Conway, C.J., dissenting).

A final, and perhaps the most significant, reason for the generally moderate cost of protection has been the effectiveness of witness relocation programs.[463] If an individual requires constant protection for an extended time, the government may give him a new identity and relocate him in another part of the country. Relocation efforts have met with substantial success. The federal government's $11,000,000-a-year witness relocation program relocates approximately five hundred persons annually.[464] In 1976 the program's director asserted that to his knowledge, no one in the program had ever been killed because of cooperating with government authorities.[465]

5. Implications for Law Enforcement Officers

Faced with the prospect of costly tort actions, government officials must take precautionary steps to avoid liability. In considering the source and scope of the protection duty, it is important to note that the finder of fact will be viewing the government's actions with all the benefits, and distorting influences, of 20-20 hindsight. In Swanner, for example, the federal officers' conclusion that the plaintiff was not in danger may have been wholly reasonable. Swanner lived in Montgomery, Alabama, and the officers believed the leader of the whiskey ring was in Tennessee at the site of the still. There was no apparent

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[463] See generally F. Graham, The Alias Program (1977).

[464] Id. at 48.

[465] Gerald Shur, speech before the Cornell Institute on Organized Crime, Summer, 1976 (recording on file with Cornell Institute on Organized Crime).

reason to believe that any ring members were in the Montgomery area. Moreover, Swanner learned of the threat solely through hearsay.

The effects of hindsight also appeared in a recent New York case[466] in which a former boyfriend threatened to kill his lover and her husband. The Appellate Division reversed the trial court's dismissal of the complaint, even though the police warned the victims of the threat, advised them to take precautions, and maintained patrol in the vicinity of the victims' home.

C. Nondisclosure of Informant Identities

With the growing sophistication of criminal activities and methods of avoiding apprehension, law enforcement agencies have increasingly relied on informants to combat crime. To encourage informants to assist the government, courts have recognized a limited prosecutorial privilege to refuse disclosure of informant identities.[467]

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[466] Zibbon v. Town of Cheektowaga, 51 A.D.2d 448, 382 N.Y.S.2d 152 (4th Dept. 1976). While Zibbon did not involve a witness or informant, it bears directly on the scope of the protection duty. The duty to protect may arise out of circumstances other than cooperation with government authorities. While such cases are of limited importance in determining when the duty to protect witnesses or informants arises, they may cast substantial light on how much protection is reasonable. In Zibbon the duty to protect matured out of an "assumption of duty," which requires non-negligent performance of tasks voluntarily undertaken. Even if a jurisdiction were not to follow Schuster and its progeny, this doctrine might impose on governmental units the duty to protect witnesses and informants. See Schuster v. City of New York, 5 N.Y.2d 75, 87, 154 N.E.2d 534, 541, 180 N.Y.S.2d 265, 275 (1958) (McNally, J., concurring).

[467] See Scher v. United States, 305 U.S. 251, 254 (1938); In re Quarles and Butler, 158 U.S. 532, 535-36 (1894); Vogel v Gruaz, 110 U.S. 311, 316 (1884).

The United States Supreme Court justified this approach in Roviaro v. United States:[468]

> The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.[469]

In short, nondisclosure keeps open the flow of information regarding criminal activity. If the informant's identity is disclosed, he and his family may be threatened with physical harm. The danger of death or bodily harm is especially great when the trial involves organized crime members. The court suggested the magnitude of this problem in Harrington v. State:[470]

> It is common knowledge that without the aid of confidential informants the discovery and prevention of crime would present such a formidable task as practically to render hopeless the efforts of those charged with law enforcement. And the alarming fact that the underworld often wreaks vengeance upon informers would unquestionably deter the giving of such information if the identity of the informer should be required to be disclosed.[471]

The benefits of nondisclosure extend beyond particular criminal transactions. Law enforcement officials rely on confidential informants as continuing sources of information, often regarding an interrelated network of criminal activity. In

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[468] 353 U.S. 53 (1957).

[469] Id. at 59.

[470] 110 So. 2d 495 (Fla. Dist. Ct. App. 1959).

[471] Id. at 497.

these situations, disclosure of a confidential informant's identity terminates his usefulness by "blowing his cover."

Despite these considerations, the privilege of nondisclosure is not absolute. The sixth amendment promises the defendant a right to confront his accusers and the fifth and fourteenth amendments guarantee due process of law. Thus, when the defendant can show that disclosure is necessary to ensure a "fair trial," the informant's identity must be revealed.[472] The tension between promoting effective law enforcement and upholding the defendant's due-process rights pervades the cases addressing the disclosure-of-identity issue.

1. Scope of the Nondisclosure Privilege

In Roviaro, the Supreme Court considered whether the prosecutor's refusal to disclose the identity of a confidential informant violated the defendant's right to a fair trial. The defendant, who had handed the informant a package containing heroin while agents looked on, asserted various defenses, including ignorance of the contents of the package. Emphasizing that the informant actively participated in the transaction,[473] the Court ordered disclosure of the informant's identity.

While recognizing a privilege of nondisclosure, the Court articulated limits on its scope: "Where the disclosure of an informer's identity . . . is relevant and helpful to the defense

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[472]People v. McSchann, 50 Cal. 2d 802, 810-11, 330 P.2d 33, 38 (1958); Priestly v. Superior Court, 50 Cal. 2d 812, 818-819, 330 P.2d 39, 43 (1958); People v. Williams, 51 Cal. 2d 355, 359-60, 333 P.2d 19, 22 (1958).

[473]353 U.S. at 62.

of an accused, or is essential to a fair determination of a cause, the privilege must give way."[474]

The Court went on to outline in general terms the basic considerations involved in this inquiry:

> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.[475]

In applying the Roviaro balancing test, courts have uniformly held that the defendant bears the burden of demonstrating why disclosure should be ordered; he can discharge this burden only by showing that nondisclosure will prejudice his case or deny him a fair trial.[476] In the final analysis, resolution of the disclosure issue rests within the discretion of the trial court.

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[474] Id. at 60.

[475] Id. at 62. The circumstances that justified disclosure in Roviaro included: (1) the defendant's opportunity to cross-examine the agents was no substitute for questioning the person "who had been nearest to him and took part in the transaction"; (2) the informant played a prominent role in the transaction; (3) the informant's testimony might have revealed an entrapment; (4) the informant may have thrown doubt on the identity of the package or the defendant; (5) the informant could testify to the defendant's "possible lack of knowledge of the contents of the package." Id. at 64.

[476] United States v. Hanna, 341 F.2d 906, 907 (6th Cir. 1965); United States v. Coke, 339 F.2d 183, 184-85 (2d Cir. 1964); United States v. Mainello, 345 F. Supp. 863, 881-82 (E.D.N.Y. 1972); Treverrow v. State, 194 So. 2d 250, 252 (Fla. 1967); State v. Davis, 308 So. 2d 539, 540 (Fla. Dist. Ct. App. 1975); Commonwealth v. Fielding, 353 N.E.2d 719, 731 (Mass. 1976).

Only a clear abuse of discretion will result in reversal.[477]

2. Factors Influencing the Disclosure Decision

a. Informant as Part of the Actual Criminal Transaction

Even before Roviaro, courts required disclosure of the identity of an informant who had taken part in the alleged criminal transaction.[478] Recent cases have built upon Roviaro by specifying factors that constitute "participation" in the criminal occurrence. In United States v. Martinez,[479] for example, the court concluded that when "the informer introduced the undercover agent to the accused's co-defendant and was present when the sale was consummated, then the testimony of the informer is relevant and the 'balancing' test in such circumstances dictates a disclosure of the identity of the Government's informer."[480]

Many state courts also require disclosure when the informant has participated in an illegal transaction. A New York court, for example, held that where the informant accompanied a police officer to defendant's apartment to purchase large quantities of

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[477] United States v. Van Orsdell, 521 F.2d 1323, 1326 (2d Cir. 1975), cert. denied, 423 U.S. 1059 (1976); United States v. Soles, 482 F.2d 105, 109 (2d Cir.), cert. denied, 414 U.S. 1027 (1973).

[478] See, e.g., Portomene v. United States, 221 F.2d 582, 583-84 (5th Cir. 1955) (where sale of heroin made to government informer, court erred in denying defendant's request for disdisclosure).

[479] 487 F.2d 973 (10th Cir. 1973).

[480] Id. at 976. Cf. United States v. Kelley, 449 F.2d 329 (9th Cir. 1971) (not error to deny defendant's request for disclosure where the informant neither witnessed the crime nor participated in the criminal activity).

marijuana, the trial judge erred in failing to order disclosure since the prosecution used the informant to establish the defendant's identity.[481]

In State v. Robinson,[482] however, the Supreme Court of New Mexico retreated from a per se approach in active-participant cases. The court concluded that:

> To require the state to reveal the informer's identity in every instance where that person has witnessed and helped arrange the drug transaction, without first determining whether the informer's testimony will be at all relevant or necessary to the defense, would unreasonably cripple the state's efforts at drug law enforcement.[483]

Influencing the court's decision was the fact that at an in camera hearing, the informant neither contradicted nor varied the police account of the offense.[484] The court continued by distinguishing Roviaro:

> [I]n Roviaro, the Government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of Government witnesses. In the case before us [the] agent . . .

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[481] People v. Simpson, 47 A.D.2d 665, 665, 364 N.Y.S.2d 198, 199-200 (2d Dep't 1975). See State v. Roundtree, 118 N.J. Super. 22, 30-32, 285 A.2d 564, 569 (A.D. 1971) (disclosure required where informant, in the presence of an undercover agent, gave defendant $10 with which to purchase narcotics); Ricketts v. State, 305 So. 2d 296, 297 (Fla. Dist. Ct. App. 1974) (disclosure required where informant supplied "lead," was present at the time of the illegal transaction, and actively participated in the unlawful transaction).

[482] 89 N.M. 199, 549 P.2d 277 (1976).

[483] Id. at 201, 549 P.2d at 279.

[484] Id.

> was the dominant moving party in the transactions, not the informer.[485]

The teaching of Robinson comports with Roviaro. The courts' eagerness to give determinative effect to the informant's active participation negates the balancing approach mandated by Roviaro. Following Robinson, courts should consider all relevant factors in passing on the disclosure issue.

b. Informant as Eyewitness

Generally, the prosecution need not disclose the identity of an informer who merely observed a criminal act. In Doe v. State,[486] for example, where the informant witnessed the sale of heroin to an undercover agent but did nothing in advance to prepare for the sale, the court ruled that disclosure of the informant's identity was not required.[487] Notwithstanding this general rule, the presence of an informant at a staged offense may complicate the disclosure issue--at least when the defense rests on allegations of entrapment or mistaken identity.

c. Identity of the Defendant in Issue

When the identification of the defendant as the alleged perpetrator of the crime is an issue in the case and the in-

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[485] Id. For a discussion of the Robinson decision, see Note, Judicial Discretion To Withhold Disclosure of Informant's Identity: State v. Robinson, 7 N.M.L.R. 241 (1977).

[486] 262 So. 2d 11 (Fla. Dist. Ct. App. 1972).

[487] Id. at 13. See Commonwealth v. Swenson, 331 N.E.2d 893, 898-900 (Mass. 1975) (no error in failure of trial judge to require disclosure of informant's identity where informer witnessed a robbery and defendant did not show that informant was necessary to prepare defense); State v. Oliver, 50 N.J. 39, 42, 231 A.2d 805, 807 (1967) (disclosure of an informant who merely accompanied police officer to bar used for bookmaking activities not required).

formant can help resolve the question, courts will usually order disclosure.[488] The privilege of nondisclosure depends on the materiality of the informer's identity to the defense.[489] When the informant could possibly contradict the government witness's identification of the defendant, he is a material witness to the defendant's case, thus warranting disclosure.[490]

In People v. Durazo,[491] the defendant moved for the disclosure of an informer's identity in the hope that the informant could cast doubt on the undercover agent's identification. In ruling that the trial court erred in withholding disclosure, the court enumerated several factors that overrode the need for confidentiality:

1. the defendant testified that he had not known the agent before trial;

2. the agent testified that he had not known the defendant

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[488] See State v. Anderson, 329 So. 2d 424, 425 (Fla. Dist. Ct. App. 1976) (among relevant factors in judging propriety of disclosure is whether identity of defendant is in issue and whether informant participated in the crime); Monserrate v. State, 232 So. 2d 444, 445 (Fla. Dist. Ct. App. 1970) (disclosure necessary to determine if appellent sold heroin to unnamed defendant); People v. Goggins, 34 N.Y.2d 163, 172-73, 313 N.E.2d 41, 46, 356 N.Y.S.2d 571, 578 (disclosure of informant who accompanied police officer to bar required where high risk of mistaken identification existed), cert. denied, 419 U.S. 1012 (1974); Ricketts v. State, 305 So. 2d 296 (Fla. Dist. Ct. App. 1974) (disclosure mandated because non-participant informant only witness who could possibly contradict prosecution's evidence).

[489] People v. Williams, 51 Cal. 2d 355, 359, 333 P.2d 19, 21 (1959).

[490] People v. Durazo, 52 Cal. 2d 354, 356, 340 P.2d 594, 596 (1959).

[491] Id.

before the first three sales of heroin;

3. grand jury proceedings at which the agent identified the defendant took place three weeks after the sales;

4. the defendant was not arrested until five months after the agent dealt with him.[492]

d. Entrapment

By raising the defense of entrapment, the defendant does not automatically acquire the right to learn the identity of a government informant. The defendant must first specifically demonstrate that the informant's testimony could aid in establishing the entrapment defense.[493] Thus, in United States v. Eddings,[494] where the defendant freely admitted purchasing non-

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[492] Id. at 356, 340 P.2d at 596. For a case in which similar facts resulted in disclosure, see People v. Rivera, 53 A.D.2d 819, 385 N.Y.S.2d 537 (1st Dep't 1976) (also highlighting fact that agent only was in presence of narcotics dealer for short time and that agent spoke to several persons, including seller, at time of transaction). See also Spataro v. State, 179 So. 2d 873, 880 (Fla. Dist. Ct. App. 1965) (disclosure ordered when only proof of possession of contraband by defendant was testimony of state's witness; court noted that "[i]f the informant had testified that the 'female' who sold him . . . marijuana was in fact the State's witness, it would have materially affected the credibility of her testimony").

[493] Compare Richert v. State, 338 So. 2d 40 (Fla. Dist. Ct. App. 1976) (trial court erred in not disclosing informant's identity where informant could corroborate defendant's account of entrapment and possibly identify individual who gave defendant controlled substance), with United States v. Simonetti, 326 F.2d 614 (2d Cir. 1964) (where record contained ample proof that defendant was guilty of failing to register as a person in business of accepting bets; disclosure not warranted where no evidence of entrapment existed and informant's testimony would be only cumulative).

[494] 478 F.2d 67 (6th Cir. 1973).

tax-paid whiskey with the intent to subsequently sell it,[495] disclosure was properly withheld.[496] Circuit Judge McCree observed:

> [A]lthough in the ordinary case the testimony of the informer would have been material to presentation of the entrapment defense, we do not believe that the informer's testimony. . . could have created in the minds of the jurors a reasonable doubt whether appellant was predisposed to commit the offense.[497]

e. Informant Setting Up Criminal Activity

Defendants often request disclosure of an informant's identity when the informant was instrumental in setting up the illegal transaction or contributed to the atmosphere that facilitated its occurrence. While most courts deny disclosure despite these circumstances,[498] some courts have considered the "set-up" as

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[495] Id. at 69.

[496] Id. at 72.

[497] Id. See United States v. Fredia, 319 F.2d 853, 854 (2d Cir. 1963) (not error to refuse disclosure where defendants confessed their participation in the sale of cocaine to a narcotics agent; "[i]t is inconceivable that anything the informer might have said . . . would materially have aided appellants in setting up a defense of entrapment"); State v. Dolce, 41 N.J. 422, 430, 197 A.2d 185, 192 (1964) (absent testimony by defendant giving rise to inference that "his was an innocent mind free of any intention to acquire stolen certificates until it was transmuted into a criminal mind by the . . . enticement of . . . the officers," there was no need to require disclosure of informant's identity).

[498] See United States v. Russ, 362 F.2d 843 (2d Cir.) (nondisclosure not error where informant merely introduced government agent to defendant and then left while negotiations for sale of narcotics proceeded), cert. denied, 385 U.S. 932 (1966); State v. Boone, 125 N.J. Super. 112, 113-14, 309 A.2d 1, 2 (A.D. 1973) (where informant's transaction merely confirmed police suspicions that defendant possessed "dangerous substance" but informant did not participate in the crime charged, trial court did not err in refusing disclosure).

a factor favoring disclosure of the informant's identity.[499]

3. Informant Used as a Source of Probable Cause

When information obtained from a confidential informant allegedly provided probable cause for an arrest or a search, the defense will often move for disclosure of the informant's identity at a subsequent suppression hearing.[500] The purpose of the motion is to acquire an opportunity to attack the re-

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[499] See Gilmore v. United States, 256 F.2d 565, 567 (5th Cir. 1958) (informant introduced defendant to undercover agent and helped set up "friendly" atmosphere between them):

> Here [the informant] . . . was an active participant in setting the stage, in creating the atmosphere of confidence beforehand and in continuing it by his close presence during the moments of critical conversation [when the drug sale was arranged]. . . . As [the informant] was a principal actor before and during the performance, who he was and what he knew was certainly material and relevant. In this testimony there might have been the seeds of innocence, of substantial doubt, or overwhelming corroboration. As the inferences from it covered the full spectrum from innocence to guilt, the process of truth finding, which should be the arm of every trial, compelled its disclosure.

Cf. Encinas-Sierras v. United States, 401 F.2d 228, 231 (9th Cir. 1968):

> The actual informant did not entrap the defendant. According to the defendant's testimony, the actual informant was not even present, and certainly had no part in making the arrangements for the carriage of . . . heroin across the border.

See also People v. Rivera, 53 A.D.2d 819, 385 N.Y.S.2d 537 (1st Dep't 1976) (court relies on possibility of mistaken identity and fact that informant introduced seller-defendant to agent).

[500] See, e.g., Commonwealth v. Mott, 308 N.E.2d 557, 561 (Mass. 1974).

liability of the informant and thus cast doubt upon the existence of probable cause.[501]

In McCray v. Illinois,[502] the United States Supreme Court upheld an Illinois law which allowed nondisclosure of the informant's identity at a pre-trial hearing at which the defendant challenged the existence of probable cause.[503] Rejecting the claim of four dissenting justices that nondisclosure left the fourth amendment's requirement of probable cause exclusively in the custody of the police,[504] the court declared that disclosure is not required where the trial judge finds that police officers relied in good faith on credible information supplied by a reliable informant.[505]

The Court swept away sixth and fourteenth amendment challenges[506] to the refusal to disclose and concluded:

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[501] See generally Spinelli v. United States, 393 U.S. 410 (1969).

[502] 386 U.S. 300 (1967).

[503] The informant, who had previously supplied reliable information, told police that the defendant was selling narcotics at a certain location at a certain time and that he also had narcotics in his possession. When they arrived at the location, the informant pointed out the defendant to the police and left. The police then arrested the defendant and found narcotics on him. Id. at 302.

[504] 386 U.S. at 315.

[505] In McCray, the informant had, over a two-year period, supplied information leading to over twenty narcotics convictions. Id. at 304.

[506] "The argument is based upon the due process clause of the fourteenth amendment, and upon the sixth amendment right of confrontation, applicable to the States through the fourteenth amendment." Id. at 313.

> [T]he Court in the exercise of its power to formulate evidentiary rules for federal criminal cases has consistently declined to hold that an informer's identity need always be disclosed in a federal criminal trial, let alone in a preliminary hearing to determine probable cause for arrest or search. Yet we are now asked to hold that the Constitution somehow compels Illinois to abolish the informer's privilege . . . where it appears that the officers made the arrest or search in reliance upon facts supplied by an informer they had reason to trust . . . We find no support for the petitioner's position in either of those constitutional provisions . . . . Nothing in the Due Process Clause of the Fourteenth Amendment requires a state court judge in every such hearing to assume the arresting officers are committing perjury [in testifying as to the reliability of a confidential informant].[507]

McCray's rejection of the notion that disclosure of an informant's identity is necessary to ensure his reliability comports with both sound policy and existing law. First, probable cause is based on information in the hands of the police, not the informant. As long as the police can demonstrate the veracity of the informant and indicate the basis of his information, the sole test of probable cause is the sufficiency of that information. Thus, even if the defense could establish at a suppression hearing that a previously reliable informant lied on the occasion in question, that would be irrelevant; as long as the affiant told the truth, the search should be sustained.[508] Second, leading Supreme Court cases prior to McCray specifically recognized the permissibility of

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[507] Id. at 312.

[508] See Franks v. Delaware, 23 Crim. L. Rep. 3179, 3182 (U.S. June 26, 1978) (affidavit "is to be 'truthful' in the sense that the information put forth is believed or appropriately accepted by the affiant to be true.").

resting probable cause on hearsay affidavits.[509] Requiring disclosure of the informant's identity so that he might appear at the suppression hearing would effectively nullify this rule. Finally, as the Court specifically recognized in McCray, the suppression hearing is merely a prelude to trial;[510] even "[i]f the motion to suppress is denied, defendant will be judged upon the untarnished truth."[511]

D. Nondisclosure of Witness Identities

Modern commentators have embraced liberal criminal discovery, including disclosure of prosecution witnesses, as a wise alternative to the sporting theory of justice.[512] Timely identification of witnesses facilitates defense planning and pretrial investigation.[513] Most importantly,

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[509] United States v. Ventresca, 308 U.S. 102 (1964). While the McCray dissent sought to distinguish warrant-based and warrantless searches, the probable cause requirement is identical in both cases.

[510] 386 U.S. at 312.

[511] Id. at 307 (citing State v. Burnett, 42 N.J. 377, 386, 201 A.2d 39, 44 (1964)).

[512] See note 519 infra.

[513] Others have argued that strict limits on discovery advance the truth-finding goal of trial by minimizing intimidation of witnesses and deployment of artifices designed to obscure the actual facts. See Flannery, Prosecutor's Position: Arguments and Illustrations Against Liberalization of Defense Discovery Rules; Need for Prosecutor's Discovery of Specific Defenses (alibi, insanity, etc.), 33 F.R.D. 74, 78-80 (1963) (liberal discovery in criminal cases would encourage perjury, bribery, and intimidation of government witnesses); Speeches Delivered at the Conference of the National District Attorneys Association, Panel on Pre-Trial Discovery in Criminal Cases, 31 Brooklyn L. Rev. 320, 326-32 (1965) (liberal discovery in criminal cases would encourage "fabrication of spurious defenses by the defendant").

it increases the defendant's ability to prepare for cross-examination. Thus, it is maintained, disclosure goes far toward ensuring revelation of the truth at trial.[514]

While this general thesis has much to recommend it, it is of limited applicability in cases involving organized crime--especially prosecutions of fear-based crimes such as loansharking and extortion. In these cases, refusing disclosure protects prospective witnesses from violence, ensures the availability of vital evidence, and minimizes the possibility of threat- or bribery-induced perjury at trial. When the prosecution can demonstrate a genuine possibility of these consequences, nondisclosure of witness identities is likely to advance, rather than frustrate, the search for the truth.

1. Constitutional Dimensions of the Duty to Disclose

Invoking the due-process guarantee of a "fair trial," defense attorneys have attempted to constitutionalize a duty to disclose witness identities. In Brady v. Maryland,[515] the court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where

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[514] See United States v. Cannone, 528 F.2d 296, 301 (2d Cir. 1975).

[515] 373 U.S. 83 (1963).

the evidence is material either to guilt or to punishment."[516] Although Brady does not address the issue of witness anonymity, proponents of a constitutional right to obtain pretrial disclosure of witness identities have relied on its rationale.[517]

The Brady argument rests on the practical effects of nondisclosure: absent knowledge of his accusers' identities, the defendant will be unable to gather rebuttal evidence and prepare for cross-examination by investigating the background and pending testimony of key prosecution witnesses.[518] Moreover, absent pretrial disclosure, prosecution witnesses will frequently surprise defense counsel, who will thus confront serious difficulties in challenging the prosecution's case.[519] Similarly, without disclosure, the defense will lack the opportunity prior to trial to refresh the witness's memory,

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[516] Id. at 87. In Brady, petitioner and a companion were found guilty of first degree murder and sentenced to death. At his trial, Brady admitted participation in the crime but claimed that his companion did the actual killing. In an extrajudicial statement, the companion admitted to the killing, but the prosecution withheld this statement until after Brady's conviction.

[517] See note 522 and accompanying text infra.

[518] Cf. A. Amsterdam (Reporter), Trial Manual for the Defense of Criminal Cases, § 270, at 1-283 (1976) ("as any experienced trial lawyer knows, uninformed cross-examination is worse than no cross-examination at all").

[519] American trial procedure emphasizes broad discovery privileges. The practice of withholding all information until trial has been supplanted by discovery standards that encourage the parties to exchange all relevant information bearing on the case. See, e.g., ABA Standards, Discovery and Procedure Before Trial, Introduction; cf. Fed. R. Civ. P. 26(b) (endorsing broad discovery in civil proceedings).

raise questions in his mind, and thereby influence his direct testimony. Citing these factors, defense counsel have argued that nondisclosure increases the likelihood of conviction, and thus violates the "fair trial" right recognized in Brady.

Despite this argument, Brady is patently distinguishable from the typical witness-disclosure case. Prosecution witnesses, by definition, provide evidence unfavorable to the defendant; thus the defendant's legitimate interest in obtaining favorable information and the prosecution's obligation of fair play--at least as defined in Brady--are totally inapposite in this context. In Weatherford v. Bursey,[520] the Supreme Court embraced this reasoning, in rejecting the Brady-based argument.

Weatherford involved a prosecution for vandalizing Selective Service offices in Columbia, South Carolina. After Weatherford, a government informer, testified for the prosecution at trial, Bursey, the defendant, was convicted. After serving his sentence, Bursey sued for violation of his civil rights asserting that the prosecution's refusal to identify Weatherford as a witness before trial denied him due process.[521] Citing Brady, the court of appeals held that the state was constitutionally forbidden to "conceal the identity of an informant from a defendant during his trial preparation," at least when he "den[ies] up through the day before his

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[520] 429 U.S. 545 (1977).

[521] Id. at 550.

appearance at trial that he will testify against the defendant," and then "testifies with devastating effect."[522]

The Supreme Court rejected the circuit court's analysis:

> It does not follow from the prohibition against concealing evidence favorable to the accused that the prosecution must reveal before trial the names of all witnesses who will testify unfavorably. . . . [A]s the Court wrote recently 'the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded . . . .'
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> . . . Brady is not implicated here where the only claim is that the State should have revealed that it would present the eyewitness testimony of a particular agent against the defendant at trial.[523]

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[522] 528 F.2d at 487.

[523] 429 U.S. at 559-60. Related to the due-process claim is an argument based on the sixth amendment, which guarantees the criminal defendant the right to confront witnesses against him. Although in every case the defendant will receive the opportunity to face and cross-examine the undisclosed witness at trial, he may nonetheless argue that nondisclosure so seriously retards effective cross-examination that it renders the confrontation clause a hollow guarantee. Cf. Griffin v. Illinois, 351 U.S. 12 (1956) (right to appeal conviction carries with it entitlement to free trial-court record for indigent defendants where presentation of record necessary to effectuate appeal).

Although apparently no reported decision has addressed the right-of-confrontation claim, such an argument is not likely to succeed. Policies underlying the sixth amendment claim closely parallel those underlying the due-process argument. Thus, rejection of the due-process claim portends repudiation of the confrontation attack. In State v. Booton, 114 N.H. 750, 329 A.2d 376 (1974), cert. denied, 421 U.S. 919 (1975), for example, the defendant appealed from the trial court's denial of her motion for disclosure of a list of witnesses prior to trial. The court noted that "providing defendant with a list of witnesses prior to trial promotes fairness, adequate preparation, and courtroom efficiency." Id. at 754, 329 A.2d at 380. Despite express recognition of these countervailing considerations, the court rejected the defendant's due-process claim, concluding that there was no error in the denial of the motion. The court's refusal of disclosure in the face of considerations of fairness and adequate preparation strongly indicates that a

2. Judicial Discretion To Compel Disclosure

a. Sources of Discretion

Notwithstanding Supreme-Court rejection of a constitutional mandate, courts universally recognize a general discretion to compel disclosure even in the absence of an authorizing statute.[524] The source of this discretion is subject to dispute. Some courts have cited the "inherent power" of courts.[525] Others have analogized to Federal Rule of Criminal

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right-of-confrontation claim would meet a similarly negative response, since those same considerations necessarily underly the "empty right" argument based on the sixth amendment.

This conclusion finds further support in the Supreme Court's broad language in Weatherford:

> In the last analysis . . . the undercover agent who stays in place and continues his deception merely retains the capacity to surprise; and unless the surprise witness or unexpected evidence is without more a denial of constitutional rights, Bursey was not denied a fair trial.

429 U.S. at 460 (emphasis added). See also notes 657-661 and accompanying text infra (confrontation right normally not violated even in case of declarant absence where proferred statement falls within hearsay exception).

Defendants may also argue that nondisclosure violates the sixth amendment right to counsel. Cf. Powell v. Alabama, 287 U.S. 45, 71 (1932) (court's duty to assign counsel prohibits assignment that precludes "the giving of effective aid in the preparation and trial of the case"); Coleman v. Alabama, 399 U.S. 1, 9 (1969) (right to counsel aims to ensure preparation of proper defense). See also Wardius v. Oregon, 417 U.S. 470, 474 (1972). Again, however, rejection of due-process claims suggests the unlikelihood of this argument's success.

[524] See, e.g., United States v. Cannone, 528 F.2d 296, 299 (2d Cir. 1975).

[525] See, e.g., United States v. Jackson, 508 F.2d 1001, 1007 (7th Cir. 1975) (upholding, on basis of trial court's "inherent power," dismissal of indictment on grounds of

Procedure 16, which specifically allows criminal discovery in other situations.[526] The most sensible source of judicial

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government's refusal to comply with pretrial order to identify witnesses).

[526] See, e.g., United States v. Richter, 488 F.2d 170 (9th Cir. 1973). See generally note 528 infra.

The Ninth Circuit, in United States v. Richter, 488 F.2d 170 (9th Cir. 1973), looked to Fed. R. Crim. P. 16 in establishing a procedure to balance the conflicting interests implicated by the witness-disclosure issue. Recognizing that the rule applies only to documents and physical objects, the court concluded that it could nonetheless help solve witness-disclosure problems. 488 F.2d at 174. The court asserted that if a defendant desires discretionary disclosure of the government's witnesses, he should make a showing similar to that required by what is now Rule 16(a)(1)(C):

> Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents . . . which are within the possession, custody or control of the government, and which are material to the preparation of his defense or are intended for use by the government as evidence in chief at trial . . . .

(emphasis added).

After noting the mandatory character of the provision, the court pointed to Rule 16(d)(1), a companion section which allows courts to issue protective orders. The court concluded that, "[f]ollowing these procedures will insure that there is an adequate basis for requesting such discovery and will afford the government a known method for resisting the request." 488 F.2d at 175.

But cf. United States v. Larsen, 555 F.2d 673, 676 (8th Cir. 1977) (under Rule 16, "it is clear that defendant is not entitled to the names of government witnesses"); United States v. Jackson, 508 F.2d 1001, 1007 (7th Cir. 1975):

> Fed. R. Crim. P. 2 provides that the Rules "shall be construed to secure simplicity in procedure, fairness in administration and the elimination of unjustifiable expense and delay." With this in mind, we do not believe . . . the discretion employed by the district court . . . need be limited to defense showing of materiality and reasonableness.

authority, however, rests on a common-sense proposition: due to his active involvement in the administration of criminal justice, the trial judge is in the best position to administer the law and protect the rights of all.[527]

b. Balancing Interests

Regardless of its source, judicial authority to compel disclosure unquestionably exists. In exercising this discretion, courts must determine whether, in a particular case, the benefits of disclosure outweigh its costs.[528]

Although Rule 16 provides a procedural scheme for dealing with disclosure requests, it fails to articulate useful factors to be considered in reaching a decision. The Rule gives no guidance in determining what is "material to the preparation of [defendant's] defense"; the Rule also does not specify when protective orders should issue, although the Advisory Committee notes, "Although the rule does not attempt to indicate when a protective order should be entered, it is obvious that one would be appropriate where there is reason to believe that a witness would be subject to physical or economic harm if his identity is revealed."

Given the Rule's lack of guidance, the analogy drawn to Rule 16 does little more than establish a procedural framework for the presentation of motions to disclose. While application of Rule 16 tends to tip the scales against the prosecutor by requiring a "sufficient showing," the court must still balance interests without guidance as to which "interests" are relevant or crucial.

[527] 488 F.2d at 173-74.

[528] An issue closely related to witness disclosure concerns whether the indictment alleging extortion or other loanshark-related crime must identify the alleged victim. As a general rule, the indictment must state the elements of the offense charged and describe the acts alleged in sufficient detail to allow preparation of the defense and protect the defendant's double-jeopardy claim in the event of a second prosecution. Russell v. United States, 369 U.S. 749, 763-64 (1962). These requirements cause problems in three situations.

On one side of the balance lies the defendant's interest

First, in some cases the grand jury will not know who the victim is, but will be able to state the time, place, and method of the crime. In such cases failure to name the victim should not prove fatal to the indictment. Since the prosecution's case will not focus on the victim, and the prosecution's proof will not include the victim's testimony, specific identification of the alleged criminal act by time, place, language used, etc. provides the defendant with sufficient information to prepare his defense and preserve his double-jeopardy claim. Cf. United States v. Rizzo, 373 F. Supp. 204, 206 (S.D.N.Y. 1973), cert. denied, 417 U.S. 944 (1974) (court upheld indictment that "spell[ed] out alleged extortion scheme in considerable detail, [but did] not state name of [victim]"; but suggested that "the fact that a conspiracy was charged and not a substantive offense was crucial").

Second, some indictments will allege sufficiently specific facts that the defendant will be able to infer the identity of the victim, even though not specifically named. In such cases, the prosecution cannot consistently argue that 1) the victim must be protected, and 2) the defendant has sufficient facts to identify the victim. Existing authority suggests that failure to name the victim in this situation is not fatal to the indictment, but that the court will usually order disclosure of the victim's name if requested in a bill of particulars. See United States v. Tomasetta, 429 F.2d 978, 980 (1st Cir. 1970) (dictum); United States v. Agone, 302 F. Supp. 1258, 1261 (S.D.N.Y. 1969).

Finally, cases arise in which the grand jury knows the victim's identity, but--in order to protect the victim--hands down an indictment which, while alleging specific facts, is sufficiently ambiguous to render uncertain who the victim is. Such a situation will occur when a loan-shark has made a number of usurious loans of similar size during a limited time period.

Eight reasons favor judicial liberality in upholding indictments in such cases. First, all the considerations favoring witness nondisclosure (see notes 533-534 and accompanying text infra) are especially applicable in this context; since the victim is likely to be the key prosecution witness, he is particularly vulnerable to attempts to eliminate or alter his testimony at trial. Second, nondisclosure in the indictment may protect the victim from any chance of reprisals, since if the defendant pleads guilty to the offense alleged or a lesser related offense, disclosure need never occur. Third, nondisclosure benefits the defendant, since it provides him with an enhanced plea negotiation position. Due to the prosecution's interest in protecting the would-be witness, the defendant

in preparing his defense,[529] an interest that arguably in-

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may be able to obtain a more favorable disposition by foregoing any potential right to discover the victim's name. Fourth, nondisclosure in the indictment alleviates the need for the police to provide protection throughout the entire pre-trial period; this not only saves taxpayer dollars, but avoids the anomolous result of requiring the state to forego prosecution in cases where the defendant is likely to be able to "reach" the victim prior to trial. Mandatory witness-disclosure statutes implicitly recognize this problem, in requiring disclosure only a short time before trial. See notes 550-553 and accompanying text infra.

Fifth, concerns of double jeopardy may be minimized by careful delineation of facts in the indictment and liberal construction of the initial indictment should a second prosecution occur.

Sixth, nondisclosure in the indictment will not adversely affect the defendant in preparing his defense. He can always request disclosure via a bill of particulars, and at the very least, will learn the victim's identity at trial. As in the typical witness nondisclosure case, a mid-trial continuance can protect--and indeed improve--the defendant's ability to present his defense. See notes 547-549 and accompanying text infra.

Seventh, it is theoretically inconsistent to permit nondisclosure if the grand jury is unaware of the victim's identity, but to require it in this context. The sufficiency of an indictment's allegations does not depend on the grand jury's subjective state but on the objective notice provided. In either context the most sensible result is to uphold the indictment and to deal with the disclosure issue if identification is requested in a bill of particulars.

Eighth, existing authority supports this result. In Dario-Sanchez v. United States, 341 F.2d 379, 380 (1st Cir.), cert. denied, 381 U.S. 940 (1965), the First Circuit upheld nondisclosure of the purchaser's identity in a narcotics prosecution, reasoning that a specific description of the alleged transaction, notwithstanding nondisclosure, prevented the prosecution from "roaming at large." Accord, Llamas v. United States, 226 F. Supp. 351 (E.D.N.Y. 1963), aff'd, 327 F.2d 657 (2d Cir. 1964). See also United States v. Tomasetta, 429 F.2d 978 (1st Cir. 1970) (mere failure to name victim "might not have" warranted dismissal of indictment). The only arguably contrary case, United States v. Agone, 302 F. Supp. 1258, 1260 (S.D.N.Y. 1969), is patently distinguishable. In Agone, the status of the victim was an element of the offense; since the applicable statute prohibited only threats to union members, the court focused on the particularity of the statute and the large number of potential victims in mandating disclosure.

[529] See United States v. Cannone, 528 F.2d 296 (2d Cir. 1975);

creases with the severity of possible punishment[530] and the complexity of the underlying factual situation.[531] Considerations of judicial convenience and expediency, as well as problems in effectively conducting voir dire, also support the defendant.[532]

Against the defendant's interest, courts must weigh the possible harms of pretrial identification. Intimidation[533] or injury[534] of witnesses and subornation of perjury are

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Carnivale v. State, 271 So. 2d 793, 795 (Fla. Dist. Ct. App. 1973).

[530] 18 U.S.C. § 3432 (1976), for example, provides for mandatory disclosure of witnesses in capital cases. See note 550 supra. Courts might analogize to the statute in reasoning that the greater the severity of the possible sentence, the greater the need for disclosure.

[531] See United States v. Murphy, 480 F.2d 256, 259 (1st Cir.), cert. denied, 414 U.S. 912 (1973).

[532] United States v. Jackson, 508 F.2d 1001, 1007 (7th Cir. 1975) (suggesting problem of juror who discovers relationship with witness only when he takes the stand).

[533] United States v. Bolden, 514 F.2d 1301, 1312 (D.C. Cir. 1975) (evidence of threats against witnesses). Cf. People v. Andre W., 44 N.Y.2d 179, 186, 375 N.E.2d 758, 762, 404 N.Y.S.2d 578, 582 (1978) (danger of intimidation of witness whom prosecution did not intend to call).

[534] United States v. Clardy, 540 F.2d 439, 442 (9th Cir.) (disclosure of names and exact whereabouts of inmates who planned to testify might endanger witnesses), cert. denied, 429 U.S. 963 (1976). Cf. United States v. Baum, 482 F.2d 1325, 1331 (2d Cir. 1973) (since witness was in federal custody, there was no source of danger to him).

Concern for the safety of the witness is especially strong where the witness is also an informer. In United States v. Pennick, 500 F.2d 184, 196 (10th Cir.), cert. denied, 419 U.S. 1051 (1974), the Tenth Circuit observed that "informers whose identity is revealed prior to trial are often among the missing when the trial date rolls around."

recurrent dangers,[535] especially in organized crime prosecutions.[536] The courts have isolated a number of factors supporting nondisclosure due to the possibility of these abuses. Where the defendant's position might facilitate reprisals, for example, disclosure appears undesirable.[537]

In People v. Lopez,[538] the court upheld nondisclosure, citing the witness's actual fear inspired by the defendant's prior acts; in addition, a probation officer had characterized the defendant as a "desperate inmate and leader of disorder and likely to be a continuous menace and source of trouble."[539]

Harassment of others associated with the case also cuts against disclosure.[540] In United States v. Cannone, the Second Circuit held that the district court erred in sustaining without explanation the defense's motion for pretrial discovery of witness names. In reversing the lower court's summary direction to order disclosure, the court focused on the indictment of several of the defendants for beating a grand

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[535] United States v. Cannone, 528 F.2d 296, 301 (2d Cir. 1975).

[536] See Harrington v. State, 110 So. 2d 495, 497 (Fla. Dist. Ct. App. 1959), quoted in text accompanying note 471 supra.

[537] United States v. Anderson, 481 F.2d 685, 693 (4th Cir. 1973) (defendants were powerfully-placed officials in small county where witnesses lived).

[538] 60 Cal. 2d 223, 384 P.2d 16, 32 Cal. Rptr. 424 (1963).

[539] Id. at 246, 384 P.2d at 29, 32 Cal. Rptr. at 437.

[540] United States v. Anderson, 481 F.2d 685, 693 (4th Cir. 1973).

jury witness.[541]

Since Cannone involved alleged attacks on actual participants in the judicial process, it is arguably distinguishable from typical loanshark and extortion prosecutions which involve allegations of violence outside the judicial setting. Cannone's logic, however, applies to all cases involving indictments for violent crimes; a grand jury indictment provides a source independent of the prosecutor indicating probable cause to believe the defendant has engaged in violence.[542] This independent source bolsters the prosecutor's admonitions of the potential dangers of reprisals for witness cooperation.[543]

c. Impact of the Tort-Based Duty To Protect

Tort law imposes an affirmative duty on government officials to provide witnesses and informants with reasonable pro-

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[541] 528 F.2d at 302.

[542] Id. n.6.

[543] Thus, government attorneys should emphasize the violent character of the offense charged in seeking to justify nondisclosure in loanshark prosecutions. Cf. Moore, Criminal Discovery, 19 Hastings L.J. 865, 893 (1960) (character and background of the defendant proper considerations in deciding whether to require disclosure of witness list to defendant).

Arguments for nondisclosure are even stronger where the prosecution intends to call a witness only for purposes of rebuttal. United States v. Windham, 489 F.2d 1389 (5th Cir. 1974); McCurry v. State, 538 P.2d 100 (Alaska 1975); Breedlove v. State, 295 So. 2d 654 (Fla. Dist. Ct. App. 1974). But see People v. Manley, 19 Ill. App. 3d 365, 311 N.E.2d 593 (1974).

tection.[544] Although courts have yet to tie this doctrine to nondisclosure of witness identities, the duty to protect and witness nondisclosure interface in three important ways. First, nondisclosure is itself an effective means of providing protection; injury is unlikely when the defendant cannot identify the proper target. Second, as a result of its protective effect, nondisclosure advances the important policies underlying the duty to protect; encouraging cooperation, reciprocating for citizen service, and preventing injury all result from nondisclosure.

Finally, witness nondisclosure provides a means to undermine the primary criticism of the "reasonable protection" rule. Commentators have challenged the duty to protect witnesses as ultimately frustrating law enforcement efforts by imposing excessive costs on the state and demands on authorities' time.[545] Courts can blunt this criticism, while retaining the rule, by refusing to order disclosure of witness names. Nondisclosure eliminates the necessity to provide costly physical protection during the crucial pre-testimony

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[544] See, e.g., Schuster v. City of New York, 5 N.Y.2d 75, 80-81, 154 N.E.2d 534, 537, 180 N.Y.S.2d 265, 269 (1958) ("the public owes a special duty to use reasonable care for the protection of persons who have collaborated with it in the arrest or prosecution of criminals, once it reasonably appears that they are in danger due to their collaboration"); see also Comment, Municipality Liable For Negligent Failure to Protect Informer: The Schuster Case, 59 Colum. L. Rev. 487 (1959); see generally notes 432-466 and accompanying text supra.

[545] See notes 461-462 and accompanying text supra.

period.[546] Once the witness has testified, the scope of the duty to protect should diminish significantly; since the witness has already done his damage and sentencing may be imminent, the defendant will normally hesitate to kill or injure the witness once he has told his story at trial.

d. Use of Continuances To Facilitate Preparation

By allowing the defense to prepare for cross-examination, mid-trial continuances may mitigate the deleterious effects of nondisclosure. Indeed, courts have focused on the defense's failure to seek a continuance in upholding convictions against wrongful nondisclosure attacks.[547] This emphasis is well-placed. Mid-trial continuances protect the defendant's right to confrontation without infringing upon his right to a speedy trial.[548]

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[546] Other possible means of protection include relocation of the prospective witness, and the assumption of an alias. These devices, however, are unavailable in providing pre-testimony protection.

[547] See United States v. Pennick, 500 F.2d 184, 187 (10th Cir. 1974), cert. denied, 419 U.S. 1051 (1974); Siblisk v. State, 263 Ind. 651, 336 N.E.2d 650 (1975).

[548] A number of factors work against the defendant faced with long pretrial delays. See generally Barker v. Wingo, 407 U.S. 514 (1972). If the defendant is imprisoned, time spent in jail disrupts family life and enforces idleness. As proceedings drag on, the defendant may be unable to gather evidence, contact witnesses, and otherwise prepare his case. For defendants on pretrial release, "the denial of a speedy trial may result in loss of employment or make it impossible to find work; restraints are placed on the accused's liberty, [and] he may be forced to live under a cloud of anxiety, suspicion, and hostility." H.R. Rep. No. 1508, 93d Cong., 2d Sess. 15, reprinted in [1974] U.S. Code Cong. & Ad. News 7401, 7408. "The defendant's resources may be drained and his friendships adversely affected; he may be subjected to public disgrace which creates anxiety in his family, friends and the defendant himself." Id.

The prosecutor willing to accept a continuance in return for witness nondisclosure[549] should impress upon the court the unusual benefit the mid-trial continuance confers on the defendant. Even when the defendant knows the identities of prosecution witnesses and can therefore prepare for cross-examination, he cannot know precisely what evidence the prosecutor will develop on direct. Thus, the defense attorney, in the usual case must "overprepare" to insure his ability to neutralize all possible prosecutorial lines of attack. Moreover, he must prepare for cross-examination largely in the dark. The post-direct-examination continuance eliminates these problems of defense preparation. Counsel need not speculate as to the witness's direct testimony, since the witness has already told his story. The defense can prepare for cross-examination with perfect knowledge of the precise points drawn out on direct. Thus, in cases culminating in a mid-trial continuance, the refusal of the

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These factors, although normally salient, are almost entirely inapplicable to mid-trial continuances designed to facilitate the defendant's preparation for cross-examination. Concerns with the defendant's inability to prepare drop out completely; the very purpose of the continuance is to facilitate preparation. In addition, courts can avert undue prolongation of anxiety and incarceration, while minimizing inconvenience to the court and jury, by restricting the duration of the mid-trial continuance.

[549] In arguing for nondisclosure, prosecutors may find it advantageous to alert the court to the continuance device. On the other hand, prosecutors may fear that a continuance will allow the defendant to "reach" the witness and induce him to change his story during the break in trial proceedings. A complete reversal on cross-examination, however, may do the prosecution less harm than good. A perceptive jury, with prosecutorial prodding on re-direct, would be likely to discern the genuine sequence of events, and infer, from coercion of the witness, commission of the crime charged.

prosecution to release the names of witnesses may well enhance, rather than undermine, the defendant's ability to prepare his defense.

e. Effect of Rules and Statutes Upon the Disclosure Question

A number of jurisdictions have dealt by statute or rule with the disclosure issue. Three types of disclosure provisions are common. The first, which mandates disclosure without exception, generally applies only to cases in which the accused is charged with a capital crime.[550] The rationale for limiting such provisions to capital offenses[551] is not surprising: where capital punishment may be imposed,[552] the

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[550] See, e.g., N.H. Rev. Stat. Ann. § 604.1 (1974) (must disclose witness list 24 hours before trial where indictment is for offense punishable by death). 18 U.S.C. § 3432 (1976) provides:

> A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness.

A distinctive feature of some provisions is that the prosecutor must disclose identities "in time to permit [the defendant] to make beneficial use thereof." Fla. R. Crim. P. 3.220(h) (West 1975); see ABA Standards Relating to the Administration of Criminal Justice, Compilation, p. 260 (1974); Uniform Rules of Criminal Procedure 421(b)(3)(i) (1974). Invariably, these provisions do not specify a time when disclosure should be made; rather, the time of disclosure is left to the discretion of the trial judge.

[551] United States v. Chase, 372 F.2d 453, 466 (4th Cir.) (disclosure only required in capital cases), cert. denied, 387 U.S. 907 (1967).

[552] Several federal statutes provide for the death penalty.

defendant's need for access to witness identities outweighs the potential dangers accompanying disclosure.[553]

A second type of statute provides for the exchange of witness lists between prosecution and defense.[554] Such provisions in effect amount to conditional disclosure rules. In Wisconsin, for example, defendant's discovery of prosecution witnesses is conditioned upon his tender to the prosecutor of a list of prospective defense witnesses.[555]

See, e.g., 18 U.S.C. § 34 (1976) (death penalty imposed when death results from willful or reckless destruction of aircraft or motor vehicle); 18 U.S.C. § 2031 (1976) (death penalty imposed for rape); 49 U.S.C. § 1472(i)(1)(B) (1976) (if death of another person results from commission or attempted commission of aircraft piracy, death penalty may be imposed).

[553]To allow the criminal defendant to obtain information that may be necessary to his defense, the federal statute does not provide for the issuance of protective orders. Disclosure is mandated by the statute, with "no strings" attached.

[554]Wis. Stat. Ann. § 971.23(3) (West 1971) provides:

> A defendant may, not less than 15 days nor more than 30 days before trial, serve upon the district attorney an offer in writing to furnish the state a list of all witnesses the defendant intends to call at the trial, whereupon within 5 days after the receipt of such offer, the district attorney shall furnish the defendant a list of all witnesses and their addresses whom he intends to call at the trial. Within 5 days after the district attorney furnishes such a list, the defendant shall furnish the district attorney a list of all witnesses and their addresses whom the defendant intends to call at the trial. This section shall not apply to rebuttal witnesses or those called for impeachment only.

[555]See Wis. Stat. Ann. § 971.23, Comments (West 1971) ("If the defendant is unwilling to disclose his own witnesses, then he is not entitled to learn the names of the state's

Finally, many states supplement mandatory disclosure provisions with provisions allowing for the issuance of protective orders upon a showing of good cause by the prosecutor. Most jurisdictions emphasize the same considerations in deciding whether to issue such orders: threats of physical harm, bribes, intimidation, economic harm, coercion, and interference with a criminal investigation.[556] In short, application of protective order provisions entails the same balancing process employed in the absence of statutory guidelines.

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witnesses"). But cf. Wash. Rev. Code Ann. § 10.37.030 (1961):

> [All] informations shall be filed in the court having jurisdiction of the offense specified therein by the prosecuting attorney of the proper county as informant; he shall subscribe his name thereto, and at the time the case is set for trial the prosecuting attorney shall file with the clerk a list of the witnesses which he intends to use at the trial and serve a copy of the same upon the defendant, and within five days thereafter the defendant shall file with the clerk and serve upon the prosecuting attorney a list of the witnesses which the defendant intends to use at the trial. Either party may add such additional names at any time before trial as the court may by order permit, and the said court shall possess and may exercise the same powers and jurisdiction to hear, try, and determine all such prosecutions upon information, to issue writs and process, and do all other acts therein, as it possesses and may exercise in cases of like prosecution upon indictments.

The provision that defendant serve a list of witnesses, within a prescribed time after service of the state's list, is not mandatory. State v. Sickles, 144 Wash. 236, 257 P. 385 (1927); State v. Adams, 144 Wash. 699, 257 P. 387 (1927).

[556] See Wis. Stat. Ann. § 971.23(6) (West 1971); N.J. Ct. R. Ann. 3:13-3 (West Supp. 1977); cf. Fla. R. Crim. P. 3.220(h) (West 1975) (allowing issuance of protection order "upon a showing of cause"). But cf. Wash. Rev. Code Ann. § 10.37.30 (1961) (no provision for issuance of protective orders).

f. Relation of Informant-Disclosure Balancing

Although the basic principles underlying the balancing approach[557] applied in the informant-disclosure context clearly apply by analogy to witness disclosure, the policies implicated in the two situations markedly diverge. The prosecutor seldom uses the informant as a witness, while the defendant normally seeks the informant's identity with a view toward calling him to testify. Defendants, on the other hand, normally seek disclosure of witness identities merely to prepare for cross-examination. Similarly, while prosecutors fear that "blowing the cover" of informants will eliminate continuing sources of information, their reluctance to disclose the identity of a witness normally rests on its impact upon only the case at hand. Two prosecutorial concerns, however, apply in both situations--the danger of injury or death resulting from disclosure and the resulting deterrence of cooperation with law enforcement authorities.[558]

In both instances, courts should note these differences and similarities, so as to avoid applying inapposite principles. The defense's interest in calling an informant who

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[557] See notes 473-477 and accompanying text supra.

[558] See United States v. Pennick, 500 F.2d 184, 186 (10th Cir.), cert. denied, 419 U.S. 1051 (1974), quoted in note 534 supra; United States v. Clardy, 540 F.2d 439, 442 (9th Cir.), cert. denied, 429 U.S. 963 (1976); United States v. Anderson, 481 F.2d 685, 693 (4th Cir. 1973).

participated in the alleged criminal activity--an interest forfeited entirely if the informant's name is not disclosed--does not apply in the witness context; because a witness, by definition, will appear at trial, the defense may question him concerning the transaction whether or not his identity has previously been disclosed. On the other hand, the defendant's interest in effective cross-examination is irrelevant to the informant-disclosure issue.

V

PROOF PROBLEMS POSED BY WITNESS FEAR-- EVIDENTIARY OBSTACLES AND ALTERNATIVES IN COPING WITH THE RECALCITRANT WITNESS

The "scared witness" may be no witness at all. Despite legal doctrines designed to provide protection, the prospective witness may refuse to testify, claim failure of memory, or spuriously invoke his fifth-amendment rights. In other cases, after initially providing information implicating the defendant, the would-be witness may completely reverse his story either at or prior to trial. The law does not look lightly upon these dereliections of duty. The subpoena power allows the prosecutor to insist that the fearful witness testify, and sanctions for contempt and perjury reinforce this authority.

Contempt citations and perjury indictments, however, are no panacea. Where witness fear is substantial, the witness may continue in his reticence or fabrication notwithstanding the possibility of legal reprisals. When such sanctions are imposed, they often result in punishing the "wrong" party; the wrath of the state comes to rest on the manipulated contemptor or perjurer, while the primary defendant goes free. These limitations on perjury and contempt, however, often need not prove fatal to the prosecution's case. Many cases will present opportunities for the employment of other, more effective prosecutorial tools.

Effective cross-examination, introduction of prior inconsistent statements, and use of extrinsic evidence to refresh recollection are among the options sometimes available. To use

these devices, however, the prosecutor must first be able to put the recalcitrant witness on the stand. At least where a claim of self-incrimination is present, the prosecutor will generally be unable to do this. The law of evidence, however, in large measure compensates for this problem. Recognizing the increased need for evidence where a would-be witness will not or cannot testify, all jurisdictions admit a wide range of hearsay statements when the declarant is unavailable.

A. Calling the Frightened Witness: Recalcitrance and Fifth Amendment Rights

Although witnesses invoke the privilege against self-incrimination for a wide variety of reasons,[559] the only legitimate reason is to avoid subjecting oneself to criminal penalties.[560] The constitutional privilege does not attach when invoked to protect another person or merely to avert reprisals.[561] Courts, however, often hesitate to inquire into the prospective witness's

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[559]While the major concern of this material is the frightened witness, the doctrines discussed are equally applicable to witnesses who invoke the privilege against self-incrimination for reasons other than fear. Witnesses in the cited cases, therefore, include accomplices, co-defendants, and victims. Similarly, while this paper focuses on the witness who refuses to testify on the basis of the fifth amendment, policies relevant in the fifth-amendment context apply in large measure to refusals to testify based on other reasons. This observation is not designed to oversimplify the issue. For example, the chain of inference when a co-conspirator tacitly acknowledges guilt by pleading the fifth differs from the inferential sequence where an alleged victim openly refuses to take the stand. In both cases, however, the likely result is the same--prejudice to the defendant based on technically inadmissable "proof."

[560]Hale v. Henkel, 201 U.S. 43, 66-67 (1905); Brown v. Walker, 161 U.S. 591, 597 (1895).

[561]See State v. Abbott, 275 Or. 611, 616-17, 552 P.2d 238, 241 (1976); State v. Classen, 31 Or. App. 683, ___, 571 P.2d 527, 533 & n.8 (1977). In Rogers v. United States, 340 U.S.

motives or require him to "justify his fear of incrimination."[562] And even if a court does decide that the invocation of the privilege is improper, this rarely affects whether the prosecution can call the recalcitrant witness. Courts normally prohibit the prosecution from putting on the stand any known recalcitrant witness.[563]

1. Goals in Calling the Recalcitrant Witness

For several reasons, the prosecution may wish to call a witness to the stand even when forewarned of his intention to invoke the fifth amendment. The prosecutor may believe that the witness, when faced with the formality of the courtroom or the imminent possibility of a contempt citation, will change his mind and testify. The prosecutor may wish to call the recalcitrant witness to avert the inference that the witness's testimony was damaging to his case,[564]

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367 (1951), the Supreme Court said the court must determine "as to each question to which a claim of privilege is directed . . . whether the answer to that particular question would subject the witness to a 'real danger' of further crimination." Id. at 374.

Various factors determine whether a witness may validly invoke the fifth amendment. Important considerations include whether the witness was found guilty of a related charge (See, e.g., Commonwealth v. Martin, 362 N.E.2d 507, 510-11 (Mass. 1977); State v. Kendrick, 538 P.2d 313, 314 (Utah 1975)) or whether he may still appeal a conviction (See, e.g., State v. Abbott, 275 Or. 611, 617 n.2, 552 P.2d 238, 241 n.2 (1976)).

[562]See, e.g., Bowles v. United States, 439 F.2d 536, 542 (D.C. Cir. 1970), cert. denied, 401 U.S. 995 (1971).

[563]See notes 564-597 and accompanying text infra. But see State v. Abbott, 275 Or. 611, 616-17, 552 P.2d 238, 241 (1976) (affirming conviction where prosecution called known recalcitrant witness who had "no privilege to remain silent."). See generally Note, Exercise of the Privilege Against Self-Incrimination by Witness and Codefendants: The Effect Upon the Accused, 33 U. Chi. L. Rev. 151 (1965).

[564]Courts will usually not permit calling the recalcitrant witness solely for this purpose. See, e.g., People v. Pollack 21 N.Y.2d 206, 211, 234 N.E.2d 223, 225, 287 N.Y.S.2d 49, 52

or to establish the witness's unavailability, thus bringing special hearsay rules into play.[565] Finally, the prosecutor may wish to call

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(1967); Commonwealth v. Greene, 445 Pa. 228, 230, 285 A.2d 865, 866 (1971). But see State v. Abbott, 24 Or. App. 111, 114, 544 P.2d 620, 621 (calling recalcitrant witness allowed to rebut possible "adverse inference" from not calling), aff'd, 275 Or. 611, 552 P.2d 238 (1976). Jurisdictions are split on whether or not a missing witness instruction is necessary in these cases. Some maintain that no instruction will be given unless the defendant uses the witness's absence to establish his innocence. See, e.g., United States v. Maloney, 262 F.2d 535, 538 (2d Cir. 1959). Others place discretion for its use solely within the domain of the trial court. United States v. Bautista, 509 F.2d 675, 678 (9th Cir.), cert. denied, 421 U.S. 976 (1975).

[565] In those jurisdictions which permit the introduction of admissions against penal interest and other forms of hearsay only if the witness is unavailable, a witness's refusal to testify is properly classified as unavailability. According to People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970):

> [W]hether the person is dead, or beyond the jurisdiction, or will not testify, and cannot be compelled to testify because of a constitutional privilege, all equally spell out unavailability of trial testimony. If the rule is to be changed to include penal admissions against interest, it ought to embrace unavailability because of the assertion of constitutional right which might be fairly common in the area of penal admissions.

Id. at 93, 257 N.E.2d at 18, 308 N.Y.S.2d at 828. Although the court employed language such as "where he is in court and refuses to testify as to the fact of the admission on the ground of self incrimination," (id. at 94, 257 N.E.2d at 19, 308 N.Y.S.2d at 829 (emphasis added)), the Brown decision never specifically ruled on whether a simple declaration by the prosecutor or the witness's attorney suffices to establish unavailability. In 1976, however, the New York Appellate Division specifically held that the witness must invoke his fifth amendment rights before being labelled "unavailable." People v. Keough, 51 A.D.2d 808, 808, 380 N.Y.S.2d 267, 269 (2d Dept. 1976). Nevertheless, the best procedure appears to be to request an in camera hearing to determine the witness's unavailability. This process establishes unavailability as effectively as calling the recalcitrant witness at trial, yet avoids the problems of prejudicing the defendant.

the recalcitrant witness to raise the improper inference from his silence that the defendant is guilty of the crime charged.

2. The Prohibition Against Calling The Recalcitrant Witness

Courts have generally looked with disfavor on any attempt by the prosecutor[566] to call a known recalcitrant witness. Three justifications support this view: (1) the risk of prejudice to the defendant, (2) the protection of the defendant's right to confrontation, and (3) the deterrance of prosecutorial misconduct.[567]

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[566]There is a dispute concerning the applicability of these rules to defense witnesses who intend to invoke the fifth amendment. The majority view applies the same rules regardless of who calls the witness:

> There is no reason for distinguishing these cases on the basis that the party calling the witness was the government. The fundamental point is that the exercise of the privilege is not evidence to be used in the case by any party . . . .
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> . . . .
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> If the claiming of the privilege is not evidence which the prosecutor can use, there is no reason why it should be deemed to acquire probative value simply because a co-defendant rather than the state seeks to utilize it.

State v. Smith, 74 Wash. 2d 744, 758-59, 446 P.2d 571, 581 (1968), vacated on other grounds, 408 U.S. 934 (1972). Accord, 439 F.2d 536; Commonwealth v. Greene, 445 Pa. 228, 285 A.2d 865 (1971). In a strong dissent, Justice Roberts in Commonwealth v. Greene, id. at 233, 285 A.2d at 868, stated, "This argument achieves an empty symmetry without significance." Chief Judge Bazelon dissenting in Bowles v. United States, 439 F.2d at 545 n.13, indicated that there was a differing potential for abuse due to the "jurors' natural skepticism of any 'buck passing,' and . . . the prosecutor's right to demonstrate to the jury that the person accused by the defendant is someone on whom he has prevailed (through friendship, or by threats of injury) to come to court and then refuse to testify."

[567]Courts have adopted various approaches to ascertain whether

a. Prejudicial Effect

Whenever a witness exercises the privilege against self-incrimination, "a natural, indeed an almost inevitable, inference arises as to what would have been his answer if he had not refused."[568] Since the exercise by the witness of his fifth-amendment rights is not evidence and therefore has no probative weight, any in-

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reversible error has occurred as a result of the prosecution's calling a recalcitrant witness. The Supreme Court in Namet v. United States, 373 U.S. 179 (1963), suggested two tests, each of which relates directly to one of the justifications. The first, the "conscious and flagrant attempt" test (id. at 186), is concerned with deterring prosecutorial misconduct; the second, the "critical weight" test (id. at 187), relates directly to the defendant's right of confrontation. According to Namet, prosecutorial misconduct occurs "when the Government makes a conscious and flagrant attempt to build its case out of inferences arising from use of the testimonial privilege." Id. at 186 (emphasis added). The court, by using this language, indicates that the crucial inquiry is subjective, concerned with the prosecutor's reasons for putting the witness on the stand. For example, a prosecutor who admits that he had a weak case and has called the witness for the express purpose of raising the inference of the defendant's guilt, has probably made a "conscious and flagrant attempt" in violation of Namet.

The Namet court further stated that a defendant's sixth-amendment rights are denied if, "in the circumstances of a given case, inferences from a witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross-examination, and thus unfairly prejudiced the defendant." Id. at 187 (emphasis added). Contrary to the subjective test established for prosecutor misconduct, the test for sixth amendment violations is an objective one concerned with the amount of evidence the prosecution offered to the jury. Thus, the court would not look to the prosecutor's intentions but to the sufficiency of the evidence without the adverse inferences from the witness's recalcitrance.

While the two Namet tests were originally developed as discrete bases for decisions, many courts have used the "conscious and flagrant attempt" test and the "critical weight" test as mere labels, demonstrating little concern for the subjective and objective components that distinguish them. Further confusion is caused by the courts' interchangeable use of the three justifications, and their automatic use of "prejudice" as a catch-all for any types of errors that may result from the use of a recalcitrant witness.

[568] United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959).

ferences drawn from it are improper.[569] Furthermore, due to the "high courtroom drama"[570] of this kind of confrontation, a witness's invocation of his privilege against self-incrimination may "have a disproportionate impact on [the jury's] deliberations."[571] If, for example, prior evidence has established that the witness was an associate of the defendant and was present at the time of an alleged loansharking incident, the witness's invocation of the self-incrimination privilege gives rise to the inference that the defendant is guilty. Similarly, if an alleged extortion victim expressly refuses to testify, the jury might attribute this reluctance to fear of the defendant, concluding from this that a criminal threat did exist.

b. Protecting the Confrontation Right

In Pointer v. Texas,[572] the Supreme Court emphasized the fundamental character of a defendant's confrontation right:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.[573]

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[569] Id.

[570] 439 F.2d at 541.

[571] Id. In DeGesualdo v. People, 147 Colo. 426, 432, 364 P.2d 374, 378 (1961), the court went farther and took judicial notice "that in the public mind an odium surrounds the claim of constitutional privilege by a witness in refusing to testify." See also 8 Wigmore, supra note 392, at 426 ("[t]he layman's natural suggestion [is probably of a] clear confession of crime").

[572] 380 U.S. 400 (1965).

[573] Id. at 405.

Since the courts do not consider a recalcitrant witness's invocation of the fifth amendment to be testimony,[574] the defendant has no right of cross-examination.[575] By calling such a witness, therefore, the prosecution effectively advances his case without giving the defendant a chance to rebut, undermine the witness's credibility, or elicit favorable testimony.

c. Deterrence of Prosecutorial Misconduct

In United States v. Maloney,[576] Judge Learned Hand stated that "[i]f the prosecution knows when it puts the question that [the witness] will claim the privilege, it is charged with notice of the probable effect of his refusal upon the jury's mind."[577] Courts have combined this notice concept with their concern for "fair play,"[578] and concluded that placing a known recalcitrant witness on the stand constitutes prosecutorial misconduct. To deter this kind of misconduct, courts have repeatedly reversed convictions in cases that involved the prosecution's calling a recalcitrant witness.[579] The American Bar Association's Project on Standards for Criminal Justice states:

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[574] Griffin v. California, 380 U.S. 609, 610 (1964); 439 F.2d at 541.

[575] United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959).

[576] Id.

[577] Id. at 537.

[578] United States v. Scully, 225 F.2d 113, 116 (2d Cir.), cert. denied, 350 U.S. 897 (1955).

[579] See, e.g., Commonwealth v. Terenda, 451 Pa. 116, 122, 301 A.2d 625, 629 (1973) ("Convictions should not be obtained with any suspicion of prosecutorial misconduct.")

> A prosecutor should not call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege. In some instances, as defined in the Code of Professional Responsibility, doing so will constitute unprofessional conduct.[580]

Thus, at least where the recalcitrant witness's privilege claim is valid, the prosecutor's efforts to call him may warrant disciplinary action as well as reversal. Furthermore, the defendant does not waive the charge of prosecutorial misconduct by failing to request a curative instruction concerning the evidentiary value of a witness's silence. To further deter misconduct, the defendant is given "the benefit of the doubt as to whether or not the error could have been cured by an instruction."[581]

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[580] ABA Project on Standards for Criminal Justice, Standards Relating to the Administration of Criminal Justice 97 (1974). This provision is quoted in Commonwealth v. DuVal, 453 Pa. 205, 216, 307 A.2d 229, 235 (1973). The reference in the quote is apparently to ABA Code of Professional Responsibility DR 1-102(A)(5) ("A lawyer shall not [e]ngage in conduct that is prejudicial to the administration of justice."). See 96 ABA Annual Report 294 (1972).

[581] Commonwealth v. DuVal, 453 Pa. 205, 218, 307 A.2d 229, 235 (1973). In United States v. Maloney, 262 F.2d 535 (2d Cir. 1959), Judge Learned Hand stated:

> As res integra, it is doubtful whether such admonitions are not as likely to prejudice the interest of the accused as to help them, imposing, as they do, upon the jury a task beyond their powers: i.e. a bit of "mental gymnastics," as Wigmore § 2272 calls it, which it is for practical purposes absurd to expect of them. However, the situation is in substance the same as when a judge tells the jury not to consider the confession, or admission, of one defendant in deciding the guilt of another, tried at the same time; and, since it is settled that this rubric will cure that error . . . we do not see why it should not cure the error here.

The prosecutor does have the option of trying to persuade the court, in camera, that the witness has invoked the privilege improperly and should be compelled to testify. Even if the court is persuaded, however, it will not usually allow the prosecutor to call before the jury a witness who persists in his refusal to testify.[582]

While the basic formula developed in reviewing convictions involving prosecutorial misconduct--the "conscious and flagrant attempt" test[583]--focuses on the reasons behind the calling of the witness, many jurisdictions apply a corollary test based strictly upon the prosecutor's knowledge of the witness's intent to "take the fifth."[584] There is a split of authority concerning

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Id. at 538. It is noteworthy that Judge Hand's argument by analogy to the codefendant confession rule has been undermined by later Supreme Court doctrine. See Bruton v. United States, 391 U.S. 123 (1968). Moreover, the majority of the cases have rejected the Maloney view and held the curative instruction insufficient. See, e.g., People v. Owens, 22 N.Y.2d 93, 97, 238 N.E.2d 715, 718, 291 N.Y.S.2d 313, 317 (1968) ("The stigmatizing effect . . . is so powerful that it would be unrealistic to suppose that instructions can cure it . . ."). Another court based its similar decision on the belief that "[a]sking a jury not to draw an adverse inference from a witness's claim of privilege may underscore the inference; even if some or all the jurors had missed the inference, the instruction will draw it for them." People v. Giacalone, 399 Mich. 642, 647 n.8, 250 N.W.2d 492, 495 n.8 (1977). In a recent parallel development, the Supreme Court in Lakeside v. State, 46 U.S.L.W. 4248 (March 22, 1978), maintained the court's right to give a cautionary instruction on prosecutorial comments on the defendant's failure to testify on his own behalf, even over the objection of the defendant. The court held that the "giving of such an instruction . . . does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth or Fourteenth Amendments." Id. at 4250.

[582] 453 Pa. at 212, 307 A.2d at 231-32.

[583] See note 567 supra.

[584] See, e.g., Burkley v. United States, 373 A.2d 878, 880 (D.C.

the state of mind required by this test. Some jurisdictions maintain that the prosecutor must know for a fact that the witness will refuse to testify.[585] In addition, a few of these jurisdictions place an affirmative duty upon the prosecutor to ascertain the witness's intentions.[586] Other jurisdictions apply a negligence standard, basing their decisions on whether the prosecutor should have known that the witness would remain silent.[587] In Mathis v. State,[588] however, the court specifically held that error does not result if a witness changes his mind on the stand and exercises his fifth-amendment rights.[589]

There is a split of authority concerning the effect of prosecutorial misconduct. Those jurisdictions which stress deterrence of misconduct hold that, without more, misconduct constitutes reversible error.[590] Others maintain that misconduct alone

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1977); United States v. Harding, 432 F.2d 1218, 1220 (9th Cir. 1970); United States ex rel. Fournier v. Pinto, 408 F.2d 539, 542 (3d Cir. 1969); Conway v. State, 15 Md. App. 198, 218, 289 A.2d 862, 872, cert. denied, 413 U.S. 920 (1972).

[585] See, e.g., 15 Md. App. at 218, 289 A.2d at 872. See also 373 A.2d at 880; 408 F.2d at 540 (prosecutor knows or has reason to know that witness will refuse to testify). But see 432 F.2d at 1220 (even if prosecutor's conduct was improper, defendant was not prejudiced).

[586] See, e.g., Mathis v. State, 469 S.W.2d 796, 799 (Tex. Crim. App. 1970) (prosecutor has affirmative duty to determine whether witness will testify before calling him). See also 408 F.2d at 540 (prosecutor should have inquired before calling witness).

[587] See 408 F.2d at 540.

[588] 469 S.W.2d 796 (Tex. Crim. App. 1970).

[589] Id. at 799.

[590] See State v. Vega, 85 N.M. 269, 272, 511 P.2d 755, 758 (1973) (prejudice is presumed); but see Mathis v. State, 469 S.W.2d 796,

does not suffice for reversal.[591] In the latter jurisdictions, courts couple inquiries into the prosecutor's good faith with an evaluation of the prejudicial effects of his conduct.[592]

3. The Recalcitrant Immunized Witness

If a witness initially refuses to testify, a subsequent grant of immunity resulting in the witness's renewed willingness to speak is not error. Once "the initial silence [is] broken,

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804 (Tex. Crim. App. 1970) (calling witness without knowing what he would testify to constitutes harmless error).

[591]United States v. Harding, 432 F.2d 1218, 1220 (9th Cir. 1970). See also United States ex rel. Fournier v. Pinto, 408 F.2d 539, 542 (3d Cir. 1969). Burkley v. United States, 373 A.2d 878, 882 (D.C. 1977) (prosecutorial misconduct, if committed at all, was harmless error). Those courts that focus on the prejudicial effect of "misconduct" ignore the "good faith" test altogether See Commonwealth v. DuVal, 453 Pa. 205, 217, 307 A.2d 229, 234 (1973) (good faith of prosecutor irrelevant to determination of prejudicial effect of testimony). But see DeGesualdo v. People, 147 Colo. 426, 430, 364 P.2d 374, 377 (1961) (good faith sufficient to overcome possible prejudice).

[592]The decisions concern themselves with the issue of whether the impermissible inference added "critical weight" to the case by supplying a crucial factor favoring conviction. For example, in Commonwealth v. Martin, 362 N.E.2d 507 (Mass. 1977), the court, in affirming the defendant's conviction for armed robbery, stated, "For affirmance of the conviction we need not find that no 'weight' was added, although that may indeed have been the case; we need only find, as we do, that what was added could not have made the difference between acquittal and conviction." Id. at 513. This appears to be a much stricter standard for reversal, one more closely related to the implicit goals of the "critical weight" test expounded in Namet v. United States, 373 U.S. 179 (1963). See also People v. Owens, 22 N.Y.2d 93, 98, 238 N.E.2d 715, 718, 291 N.Y.S.2d 313, 317 (1968) (proof offered was not "so overwhelming that the error could be deemed harmless beyond a reasonable doubt.").

Whatever standard of review is employed, all courts look to four basic factors in determining if the error caused by calling the witness is sufficient to justify reversal. These are: (1) the type and number of questions asked, (2) the type of inference that is obtained from the witness's silence, (3) the amount of unprivileged testimony the witness gives, and (4) the sufficiency of the other evidence presented.

the jury [is] no longer tempted to speculate or tacitly infer the respondent's guilt . . . . [The] abandonment of the privilege remove[s] the danger of suspicious inference."[593]

Some witnesses, however, express an intention to remain silent even after a grant of immunity. Court decisions vary on whether these witnesses may be called to testify. Many jurisdictions refuse to allow the prosecution to call even the immunized witness. As stated in Commonwealth v. Duval:[594]

> If the fact of invocation of the privilege is, as we believe, irrelevant to the issues and prejudicial to the defendant, it is that much more prejudicial to permit the jury to observe that the recalcitrant witness (a person likely to be associated in the jurors minds with the defendant) elects to remain silent notwithstanding the order of the court that he testify.[595]

Nevertheless, one recent decision, recognizing that these witnesses have "no privilege not to testify,"[596] has held that "it [is] proper for the jury to hear [them] assert a nonprivileged refusal to testify, whatever might be the inferences to be drawn from that refusal."[597]

B. Unavailability-Based Hearsay Exceptions

When a fearful witness who claims the self-incrimination

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[593]State v. Reed, 127 Vt. 532, 537, 253 A.2d 227, 230 (1969).

[594]453 Pa. 205, 217, 307 A.2d 229, 234 (1973); accord, Aubrey v. State, 261 Ind. 692, 310 N.E.2d 556 (1974).

[595]Id.

[596]State v. Classen, 31 Or. App. 683, ___, 571 P.2d 527, 533 (1977) (inmate of state penitentiary refused to testify because he feared for his life if labeled a "snitch").

[597]Id.

right or otherwise refuses to testify has made a previous statement implicating the defendant, the prosecutor will normally seek to introduce the prior statement at trial. In such situations the hearsay rule becomes the prosecutor's principle problem. Exceptions riddle the rule, however, and expansive provisos founded on the declarant's unavailability are particularly useful in the fearful-witness context.

1. General Exceptions to the Hearsay Rule

Sometimes the prosecutor need not demonstrate the witness's unavailability to introduce hearsay evidence; rather a general exception will provide a vehicle for introducing hearsay statements. The prior statement may appear in an admissible business record[598] or constitute an admissible present sense impression[599] or excited utterance.[600] In a recent case[601] the Sixth Circuit admitted as a "recorded recollection" a record based on comments made by the witness to police shortly after an illegal cash-checking incident. Although it appeared that the witness actually remembered the relevant events and merely fabricated his forgetfulness to avoid implicating the defendant, the court admitted the

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[598] See Fed. R. Evid. 803(6); McCormick, supra note 389, § 311, at 728-29 (unavailability requirement for business records "has for all practical purposes been abandoned").

[599] See Fed. R. Evid. 803(1).

[600] See Fed. R. Evid. 803(2); see generally McCormick, supra note 389, §§ 289-98.

[601] United States v. Williams, 22 Crim. L. Rep. 2515 (6th Cir. Feb. 22, 1978).

hearsay under a rule requiring that the "witness once had knowledge but now has insufficient recollection to enable him to testify fully and accurately."[602] In refusing to look beyond the witness's allegation of memory failure, the court averted a difficult subjective inquiry in applying the recorded recollection provision and avoided the anomalous result of excluding evidence where the witness falsely testifies that his memory has faltered.

Courts may also allow use of prior statements reduced to writing merely to refresh the witness's recollection.[603] While under the general rule, all recorded statements may be used to refresh recollection,[604] some courts have refused to follow this rule where the prior statement is too remote in time from the events to which it relates.[605]

2. Unavailability-Based Hearsay Exceptions

While general hearsay exceptions may come into play in cases involving fearful witnesses, invocation of unavailability-based exceptions is more important and more common.[606] This is not surprising; the usual purpose and common effect of instilling fear is to render the would-be witness, for all

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[602] Fed. R. Evid. 803(5).

[603] See note 674 infra. Of course, use of out-of-court statements to refresh recollection does not run afoul of the hearsay rule since the statement is not offered to establish the truth of the matter asserted.

[604] See Annot., 12 A.L.R.2d 473, 597-602 (1962).

[605] McCormick, supra note 389, at 16 n.53.

[606] See generally Fed. R. Evid. 804.

practical purposes, unavailable.[607]

In order to invoke hearsay exceptions founded on the declarant's unavailability, the government must make a good-faith effort to present the witness at trial.[608] If, however, the declarant pleads the fifth amendment,[609] invokes some other privilege,[610] or flees beyond the reach of process,[611] he is, in the law's eyes, unavailable. A few states still condition admission of out-of-court statements upon "actual unavailability," such as death, absence, or incapacity.[612] In these jurisdictions, the traditional unavailability category of "mental incapacity" should embrace refusals to

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[607]Witnesses who are slain before trial also become "unavailable" for purposes of the hearsay exceptions. See United States v. West, 22 Crim. L. Rep. 2513 (4th Cir. Feb. 13, 1978).

[608]Barber v. Page, 390 U.S. 719, 724-25 (1968); cf. United States v. Mathis, 550 F.2d 180, 182 (4th Cir. 1976), cert. denied, 429 U.S. 1107 (1977) (trial court properly admitted out-of-court statement where government was proponent of prior testimony and had inadvertently caused the witness's unavailability).

[609]See United States v. Carlson, 547 F.2d 1346, 1353 (8th Cir. 1976) (refusal to testify on fifth amendment grounds after receiving threats from defendant), cert. denied, 431 U.S. 914 (1977); United States v. Wolk, 398 F. Supp. 405, 411 (E.D. Pa. 1975) (unavailability exists where there is a likelihood that declarant would have refused to testify on fifth-amendment grounds).

[610]Fed. R. Evid. 804(a)(1). See also Weinstein, supra note 425, § 804(a)[01] at 804-37 (1977) (exemption on grounds of privilege requires ruling of judge).

[611]See McCormick, supra note 389, at 140.

[612]See, e.g., N.Y. Crim. Proc. Law §§ 670.10, 670.20 (McKinney 1971) (witness unavailable if dead, ill, incapacitated, absent from jurisdiction and cannot be found with due diligence, or in federal custody); Pa. Stat. Ann. tit. 19, § 582(3) (Purdon 1964) (witness unavailable if dead, incompetent, or absent from jurisdiction and cannot be subpoenaed).

testify due to fear of the defendant.[613]

The federal courts and most state courts activate unavailability-based exceptions when the witness is only constructively unavailable.[614] Exceptions founded on witness unavailability reflect the need to admit otherwise unobtainable evidence; thus, the availability inquiry should focus on whether the declarant's testimony--rather than his body--can be produced at trial.[615]

In the fearful-witness situation, the declarant will often claim a lack of memory or merely refuse to testify.[616] Under the better rule, failure of memory constitutes unavailability,[617] a notion comporting with the common-law concept of competence.[618] Similarly, persistent refusal to testify in the face of court orders suffices to establish unavailability in most jurisdictions.[619] Again, common-law com-

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[613] See People v. Rojas, 15 Cal. 3d 540, 551-52, 542 P.2d 229, 236, 125 Cal. Rptr. 357, 364 (1975) (fear is a "mental infirmity" and a witness who refuses to testify because of threats made against him is unavailable under Cal. Evid. Code § 240(a)(3)).

[614] See 29 Rutgers L. Rev. 133 (1975).

[615] Mason v. United States, 408 F.2d 903, 906 (10th Cir. 1969), cert. denied, 400 U.S. 993 (1971).

[616] See People v. Rojas, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

[617] See McCormick, supra note 389, § 253, at 611-12.

[618] To be held competent to testify, a witness must have perceived the relevant events and be able to recall them and communicate concerning them at trial. See McCormick, supra note 389, at 140 ("capacity to observe, remember, and recount"). Failure of memory thus renders the witness incompetent as to matters outside his recollection.

[619] Fed. R. Evid. 804(a)(2); see United States v. Carlson, 547

petency principles, as well as sound policy, support this view of unavailability.[620]

a. Former Testimony

Most courts classify testimony given at a prior proceeding as hearsay even where the defendant actually cross-examined the witness.[621] The federal rules and most jurisdictions follow this approach, but admit many such statements when made by unavailable declarants under the "former testimony" exception.[622] If the prior testimony was given under oath and the defendant had an opportunity to cross-examine the witness, the statement is admissible irrespective of the character of the earlier tribunal.[623] While courts sometimes indicate that application of the former-testimony exception requires identity of parties and issues, this is "merely a means of fulfilling the policy of securing an adequate opportunity of cross-examination by the

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F.2d 1364, 1354 (8th Cir. 1976) (refusal to testify despite granting of use immunity and a six-month contempt citation rendered witness unavailable), cert. denied, 431 U.S. 914 (1977); United States v. Garner, No. 77-1222 (4th Cir. Feb. 17, 1978) (where witness who was granted use immunity and threatened with contempt, equivocated concerning willingness to answer, court ruled him unavailable).

[620] A failure to testify can be loosely viewed as a failure of the communication component of competence. See note 618 supra.

[621] J. Weinstein, supra note 425, ¶ 804(b)(1)[01], at 804-49.

[622] Fed. R. Evid. 804(b)(1).

[623] See United States v. Hayes, 535 F.2d 479, 482 (8th Cir. 1976) (testimony at prior trial admissible at later trial on different charge); United States v. Mathis, 550 F.2d 180 (4th Cir. 1976) (testimony given at prior mistrial admissible on retrial), cert. denied, 429 U.S. 1107 (1977); Crawford v. State, 23 Crim. L. Rep. 2042 (Md. Ct. App. March 27, 1978) (preliminary hearing testimony admissible).

party against whom testimony is now offered or by someone in the interest."[624] The need to show an opportunity to cross-examine, however, bars admission of grand jury statements under the former-testimony exception.[625]

b. Statements Against Interest

The hearsay exception for statements against interest[626] rests on the common-sense proposition that self-interest counsels against the making of statements subjecting one to criminal liability or pecuniary loss.[627] Statements against interest inculpating another entail a danger of unreliability, however, since they are often made by a codefendant who seeks immunity or who wishes to plead to a lesser crime.[628] Courts have therefore taken special care to separate statements against interest from statements against others.[629]

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[624]McCormick, supra note 389, § 257, at 620.

[625]Under certain circumstances, however, grand jury testimony may be admissible under catch-all exceptions to the hearsay rule, such as Fed. R. Evid. 804(b)(5). See United States v. Garner, No. 77-1222 (4th Cir. Feb. 17, 1978); United States v. West, 22 Crim. L. Rep. 2513 (4th Cir. Feb. 13, 1978); United States v. Carlson, 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977). But see United States v. Fiore, 443 F.2d 112 (2d Cir. 1971) (grand jury testimony inadmissible where witness had refused to take oath), cert. denied, 410 U.S. 984 (1973).

[626]See generally McCormick, supra note 389, §§ 276-80.

[627]Weinstein, supra note 425, § 804(b)(3)[01], at 804-77.

[628]See Bruton v. United States, 391 U.S. 123 (1968).

[629]On the other hand, courts have admitted declarations implicating others as well as the speaker where the statement is sufficiently inseverable that guarantees of reliability inherent in the contradiction of the declarant's interest transfuse the statement as a whole. As Wigmore states:

Some states admit only statements against the declarant's pecuniary interest, although the better rule, followed by

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> Since the principle is that the statement is made under circumstances fairly indicating the declarant's sincerity and accuracy . . . it is obvious that the situation indicates the correctness of whatever he may say while under that influence. In other words, the statement may be accepted, not merely as to the specific fact against interest, but also as to every fact contained in the same statement.

5 Wigmore, supra note 392, § 1465, at 339. It is unlikely, however, that this principle applies to hearsay statements of codefendants, coconspirators, and accomplices. Wigmore himself appears to recommend a special rule for confessions that implicate others--specifically, that such confessions should be admissible only against the declarant.

> The limitation [on admitting statements against penal, rather than pecuniary, interest] is apparently supported by the doctrine that the confessions of an accomplice are not to be used by the prosecution against the accused except so far as they are the admissions of a coconspirator; for A's confession implicating himself and B, the accused, is at least against his own penal interest, and therefore might seem to fall under the present supposed principle. But (1) the interest of A in obtaining a pardon by confessing and betraying his co-criminals is in such cases usually so important that, according to the doctrine of preponderance of interest, the statement would not even under the present exception be admissible; (2) the question has usually been dealt with according to the doctrine of admissions . . . and the present aspect has not been considered; (3) according to the present exception, the accomplice must be shown deceased or otherwise unavailable, and this showing usually has not been attempted in such cases.

Id., § 1477, at 358 n.1. This rule appears to be mandated by the constitutional guarantee of the right of confrontation. In Bruton v. United States, 391 U.S. 123 (1968), the Supreme Court held that, in a joint trial, the admission into evidence of a codefendant's confession implicating another codefendant

the majority of jurisdictions, admits declarations against penal interest as well.[630] Since this exception requires

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violated the latter's right of confrontation since the declarant was unavailable for effective cross-examination at trial. The Court found the admission of the statement prejudicial despite a limiting instruction by the trial judge advising the jury that the statement was inadmissible hearsay. Id. at 126. Although Bruton has been limited by later cases (United States v. Montanye, 505 F.2d 1355, 1359-60 (2d Cir. 1974) (Bruton applies only where the risk is great that the jury will not or cannot follow a limiting instruction), cert. denied, 423 U.S. 856 (1975); United States v. DeBerry, 487 F.2d 448, 452 (2d Cir. 1973) (exception to Bruton in cases of "interlocking" confessions of codefendants); Duff v. Zelker, 452 F.2d 1009, 1010 (2d Cir. 1971) (limiting instruction adequate where defendant's testimony placing him at the scene with an "implication of knowing participation" supported the incriminating confession of codefendant/declarant); People v. Rastelli, 37 N.Y.2d 240, 244, 333 N.E.2d 182, 184, 371 N.Y.S.2d 911, 914 (Bruton inapplicable to statements within coconspirator declaration rule), cert. denied, 423 U.S. 999 (1975), and its language disclaims any intention of applying confrontation-clause prohibitions to any "recognized exception to the hearsay rule," 391 U.S. at 128 n.3, the opinion proceeds on the premise that the unavailable codefendant's hearsay statement implicating the appellant was inadmissible to establish the latter's guilt.

It is doubtful that Bruton applies to statements against interest by victims, since in Bruton the Court noted the particular problems of untrustworthiness in statements made by codefendants: "Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect, a fact recognized when accomplices do take the stand and the jury is instructed to weigh their testimony carefully given the recognized motivation to shift blame onto others." 391 U.S. at 136. Therefore, notwithstanding Bruton and Wigmore's requirement to redact statements against penal interest, the inseverability doctrine is useful, since prosecutors may seek to introduce the hearsay statements of victims, as well as accomplices and codefendants. Assume, for example, that the prosecution wishes to introduce against the defendant, Joe, the following out-of-court statement of a loan-shark customer to a friend: "I owe Joe $400; that's 5% per week!" The acknowledgment of the debt clearly constitutes a statement against interest. See McCormick, supra note 389, § 277, at 672. In addition, the inseverability doctrine may also render admissible the information incriminating Joe by revealing the usurious rate.

For an interesting discussion of the confrontation and evidentiary problems posed by an inseverable non-confession statement against penal interest made by an unavailable accomplice, see People v. Alexander, 61 A.D. 962 (N.Y. 1st Dep't 1978) (concurring opinion) (arguing for admissibility).

[630] Cal. Evid. Code § 1230 (West 1966); Fla. Evid. Code § 90.804(2)

that the declaration subject the speaker to criminal liability, it is inapplicable where the declarant has already been convicted or has received immunity.[631]

c. The "Catch-All" Exception

Under the federal rules, a statement unsalvaged by the enumerated exceptions may be admissible under a "catch-all" exception. This avenue is of extreme importance in seeking admission of many forms of statements, especially prior grand-jury testimony.[632] The catch-all exception is closely circumscribed, however; a statement falls within its sweep only if it satisfies five requirements.[633]

First, the offering party must establish circumstantial guarantees of trustworthiness equivalent to those supporting enumerated exceptions.[634] This limitation satisfies confrontation-clause concerns[635] and ensures presentation of

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(c) (West 1978); N.J. Rules of Evid. § 63(10) (1978); People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970).

[631]United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977).

[632]See notes 665-666 and accompanying text infra.

[633]Fed. R. Evid. 804(b)(5) (applicable where declarant is unavailable). But see S. Rep. No. 93-1277, 93d Cong., 2d Sess., reprinted in [1974] U.S. Code Cong. & Ad. News 7051, 7066 ("The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accompanied by legislative action."). Although a general residual provision phrased in terms identical to the unavailability-based catch-all appears in Fed. R. Evid. 803(24), existing cases applying the residual exception have generally involved an unavailable declarant.

[634]Fed. R. Evid. 803(24) and 804(b)(5). See United States v. Garner, No. 77-1222 (4th Cir. Feb. 17, 1978).

[635]See California v. Green, 399 U.S. 149, 161-62 (1970) (testi-

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evidence from which the trial judge can evaluate the likely veracity of the proffered statement.[636] In United States v. Carlson,[637] a government witness implicated the defendant before a grand jury, but on the eve of trial informed the government that he would not testify because he feared reprisals. The Eighth Circuit held the declarant unavailable and admitted his grand jury statement under the residual exception, citing three factors as sufficient indices of truthfulness: (1) the witness made the statement under oath and threat of perjury; (2) the witness testified to matters of first-hand knowledge; and (3) the witness never retracted or indicated reservations about his testimony.[638] In another fearful-

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mony admissible when declarant unavailable if it satisfies "indicia of 'reliability'."). See generally notes 662-664 and accompanying text infra.

[636] For cases satisfying the reliability requirement, see United States v. Rogers, 549 F.2d 490, 501 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); United States v. Insana, 423 F.2d 1165, 1170 (2d Cir.), cert. denied, 400 U.S. 841 (1970); United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976); Crawford v. State, 23 Crim. L. Rep. 2042, 2043 (Md. Ct. App. March 27, 1978); United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977). But see United States v. Fiore, 443 F.2d 112 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973); United States v. Oates, 560 F.2d 45, 81 (2d Cir. 1977).

[637] 547 F.2d 1346 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

[638] Id. at 1354. See also United States v. West, 22 Crim. L. Rep. 2513 (4th Cir. Feb. 13, 1978) (grand jury testimony admissible where witness died before trial since corroboration consisted of police recordings of witness's conversations with defendant, witness kept under continual surveillance, and the policemen who recorded conversations were available as witnesses at trial); United States v. Garner, No. 77-1222 (4th Cir. Feb. 17, 1978) (corroboration of grand jury statement of fearful witness consisted of fellow first-hand witness confirming grand jury testimony concerning defendant's trip abroad to purchase heroin, records of airline tickets, customs declarations, passport endorsements, and European hotel registrations).

witness case,[639] however, the Fifth Circuit excluded grand-jury testimony of an unavailable declarant where: (1) the prosecutor and grand jury pressured the witness to answer questions; (2) the witness responded to leading questions which would not have been allowed at trial; (3) the fear of reprisals by persons other than the defendant provided the witness with an incentive to lie; (4) although the witness testified under oath, the threat of perjury did not guarantee reliability since the prosecutor threatened to call the witness before successive grand juries where he faced an unlimited number of contempt charges if he remained silent;[640] and (5) the witness did not support his testimony with any detailed facts concerning the defendant.[641] Furthermore, unlike in Carlson, the defendant never directly threatened the witness.[642]

Second, the government must offer the statement as evidence of a material fact.[643] This requirement imposes the wise limitation that courts should not apply the catch-all exception to "trivial or collateral matters."[644] In Carlson

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[639] United States v. Gonzalez, 559 F.2d 1271 (5th Cir. 1977).

[640] Ordinarily, testimony given under oath bears strong guarantees of reliability since the declarant faces possible perjury charges if he lies. United States v. Carlson, 547 F.2d at 1354. The Gonzalez court, however, suggested that the guarantee of reliability provided by the oath is negated where the prosecutor confronts the witness with open-ended contempt penalties. 559 F.2d at 1273.

[641] 559 F.2d at 1273.

[642] Id. at 1274.

[643] Fed. R. Evid. 803(24)(A); 804(b)(5)(A).

[644] United States v. Iaconetti, 406 F. Supp. 554, 559 (E.D.N.Y.),

the government satisfied this requirement since the declarant's statement suggested "intent, knowledge, a common plan or scheme and the absence of mistake or accident."[645]

Third, the statement must be more probative on the point for which the government seeks support than any other evidence it can procure through reasonable efforts.[646] The government satisfies this requirement by showing that the testimony in question is necessary to its case.[647]

Fourth, the government must notify the defendant before trial that it plans to offer an out-of-court statement into evidence under the residual exception.[648] The notice requirement provides the defendant with the ability to prepare to contest the statement's use.[649]

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aff'd, 540 F.2d 574 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977).

[645] 547 F.2d at 1354.

[646] Fed. R. Evid. 803(24)(B); 804(b)(5)(B).

[647] 547 F.2d at 1355.

[648] Fed. R. Evid. 803(24); 804 (b)(5).

[649] H. Conf. Rep. No. 93-1597, 93d Cong., 2d Sess. 11-12, reprinted in [1974] U.S. Code Cong. & Ad. News 7098, 7106. Courts have generally interpreted this requirement flexibly. See United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir. 1976) (where the need for the out-of-court statement did not arise until after the start of trial the court admitted the evidence, noting both the impracticability of giving notice before trial and defendant's failure to request a continuance), cert. denied, 429 U.S. 1041 (1977); accord, United States v. Evans, 572 F.2d 455, 489 (5th Cir. 1978); United States v. Lyon, 567 F.2d 777, 784 (8th Cir. 1977); United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976). But see United States v. Oates, 560 F.2d 45, 72-73 n.30 (2d Cir. 1977) ("there is absolutely no doubt that Congress intended that the requirement of advance notice be rigidly enforced").

Finally, admission of the statement must accord with the purposes of the Rules and the interests of justice.[650] This sweeping requirement merely restates Rule 102,[651] and should rarely bar admission if the other four tests are met.

Only six states and the federal government provide by statute or rule for hearsay statements under a catch-all exception.[652] There is, however, also common-law authority recognizing a residual exception.[653]

3. Constitutional Limits on Admissibility of Out-of-Court Statements

a. Unavailability and Confrontation

A court may admit an out-of-court statement only if it satisfies sixth-amendment confrontation-clause requirements,[654] as well as subconstitutional evidentiary principles governing the scope of the hearsay rule.[655] These requirements are

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[650]Fed. R. Evid. 803(24)(C); 804(b)(5)(C).

[651]"These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that the truth may be ascertained and proceedings justly determined." Fed. R. Evid. 102.

[652]Ark. Stat. Ann. § 28-1001; Minn. Rule of Evidence 804 (Supp. 1977); Mont. Rule of Evidence 804 (1977); N.M. Stat. Ann. § 20-4-804 (Interim Supp. 1976); N.D. Rule of Evidence 804 (Supp. 1977); Wis. Stat. Ann. §§ 908.04; 908.045 (1975).

[653]See Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 396-97 (5th Cir. 1961).

[654]"In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI.

[655]The Supreme Court recognizes that the two requirements overlap, but has consistently refused to find them coterminous. Dutton v.

easily met in the case of an available witness since, by definition, an available witness can be called and cross-examined at trial.[656]

Because of the inability of the defense to call the declarant, a more serious confrontation problem arises when the court invokes an unavailability-based exception to admit hearsay evidence. Nevertheless, admission of out-of-court statements pursuant to a hearsay exception by a declarant afraid to testify at trial will normally survive sixth-amendment challenge.[657] The confrontation clause does not necessarily require actual confrontation.[658] Courts will admit hearsay even in the absence of the ability to cross-examine if the proffered statement bears equivalent guarantees of trustworthiness.[659] Thus, only rarely does application of a hearsay exception to admit statements of a declarant unavailable for confrontation violate the confrontation clause,[660] since all hearsay exceptions are based on peculiar indices of trust-

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Evans, 400 U.S. 74, 86 (1970); California v. Green, 399 U.S. 149, 155-56 (1970) (confrontation clause can be violated by the admission of testimony that meets all evidentiary requirements); United States v. Yates, 524 F.2d 1282, 1285-86 (D.C. Cir. 1975) (on facts presented, confrontation clause barred admission of hearsay statement).

[656] 399 U.S. at 158-59.

[657] United States v. Carlson, 547 F.2d 1346, 1356 (8th Cir. 1976), cert. denied, 431 U.S. 914 (1977).

[658] Dutton v. Evans, 400 U.S. 74 (1971).

[659] But see note 629 infra (constitutional limits on declaration against interest exception).

[660] United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965)

worthiness that accompany certain forms of utterances.[661]

In California v. Green[662] the Supreme Court mandated an examination of circumstantial "indicia of reliability" in determining the propriety of applying the confrontation clause to bar admission of out-of-court statements.[663] In Green itself, the Court admitted testimony presented during a preliminary examination. The Court held that since the testimony had been given under oath and there had been an opportunity to cross-examine the witness both then and during the subsequent trial, the testimony met the requirements of the confrontation clause. The Court noted, however, that even in the case of an unavailable witness and no opportunity to cross-examine, hearsay may meet the constitutional requirement provided it is

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("The application of . . . virtually all the exceptions to the hearsay rule, does not involve any deprivation of the right of confrontation as the Sixth Amendment has been interpreted and construed"), cert. denied, 384 U.S. 947 (1966).

[661] See Hoover v. Beto, 467 F.2d 516, 532-33 (5th Cir. 1972). But see note 629 and accompanying text supra.

[662] 399 U.S. 149 (1970).

[663] Id. at 161-62. For cases satisfying the reliability requirement see note 636 supra. See also United States v. Fiore, 443 F.2d at 115 (the oath is required for all testimonial statements); United States v. Allen, 409 F.2d 611, 613-14 (10th Cir. 1969) ("demeanor testimony not an essential ingredient of the confrontation privilege"); Crawford v. State, 23 Crim. L. Rptr. 2042 (Md. Ct. App. March 27, 1978) (cross-examination at preliminary hearing, though not as extensive as it would have been at trial, was adequate for purposes of the confrontation clause where witness was unavailable at trial). There are limitations on the defendant's right to cross-examine adverse witnesses. Chambers v. Mississippi, 410 U.S. 284, 295 (1973) ("[T]he right to confront and to cross-examine is not absolute and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process").

marked by sufficient "indicia of reliability."[664]

This test should normally be met by grand jury testimony offered as hearsay evidence at trial. Since the grand jury witness testifies under oath and is subject to prosecution for perjury, "indicia of reliability" are invariably present.[665] Survival of a confrontation-clause attack, however, does not guarantee the admission of grand jury statements; the proof must, in addition, satisfy a recognized exception to the hearsay rule.[666]

b. Waiver of the Confrontation Right

A personal privilege intended for the benefit of the accused, the confrontation right may be waived.[667] Waiver can occur in numerous ways: by voluntarily and express relinquishment;[668] by stipulation to the admission of evidence;[669] or, by pleading guilty.[670] In addition, waiver may arise out of the

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[664] 399 U.S. at 161-62.

[665] See United States v. Carlson, 547 F.2d 1346, 1356; United States v. Garner, No. 77-1222 (4th Cir. Feb. 17, 1978); United States v. West, 22 Crim. L. Rep. 2513, 2514 (4th Cir. Feb. 13,

[666] On use of hearsay exceptions to introduce grand jury testimony see note 625 and accompanying text supra.

[667] 547 F.2d at 1357.

[668] Brookhart v. Janis, 384 U.S. 1, 4 (1966). To constitute a valid waiver there must be "an intentional relinquishment or abandonment of a known right or privilege by the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

[669] United States v. Martin, 489 F.2d 674, 678 (9th Cir. 1973), cert. denied, 417 U.S. 948 (1974); see Williams v. Oklahoma, 358 U.S. 576, 584 (1959); Diaz v. United States, 223 U.S. 442, 451 (1912).

[670] Boykin v. Alabama, 395 U.S. 238, 243 (1969).

defendant's misconduct, including intimidation of the declarant.[671] The court need not explicitly advise a defendant of his confrontation right prior to waiver; the issue in every case is whether he forfeited that right personally.[672] Moreover, a waiver made by defendant's lawyer constitutes a forfeiture of the confrontation right if the defendant acquiesces.[673]

C. Coping with the Turncoat Witness

Sometimes referred to as the "spun witness" or "turned witness," the "turncoat," after initially assisting the prosecution, revises his story to support the defendant either prior to trial or while on the stand. Since, by definition, the turncoat has made a prior statement implicating the defendant, the prosecutor may attempt to use this statement at trial to refresh the witness's recollection,[674] to impeach him with his inconsistent remarks, or

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[671]United States v. Carlson, 547 F.2d at 1358 (defendant impliedly waived his right of confrontation when "he intimidated [the witness] into not testifying and, thus, created a situation in which the Government's only means of . . . [introducing witness's] relevant and probative testimony . . . was by offering [the] grand jury testimony in evidence."); see also Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (right of confrontation waived by defendant's misconduct); Taylor v. United States, 414 U.S. 17, 19 (1973) (waiver resulted when defendant voluntarily absented himself from the trial); Illinois v. Allen, 397 U.S. 337, 342-43 (1970) (waiver resulted after the removal of defendant from courtroom due to disruptive conduct).

[672]United States v. Carlson, 547 F.2d at 1358 n.11.

[673]Brookhart v. Janis, 384 U.S. at 7-8.

[674]The Supreme Court supported this technique in Hickory v. United States, 151 U.S. 303, 309 (1894). Chief Justice Fuller, writing for the majority, stated:

> When a party is taken by surprise by the evidence of his witness, the latter may be interrogated

as substantive evidence admissible under the hearsay exceptions already discussed.[675]

These strategies, however, may pose substantial difficulties. The general rules of challenging credibility, as well as special restrictions on impeaching one's "own" witness, limit the ability to impeach. Similarly, the hearsay rule provides an imposing barrier to the prosecutor seeking to introduce prior inconsistent statements as evidence-in-chief.

1. Restrictions on Impeaching One's Own Witness

As a general rule, a party calling a witness at trial may not challenge his credibility. This rule, among the oldest of evidentiary principles,[676] applies not only to attack by inconsistent statements, but to all manners of impeachment.[677]

> as to inconsistent statements previously made by him for the purpose of refreshing his recollection and inducing him to correct his testimony; and the party so surprised may also show the facts to be otherwise than as stated, although this incidentally tends to discredit the witness.

See Bullard v. Pearsall, 53 N.Y. 230, 231, 23 N.Y.S. 459, 460 (1873) (inquiries calculated to elicit true facts or to show witness that he is mistaken, consequently inducing him to correct his testimony, should not be excluded simply because they may reflect unfavorably on his credibility).

Counsel may use memoranda to refresh the witness's memory so long as the witness's subsequent testimony is based upon his own recollections and not upon the writing. United States v. Morlang, 531 F.2d 183, 191 (3d Cir. 1975). Once the witness denies making the prior statement, however, the examination must end. Furthermore, the prosecutor may not read the more incriminating statement in its entirety, thus placing it in evidence, under the guise of refreshing the witness's memory. See People v. Welch, 16 A.D.2d 554, 229 N.Y.S.2d 909 (4th Dep't 1962).

[675] See notes 598-653 and accompanying text supra.

[676] See Note, Impeaching One's Own Witness, 49 Va. L. Rev. 996 (1963).

[677] McCormick, supra note 389, § 38.

Where applicable, it presents a major obstacle for prosecutors faced with the turncoat witness. If the witness turns at trial, the rule threatens to preclude impeachment despite the witness's devastating testimony. If the witness turns prior to trial, the rule may bar the prosecutor altogether from introducing the witness's previous statement.

a. History of the Rule

At earliest common law, a party's "witnesses" were his friends and relatives, specifically chosen by him to appear at trial and take a presecribed oath. Part juror and part witness, the "oath-helper" testified only as to the veracity of the party calling him, rather than the facts of the case.[678] Since the calling party had complete freedom of choice in his selection of witnesses, he could not dispute the testimony of those he called.[679] As the modern concept of trial by jury emerged, however, the role of the witness dramatically changed. No longer permitted merely to swear an oath on behalf of a friend, the witness was obliged to have some knowledge of the facts bearing on the issue at bar.[680] Resulting limitations on parties' freedom to select witnesses and the complexity of modern courtroom procedure raised questions as to whether the no-impeachment rule impeded just decisions.[681] In response to

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[678] 51 Neb. L. Rev. 352, 353 (1971).

[679] Id.; 3 J. Wigmore, supra note 392, § 896.

[680] 51 Neb. L. Rev. 352, 354 (1971).

[681] Id. See Ladd, Impeachment of One's Own Witness--New Developments, 4 U. Chi. L. Rev. 69 (1936).

dissatisfaction with the rule, significant exceptions developed. This trend presaged a more dramatic response; within the past decade, a number of jurisdictions have rejected the rule altogether.[682]

b. Rationale and Repudiation

Courts have offered two main justifications in support of the rule against impeaching one's own witness: first, that the party by inviting the witness's testimony vouches for his trustworthiness, and second, that the power to impeach the witness's character amounts to the power to coerce self-serving testimony.[683]

An antiquated justification, the vouching theory overlooks the lack of free choice in witness selection; except in choosing character witnesses and experts, modern-day parties, for all practical purposes, have witnesses foisted upon them.[684] The validity of the coercion theory is also minimal. The threat of coercion applies only to impeachment by proof of bad character or corruption.[685] Moreover, such challenges can impugn only the witness's veracity, and, like all forms of impeachment, are further circumscribed by general evidentiary principles protecting against prejudice.[686]

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[682] See notes 709-710 and accompanying text infra.

[683] Ladd, supra note 681, at 76; McCormick, supra note 389, § 38, at 75; Wigmore, supra note 392, §§ 898-99.

[684] See Ladd, supra note 681, at 77; McCormick, supra note 389, § 38, at 76.

[685] 37 Mo. L. Rev. 507, 508 (1972).

[686] See McCormick, supra note 389, § 41, at 76.

Strictly applied, the no-impeachment rule leaves the calling party at the mercy of his witness and his adversary. If the truth supports the calling party, but the witness possesses a character for untruthfulness, honest testimony will precipitate attacks by the adversary; if, on the other hand, the witness lies, the adversary will waive cross-examination while the calling party is unable to impeach.[687] This pincer movement aimed at the prosecutor frustrates a reasoned search for truth.[688] Despite these criticisms, the no-impeachment rule remains in effect in most jurisdictions. The severity of the rule is mitigated, however, by two important exceptions.

c. Exceptions to the No-Impeachment Rule

Jurisdictions following the common-law rule have embraced, as well, a basic exception.[689] Whether statute or decision supports this exception, courts have invariably recognized two necessary components.[690] First, the party seeking to impeach

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[687] See id., § 38, at 75.

[688] See Note, supra note 676, at 1019.

[689] See generally McCormick, supra note 389, § 38, at 76 & n.74. Pennsylvania common law, for example, provides that if a party can show he had no reason to expect hostility and was surprised when his witness turned, he may impeach his witness. Commonwealth v. White, 447 Pa. 331, 338, 290 A.2d 246, 250 (1972); Commonwealth v. Reeves, 267 Pa. 361, 363, 110 A. 158, 159 (1919). Other states have embraced variations on this rule. In New Jersey, for example, one may generally impeach his own witness, but not by prior inconsistent statements except in the case of surprise. N.J. Stat. Ann. § 2A: 84A, Rule 20 (West 1976). Florida, on the other hand, permits impeachment of one's own witness when that witness proves adverse, regardless of surprise, but not by evidence of bad character. Fla. Stat. Ann. § 90.608 (West Supp. 1978). In Johnson v. State, 178 So. 2d 724, 728 (Fla. Dist. Ct. App. 1965), the court interpreted the term "adverse" to mean "giving evidence that is prejudicial to the party producing the witness."

[690] See McCormick, supra note 389, § 38.

must show that he is surprised by the witness's testimony. This requirement disarms the prosecutor who discovers before trial that his witness has spun.[691] Second, the party must demonstrate that the witness's testimony is "positively harmful to his cause."[692]

The formulation of the "harmfulness" or "prejudice" requirement varies from state to state.[693] As a general rule, however, the testimony must affirmatively injury the calling party's case. A witness's forgetfulness or mere denial will normally not warrant impeachment.[694] California, however, has liberally applied the

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[691] See Young v. United States, 97 F.2d 200 (5th Cir. 1938) (prior statement erroneously admitted where prosecutor expected witness to disavow it).

[692] McCormick, supra note 389, § 38, at 77. Prior to 1975, federal evidence law provided that a pre-trial statement could not be admitted for purposes of impeachment unless the prosecution could convince the court that it was both surprised and affirmatively damaged by the witness's in-court testimony. E.g., United States v. Allsup, 485 F.2d 287, 291 (8th Cir. 1973); United States v. Scarbrough, 470 F.2d 166, 168 (9th Cir. 1972).

[693] See, e.g., State v. D'Ippolito, 22 N.J. 318, 324, 126 A.2d 1, 5 (1956) (willful and material testimony); Commonwealth v. Bynum, 454 Pa. 9, 12, 309 A.2d 545, 547 (1973) (more than merely disappointing; testimony must contain "something . . . which, if not disbelieved by the jury, will be harmful or injurious to the party calling him"); Malone v. Gardner, 362 Mo. 569, 582, 242 S.W.2d 516, 523 (1951) (material and adverse read to mean "unfavorable" and "material"; Travelers' Ins. Co. v. Hermann, 154 Md. 171, 179, 140 A. 64, 67 (1928) (material and prejudicial: "[I]t is not sufficient to show that it is not beneficial to [the prosecutor] or that it disappoints his expectations, even though justified").

[694] See Commonwealth v. Strunk, 293 S.W.2d 629 (Ky. 1956) (requiring that "witness testif[y] positively" as to "fact prejudicial to the party, or to a fact clearly favorable to the adverse party"); Note, supra note 676, at 1004; see also People v. Newson, 37 Cal. 2d 34, 41, 230 P.2d 618, 623 (1951).

prejudice concept. In People v. LeBeau,[695] after a prosecution rebuttal witness denied making an out-of-court statement that contradicted the defendant's in-court testimony, the trial court permitted impeachment by extrinsic evidence of the witness's prior statement. Distinguishing a case concerning preclusion of impeachment evidence involving similarly "neutral" testimony, the Supreme Court of California upheld the trial court's ruling, rejecting the defendant's view that "all negative answers are harmless" since they are not favorable to either side.[696] Instead, "it is necessary to determine on the facts of each case whether the testimony of the witness sought to be impeached actually damaged the party calling him."[697] Applying this open-ended standard liberally, the court held that the appearance of unsupported harassment of the defendant sufficed to establish prejudice to the prosecution. It is uncertain how far LeBeau's "harassment" logic extends, but the prejudicial appearance of spurious harassment arguably arises in any case where the prosecution's questioning points toward the defendant's guilt.

A second standard exception to the no-impeachment rule applies to the "compelled witness." Jurisdictions requiring the prosecutor to call all known important witnesses normally permit the prosecutor to impeach them.[698] In practice, this aspect of

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[695] 39 Cal. 2d 146, 245 P.2d 302 (1952).

[696] Id. at 149, 245 P.2d at 303.

[697] Id. (emphasis added).

[698] Ladd, supra note 681, at 1014-15; McCormick, supra note 389, § 38, at 77.

the "compelled witness" exception is of limited importance. In federal court,[699] as in most state jurisdictions,[700] there is no rule requiring the prosecution to produce all known eyewitnesses to a crime.

Prosecutors in no-impeachment states, however, may find refuge in another branch of the "compelled witness" exception. A number of cases recognize that where a party must, for all practical purposes, call a witness to the stand, impeachment is permissible.[701] In loansharking cases, the victim should qualify as an essential witness.

Of course, if the defense calls the turncoat, the prosecution may challenge his credibility.[702] Fearing introduction

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[699]United States v. Bryant, 461 F.2d 912, 916 n.1 (6th Cir. 1972).

[700]In Pennsylvania, if the prosecutor believes that a potential witness is unreliable or unworthy of belief, there is no duty to call that witness even though his name appears on an indictment or he is an eyewitness. Commonwealth v. DiGiacomo, 463 Pa. 449, 345 A.2d 605, 606 (1975); Commonwealth v. Gray, 441 Pa. 91, 100, 271 A.2d 486, 490 (1970); Commonwealth v. Horn, 395 Pa. 585, 589, 150 A.2d 872, 874 (1959). In New York, the prosecution is under no duty to call at trial every witness to a crime. People v. Sapia, 41 N.Y.2d 160, 163, 359 N.E.2d 688, 690, 391 N.Y.S.2d 93, 95 (1976); People v. Stridiron, 33 N.Y.2d 287, 292, 307 N.E.2d 242, 245, 352 N.Y.S.2d 179, 182 (1973). Florida also acknowledges the prosecutor's discretion when faced with a material witness (even an eyewitness) who might prove hostile or attempt to conceal material facts. See Pride v. State, 151 Fla. 473, 474, 10 So. 2d 806, 807 (1942); Morris v. State, 100 Fla. 850, 859, 130 So. 582, 586-87 (1930). Similarly, the courts of Massachusetts and New Jersey recognize the prosecutor's wide discretion in calling witnesses whom the prosecutor does not trust. Commonwealth v. Sacco, 259 Mass. 128, 141, 156 N.E. 57, 61 (1927). See State v. Murphy, 36 N.J. 172, 178, 175 A.2d 622, 625 (1961); State v. Laganella, 144 N.J. Super. 268, 280, 365 A.2d 225, 231 (A.D. 1976).

[701]E.g., Fine v. Moomjian, 114 Conn. 226, 231-32, 158 A. 241, 244 (1932); Atwood v. Hayes, 139 Okla. 95, 100, 281 P. 259, 263 (1929).

[702]An interesting and difficult question arises as to the prosecutor's ability to impeach when a witness is first called by the

of prior statements, however, the defense will normally hesitate to do so. In some jurisdictions this problem may be resolved by calling upon the court to put the turncoat witness on the stand.[703] If the witness is called by the judge, either party may impeach.[704]

Some disagreement exists as to when a court may or must exercise its authority to call witnesses; however, it is clear that the decision rests primarily within the discretion of the trial court.[705] The judge should exercise this power to produce a satisfactory record, to render a reasonable decision on matters of fact, or to discover the real issues in the case.[706] In a

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prosecutor and then by the defendant. See generally McCormick, supra note 389, § 38, at 78-79 (outlining four different resolutions of problem).

[703] See Note, supra note 676, at 1015; see generally Note, Trial Judge's Power To Call Witnesses, 51 N.W. L. Rev. 761, 769 (1957).

[704] 3A Wigmore, supra note 6, § 392, at 703.

[705] See Annot., 67 A.L.R.2d 538 (1959); Fla. Stat. Ann. § 90.615 (Supp. 1978) (court in its discretion can call witnesses to be cross-examined by both parties); Hall v. State, 136 Fla. 644, 678, 187 So. 392, 407 (1939) (after state attorney asked court to call witness, jury was sent out, pros and cons of request argued, and court granted the state's motion). Pennsylvania cases have also recognized the court's power to call witnesses and emphasized the judge's broad discretion. Commonwealth v. Crews, 429 Pa. 16, 22-23, 239 A.2d 350, 354 (1967); Commonwealth v. Di Pasquali, 424 Pa. 500, 504, 230 A.2d 449, 450 (1967); Commonwealth v. Burns, 409 Pa. 619, 636-37, 187 A.2d 552, 561 (1963) ("In certain instances it is not only proper for the court to call a witness as the court's witness but it is necessary and imperative to do so in the interest of justice"). New Jersey also recognizes the power of the trial judge to call witnesses. See State v. Andreano, 117 N.J. Super. 498, 502, 285 A.2d 229, 231 (A.D. 1971). Balanced against the court's power to call a witness, however, is "the necessity of judicial self-restraint and the maintenance of an atmosphere of impartiality." Band's Refuse Removal, Inc. v. Borough of Fair Lawn, 62 N.J. Super 533, 548, 163 A.2d 465, 479 (A.D. 1960).

[706] Note, supra note 703, at 774. The Federal Rules of Evidence

number of cases, courts have supported judicial witness-calling by citing the refusal of either party to vouch for a witness who seemingly possesses important information.[707] Thus, in the turncoat-witness context, the prosecutor may wish to inform the judge of his dilemma and resulting refusal to vouch for the witness. Recognizing the truth-seeking function of the trial, courts should, in turn, call the witness to the stand.[708]

d. Rejecting the Traditional Rule--The Modern Trend and the Federal Rule

Breaking away from the traditional rule, several jurisdic-

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provide that a court "may [call witnesses] on its own motion or at the suggestion of a party." Fed. R. Evid. 614. While neither the rule nor the accompanying Advisory Committee Note suggest what standards a court should use when a party requests judicial calling of a witness, common-law principles should provide useful guidance. Under federal common law, "a judge [could], in the exercise of sound discretion and in the interest of justice and the ascertainment of truth, call witnesses whom the parties [had] not seen fit to call." United States v. Browne, 313 F.2d 197, 199 (2d Cir.), cert. denied, 374 U.S. 814 (1963). A conviction would be reversed only if calling the witness was an abuse of discretion resulting in prejudice to the defendant. Smith v. United States, 331 F.2d 265, 273 (8th Cir. 1964).

[707] E.g., Commonwealth v. Burns, 409 Pa. 619, 636, 187 A.2d 552, 561 (1963); Hall v. State, 136 Fla. 644, 678, 187 So. 392, 407 (1939).

[708] See Hall v. State, 136 Fla. 644, 678, 187 So. 392, 407 (1939). McCormick, citing a number of cases, states:

> The power to call witnesses is perhaps most often exercised when the prosecution expects that a necessary witness will be hostile and desires to escape the necessity of calling him and being cumbered by the traditional rule against impeaching one's own witness. The prosecutor may then invoke the judge's discretion to call the witness in which event either party may cross-examine and impeach him.

McCormick, supra note 389, § 8, at 13-14 (footnote omitted).

tions now permit impeachment without regard to which party called the witness.[709] This liberalization wisely protects the prosecutor obliged by the circumstances of the case to call a witness and eliminates the prosecutor's dilemma in cases involving uncertainty as to the witness's testimony. The witness may be called in the hope that he will testify favorably; however, if the witness proves adverse, impeachment will be allowed. Evidentiary limitations on prejudicing the defendant, however, may prohibit otherwise permissible prosecutorial impeachment even in jurisdictions that embrace the modern rule.[710]

2. Use of Prior Inconsistent Statements To Impeach the Turncoat Witness

The prosecutor able to establish an exception to the no-impeachment rule (or fortunate enough to be in a jurisdiction that permits impeachment of one's own witness), can normally challenge the turncoat witness on the basis of corruption, character for untruthfulness, and certain types of prior convictions.[711] In addition, the components of competency--such as perception and memory--may be challenged to discredit the witness.[712]

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[709] See, e.g., Fla. Stat. Ann. § 90.608(2) (West Supp. 1978) (except that party producing witness may not impeach character); Mass. Ann. Laws. ch. 233, § 23 (Michie/Law. Co-op) (except that party producing witness may not impeach "by evidence of bad character"); N.J. Stat. Ann. § 2A:84A, Rule 20 (West 1976) (except that surprise is required for impeachment by prior inconsistent statements); N.Y. Crim. Proc. Law § 60.35 (McKinney 1971).

[710] See notes 719-725 and accompanying text infra.

[711] McCormick, supra note 389, § 33, at 66, § 43, at 86.

[712] Id.

The most effective method of impeachment, however, involves introduction of prior inconsistent statements.[713] Such statements are of particular importance in the turncoat-witness context. Invariably, the turncoat witness made a prior statement implicating the defendant; otherwise he could not "turn" at trial.

a. Defining Inconsistency

To be found inconsistent, the prior statement need not diametrically contradict the witness's current testimony.[714] In fact, "inconsistencies may be found in changes in position, they may be implied through silence, and they may also be found in denial of recollection."[715] In evaluating "inconsistency," the federal courts apply a reasonableness test, permitting introduction of the prior utterance if, upon comparing the two statements in their entirety, a reasonable man would find that their effect is to produce inconsistent beliefs.[716] The contra-

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[713] Id., § 38, at 75.

[714] The court exercises its discretion in determining the inconsistency issue (United States v. Hale, 422 U.S. 171, 180 n.7 (1975); United States v. Morgan, 555 F.2d 238, 242 (9th Cir. 1977)), by looking to the circumstances of the individual case (United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977)). Jurisdictions vary on what kinds of utterances may be offered as prior inconsistent statements. New York, for example, requires either that the statement be oral and given under oath, or that the statement be written and signed by the witness. N.Y. Crim. Proc. Law § 60.35(1) (McKinney 1971).

[715] United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); 3 Weinstein, supra note 425, ¶607[06], at 607-63. But see Langan v. Pianowski, 307 Mass. 149, 151, 29 N.E.2d 700, 701 (1940) (failure to remember does not constitute inconsistency). Thus it is clear that the concept of "inconsistency" departs markedly from the concept of prejudice applied to the surprise exception to the no-impeachment rule. See text accompanying notes 692-697 supra.

[716] United States v. Barrett, 539 F.2d 244, 254 (1st Cir. 1976);

diction need not lie "in plain terms . . . [Inconsistency exists] if the proferred testimony, taken as a whole, either by what it says or by what it omits to say, affords some indication that the fact was different from the testimony of the witness whom it sought to contradict."[717] For example, if a witness in detailed testimony before the grand jury explained the loansharking operation of the defendant, yet at trial stated that he could not recall the events in question, the court probably would find his failure to remember inconsistent with his previous grand jury testimony. Consequently, the prosecution would be allowed to introduce the grand jury statement for purposes of impeachment.

b. Measuring Prejudicial Effect

Use of prior inconsistent statements to impeach necessarily increases the risk of prejudicial error since juries, in spite of cautionary instructions, may consider the statements probative of the defendant's guilt.[718] Consequently, courts may refuse to permit the prosecution to employ impeachment to place otherwise inadmissible evidence before the jury.

The Federal Rules of Evidence, for example, no longer require a showing of surprise and affirmative damage as prerequisites to

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see generally 4 Weinstein, supra note 425, ¶801(d)(1)(A)[101], at 801-76 to -76.1.

[717]United States v. Morlang, 531 F.2d 183, 190 (4th Cir. 1975). See also United States v. Coppola, 479 F.2d 1153, 1158 (10th Cir. 1973).

[718]In United States v. Desisto, 329 F.2d 929, 933 (2d Cir.), cert. denied, 377 U.S. 979 (1964), the court condemned the expectation that jurors could perform the mental gymnastics necessary to separate the impeachment function of prior inconsistent statements from their effect as substantive evidence.

impeachment of the turncoat witness.[719] Under the Rules, however, all evidence is subject to a "probative value versus unfair prejudice" analysis,[720] an exercise assigned to the discretion of the trial court.[721]

The concern with possible prejudice[722] and misleading the jury is particularly well-founded where the prosecutor knows that the witness intends to repudiate his earlier statement.[723] Aware that the witness will not provide helpful evidence, the prosecutor

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[719]Fed. R. Evid. 607 provides: "The credibility of a witness may be attacked by any party, including the party calling him." See also United States v. Alvarez, 548 F.2d 542, 543 n.3 (5th Cir. 1977).

[720]Fed. R. Evid. 403 provides:

> Although relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[721]See United States v. Robinson, 544 F.2d 611, 616 (2d Cir. 1976).

[722]The length and detail of the prior statement bear on the issue of undue prejudice. While the precise amount of the prior statement admissible to impeach the witness is unclear, it appears that the prosecutor may not read an entire lengthy affidavit. People v. Cathey, 38 A.D.2d 976, 331 N.Y.S.2d 837 (2d Dep't 1972).

[723]In United States v. Morlang, 531 F.2d 183 (4th Cir. 1975), the prosecutor called a witness whose testimony he knew would tend to exonerate the defendant. The appellate court found that the "real purpose for calling [the witness] was apparently to elicit from him a denial that he had ever had any conversation with a fellow prisoner in which he implicated [the defendant]." Id. at 190. Once he received the denial, the prosecutor introduced the incriminating prior statement. The appellate court reversed the conviction and condemned the prosecutor's actions stating: "Despite the fact that impeachment of one's own witness may be permitted, this does not go so far as to permit the use of the rule as a subterfuge to get to the jury evidence otherwise inadmissible." Id.

would normally not call the witness at all.[724] The defense will argue that in such situations the purpose of attempting to introduce prior inconsistent statements after calling the witness is not to impeach credibility, but to submit underhandedly the damaging statements for consideration as substantive evidence.[725]

Courts, however, should not overlook other factors that weigh against this argument: the uncertainties of testimony, the potential honesty-producing effect of placing the witness under oath, and the corresponding need of both defense counsel and the prosecutor to discredit potentially inaccurate testimony.

3. Use of Prior Inconsistent Statements as Evidence-in-Chief

Traditionally, courts have limited the use of prior inconsistent statements to impeachment of witnesses or refreshing recollection, reasoning that because such statements constitute hearsay, they

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[724] When the prosecutor uses prior inconsistent statements for impeachment purposes, the judge must give an immediate instruction cautioning the jury against considering the evidence as probative of the defendant's guilt. See People v. Welch, 16 A.D.2d 554, 558, 229 N.Y.S.2d 909, 914 (4th Dep't 1962). Failure to give such an instruction is reversible error whether or not the defendant requested the instruction. People v. Carroll, 37 A.D.2d 1015, 1017, 325 N.Y.S.2d 714, 717 (3d Dep't 1971). See also N.Y. Crim. Proc. Law § 60.35(2) (McKinney 1971). Furthermore, the instruction should be precise (Commonwealth v. Blose, 160 Pa. Super. 165, 172, 50 A.2d 742, 745 (1947) (judge's failure to state unequivocally that prior inconsistent statements only apply to question of witness's credibility constitutes error)) and may not leave any doubt that the statement affects solely the credibility of the witness and not the guilt of the defendant (Commonwealth v. Pimental, 363 N.E.2d 1343, 1348 (Mass. App. Ct. 1977)).

[725] See generally Ordover, Surprise! That Damaging Turncoat Witness Is Still With Us: An Analysis of Federal Rules of Evidence 607, 801(d)(1)(A), and 403, 5 Hofstra L. Rev. 65, 70 (1976).

are inadmissible to prove the truth of their content.[726] The logic of the hearsay rule, however, seems inapplicable in this context. In most instances in which the hearsay rule applies, opposing counsel has no opportunity to cross-examine the speaker of the proferred hearsay statement; in this case, however, the witness is the original speaker and is thus available for cross-examination.[727] Furthermore, given the effect of passage of time upon the human memory, the prior statement is likely to be more accurate than testimony at trial.[728]

Treating prior inconsistent statements as substantive evidence would prove helpful in combatting the fearful witness problem.[729] Such a rule would no doubt reduce threats made to prospective witnesses since the defendant would have little to gain even if the witness changed his story. Furthermore, prosecutors would not be forced to engage in subterfuge to introduce what is potentially the most relevant evidence in their case. Largely as a result of these considerations, the Model Code of Evidence provides: "Evidence of a hearsay declaration is admissible if the jury finds that the declarant . . . is

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[726] McCormick, supra note 389, § 251, at 601.

[727] See 56 Yale L. J. 583, 586 (1947). See also DiCarlo v. United States, 6 F.2d 364, 367-68 (2d Cir. 1925) (Hand, J.) (when jurors decide that truth is not what witness says now but what he said before, they are still deciding from what they see and hear in court).

[728] McCormick, supra note 389, § 251, at 602.

[729] For an example of a case involving a fearful recalcitrant witness, see State v. Caccavale, 58 N.J. Super. 560, 157 A.2d 21 (A.D. 1959).

present and subject to cross examination."[730]

In spite of the Model Code's wholesale abandonment of the orthodox view and similar moves in several states,[731] most jurisdictions still refuse to allow the introduction of prior inconsistent statements as substantive evidence.[732] The handiwork of both reformers and traditionalists, the Federal Rules of Evidence strike a compromise between these extremes. Defining some prior inconsistent statements as nonhearsay, Federal Rule 801(d)(1) in effect provides for their admission as substantive evidence, when

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (A) inconsistent with his testimony, and was given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition . . . .

Inconsistent testimony given before a grand jury, during a former trial, or during an immigration hearing is admissable under this provision.[733] Any prior signed statement which the witness affirms as truthful may also be admitted as substantive evidence.[734]

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[730]Model Code of Evidence Rule 503(b). The same position is taken in Uniform Rule of Evidence 63(1).

[731]See Gelhaar v. State, 41 Wisc. 2d 230, 163 N.W.2d 609 (1969), cert. denied, 399 U.S. 929 (1970) (permitted use of prior inconsistent statements in the form of police investigation notes as substantive evidence); N.J. Stat. Ann. § 2A:84A, Rule 63(1) (West 1976); see generally Peeples, Prior Inconsistent Statements and the Rule Against Impeachment of One's Own Witness: The Proposed Federal Rules, 52 Tex. L. Rev. 1383, 1392 (1974).

[732]See, e.g., Thomas v. State, 289 So. 2d 419, 421 (Fla. Dist. Ct. App. 1974); Rankin v. State, 143 So. 2d 193, 196, (Fla. Dist. Ct. App. 1962); People v. Freeman, 9 N.Y.2d 600, 605, 176 N.E.2d 39, 42, 217 N.Y.S.2d 5, 8 (1961); N.Y. Crim. Proc. Law § 60.35 (McKinney 1971).

[733]E.g., United States v. Castro-Ayon, 537 F.2d 1055, 1058 (9th Cir.), cert. denied, 429 U.S. 783 (1976) (immigration hearing; short discussion of legislative history of federal rule).

[734]United States v. Borelli, 336 F.2d 376, 391 (2d Cir. 1964).

VI

OBTAINING AND INTERPRETING LOANSHARK RECORDS

When direct evidence is unavailable due to a crucial witness's absence or refusal to testify, the usury prosecution may hinge on introduction of loansharking records obtained in legal searches. Such documentary evidence, when properly identified and interpreted by a qualified expert, may establish the existence of credit transactions and shed light on the level of interest charged. Moreover, the utility of loanshark records is not limited to their evidentiary role; by identifying customers such documents may provide leads to witnesses who will testify for the prosecution at trial.

The usefulness of loanshark records is matched only by the difficulty of obtaining them. Loansharks often enter illicit transactions on only a few sheets of paper or in a ledger no larger than an address book. Destroying or disposing of such records may require no more than a moment--the moment it takes for police officers to comply with the knock-and-announce rule.

A. The "Knock and Announce" Rule

The "knock and announce" rule, requiring the peace officer to give notice of his authority and purpose before entering private premises, has a long tradition in Anglo-

American law.[735] The federal government and at least 35 states now impose "knock and announce" rules by statute.[736] Where not legislatively enacted, the announcement rule is imposed by common law.[737] Moreover, the rule enjoys some degree of constitutional status.[738]

In developing the "knock and announce" rule, common-law courts emphasized the need to avoid physical damage to

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[735]Semayne's Case, 77 Eng. Rep. 194 (1603) is invariably cited as the source of the rule. The court there observed:

> [i]n all cases when the King is a party, the sheriff (if the doors be not open) may break the party's house, either to arrest him, or to do other execution of the K.'s process, if otherwise he cannot enter. But before he breaks it, he ought to signify the cause of his coming, and to make request to open doors . . . .

Id. at 195.

[736]American Law Institute, A Model Code of Pre-Arraignment Procedures, § 120.6, at 310-12, 696-97 (1975).

[737]See Commonwealth v. McDougal, 309 N.E.2d 891 (Mass. App. 1974); State v. Fair, 45 N.J. 77, 86, 211 A.2d 359, 364 (1965); State v. Doyle, 42 N.J. 334, 345, 200 A.2d 606, 612 (1964); State v. Smith, 37 N.J. 481, 497-500, 181 A.2d 761, 770 (1962), cert. denied, 374 U.S. 835 (1963).

[738]The Supreme Court held, in Ker v. California, 374 U.S. 23 (1963), that the fourth amendment incorporates the rule of announcement as an essential element of a reasonable search; the Court has yet to delineate, however, the degree of announcement constitutionally required. The Court, in Ker, recognized that in certain circumstances the Constitution might not require announcement, but the Court split over the scope of exceptions to the rule. See also Sabbath v. United States, 391 U.S. 585 (1968) (adopting Justice Brennan's exceptions to any possible constitutional rule relating to announcement).

the home.[739] Today, however, the rule rests on two rationales more responsive to modern concerns: the individual's right to privacy[740] and the avoidance of unnecessary violence.[741] The former notion emanates from fourth-amendment concepts prohibiting unreasonable searches and seizures. The latter allows the occupant to avoid the use of physical force[742] and minimizes the danger to the officer resulting from

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[739] In Lee v. Gansel, 98 Eng. Rep. 935 (1774), Lord Mansfield gave the following rationale for the rule against breaking doors or windows in the execution of warrants:

> [O]therwise the consequences would be fatal: for it would leave the family within, naked and exposed to thieves and robbers. It is much better therefore, says the law, that you should wait for another opportunity, than do an act of violence, which may probably be attended with such dangerous consequences.

Id. at 938. See also Note, Announcement in Police Entries, 80 Yale L.J. 139, 140-44 (1970).

[740] See Sabbath v. United States, 391 U.S. 585, 589 (1968); McDonald v. United States, 335 U.S. 451, 459-61 (1948) (Jackson, J., concurring).

[741] See People v. Webb, 36 Cal. App. 3d 460, 466, 111 Cal. Rptr. 524, 527 (1973).

[742] See Blakey, The Rule of Announcement and Unlawful Entry: Miller v. United States and Ker v. California, 112 U. Pa. L. Rev. 499 (1964). The particular rationale a court chooses to emphasize will affect the degree of compliance required and the remedy afforded for violation. For example, the privacy interest suggests that notice is a condition precedent to lawful entry, while the avoidance of violence theory accounts for the "useless gesture" and "increased peril" exceptions to the rule. At common law, the avoidance of damage to the house was of primary importance (once broken, the occupants lay exposed to attacks from the street) while, more recently, stress has been placed on the privacy interest. See Miller v. United States, 357 U.S. 301 (1958).

violent resistance.[743]

1. Application of the "Knock and Announce" Rule

a. Procedure

The steps required by the "knock and announce" rule are simple: in the absence of exigent circumstances, the peace officer must (1) knock, (2) announce his authority and purpose, and (3) demand admittance before entering "protected" premises.[744]

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[743] See United States v. Ford, 553 F.2d 146, 165 n.58 (D.C. Cir. 1971) (unannounced entry is "fraught with physical--even mental--danger . . . [because] occupants, on discovering the unidentified intruders, may attempt to shoot them and the police will doubtless return the fire"); Ker v. California, 374 U.S. 23, 56 (1963) (Brennan, J., concurring in part) (any exception to "knock and announce" rule not requiring a showing that those within were aware of the officer's presence implies rejection of the presumption of innocence doctrine).

[744] The "knock and announce" rule applies only to areas in which the individual holds a reasonable expectation of privacy. See generally Katz v. United States, 389 U.S. 347 (1967). Courts have applied the rule to an unannounced night-time entry of a commercial building (United States v. Phillips, 497 F.2d 1131 (9th Cir. 1974)) and to an unannounced entry of defendant's bedroom through a closed door following a proper entry of the house (People v. Webb, 36 Cal. App. 3d 460, 111 Cal. Rptr. 524 (1st Dist. 1974)). In People v. Livermore, 30 Cal. App. 3d 1073, 1077, 106 Cal. Rptr. 822, 824 (2d Dist. 1973), however, the court refused to apply the California statute, "hypertechnically" holding that where officers had properly entered the house, the subsequent nonviolent entry into the occupied bedroom through the open door did not require a repetition of notice.

Although at common law the lack of physical danger to the house exempted entries through an open door from the rule's operation, modern jurisdictions have split on whether the "knock and announce" requirement applies to entries through open doors. Compare United States v. Monticallos, 349 F.2d 80 (2d Cir. 1965) (unannounced entry gained by following narcotics customer through open door did not constitute "breaking"), with United States v. Burruss, 306 F. Supp. 915 (E.D. Pa. 1969) (unannounced entry through open door does constitute "breaking"). The privacy and peacefulness rationales underlying the modern-day rule do not clearly indicate the proper resolution of this issue;

If admitted, the officer may proceed with his search. If refused admission, the policeman may forcibly enter.

Where more than one officer executes a search or arrest, only one officer must "knock and announce." The other officer need not enter through the same door as the announcing officer, provided the unannounced intrusion follows the announced entry.[745]

The federal provision, a codification of the common law,[746] typifies prohibitory "knock and announce" statutes:

> The officer may break open any outer or inner door or window of a house, or any part of a house, or anything therein, to execute a search warrant, if, after notice of his authority and purpose, he is refused admittance or when necessary to liberate himself or a person aiding him in the execution of the warrant.[747]

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while open doors reduce expectations of privacy and the violence of entries, some entries, particularly through interior doors, may intrude on the occupant's most private quarters and incite him to violent reprisals.

With the ever-decreasing emphasis placed on the "forcible" nature of the entry, policemen would do well to heed the California Supreme Court's words of caution: "In order to avoid any possible illegality . . . it would be advisable for officers entering through an open door . . . to always demand admittance and explain their purpose." People v. Rosales, 68 Cal. 2d 299, 304, 437 P.2d 489, 492, 66 Cal. Rptr. 1, 4 (1968). This warning, however, should not be followed blindly: against the risk of suppression, police officers must always balance the risk of destruction of evidence.

[745]United States v. Bustamonte-Gamez, 488 F.2d 4, 10 (9th Cir. 1973); United States v. Coleman, 423 F. Supp. 630, 636 (N.D. Cal. 1976).

[746]Miller v. United States, 357 U.S. 301, 313 (1958).

[747]18 U.S.C. § 3109 (1969).

Although, by its terms, the statute deals only with entries to effect a search warrant, the Supreme Court has held that the validity of an entry to effect an arrest without a warrant "must be tested by criteria identical to those embodied in" section 3109.[748]

The federal statute applies only to entries made by federal officers. If the executing agency is local, even if the entry is made for a violation of federal law, local law controls.[749] It is unlikely, however, that state law will vary significantly, if at all, from the federal rule; virtually all jurisdictions--even those that have passed their own statutes--rest the "knock and announce" prohibition on longstanding common-law principles.[750]

After announcing authority and purpose, the officer must be refused admittance before he may forcibly enter.[751] Refusal may be express or implied. Failure to respond within a reasonable time may constitute implied refusal.[752] Whether the time lapse between announcement and entrance

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[748]Sabbath v. United States, 391 U.S. 585, 588 (1968) (citing Miller v. United States, 357 U.S. 301, 306 (1958) and Wong Sun v. United States, 371 U.S. 471, 482-84 (1963)).

[749]Miller v. United States, 357 U.S. 301, 305 (1958).

[750]See, e.g., cases cited in note 737 supra. Where the common law is in effect, the courts enforce announcement rules similar to the federal statute. For a discussion of the history of the "knock and announce" rule, see Blakey, supra note 742, at 500-10.

[751]United States v. Smith, 520 F.2d 74 (D.C. Cir. 1975).

[752]Masiello v. United States, 317 F.2d 121 (D.C. Cir. 1963).

suffices to demonstrate implied refusal varies with the facts of each case.[753] Thus, where officers had reasonable grounds to believe there was someone inside the house, a silence of one minute constituted refusal.[754] The court found a ten-second wait sufficient where officers, after announcing authority, heard scampering noises within.[755] Where, upon hearing the announcement of authority and purpose, parties inside the house shouted warnings to the person sought, the court held that the federal agent could reasonably imply that his admittance was being rejected.[756]

Of particular importance in determining the sufficiency of the time lapse are: (1) the nature of the illegal activity reasonably believed to be engaged in, (2) the officer's experience with the type of offense under investigation, (3) his familiarity with the suspect, (4) the destructibility of the evidence sought to be seized, and (5) noises indicating possible destruction of the evidence.[757]

The focus of these factors on the danger of evidence destruction favors liberal application of the refusal re-

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[753]People v. DeSantiago, 71 Cal. 2d 18, 453 P.2d 353, 76 Cal. Rptr. 809 (1969).

[754]United States v. Woodring, 444 F.2d 749, 751 (9th Cir. 1971).

[755]United States v. Allende, 486 F.2d 1351 (9th Cir.), cert. denied, 416 U.S. 958 (1973).

[756]United States v. Augello, 368 F.2d 692 (3d Cir. 1966) (four to five seconds between arrival at door and entry).

[757]Masiello v. United States, 317 F.2d 121, 123 (D.C. Cir. 1963).

quirement in cases where police seek loansharking records. Loanshark recordkeeping tends to be informal and clandestine; thus such records will seldom be so copious as to preclude immediate destruction. This statement, of course, is only of general applicability; as in all cases, courts evaluating loansharking raids must evaluate the specific facts of the case in resolving the implied refusal issue.

b. Use of Ruse

Early common law permitted the use of ruse to gain entry.[758] American courts have generally followed the common law, holding that deception is an acceptable method of entry.[759] Courts have upheld entrances without prior announcement of authority and purpose where officers misrepresented themselves as telephone repairmen,[760] agents from the county

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[758] See, e.g., King v. Backhouse, 98 Eng. Rep. 553 (K.B. 1763).

[759] See Leahy v. United States, 272 F.2d 487, 490 (9th Cir. 1959) (no constitutional mandate forbidding use of deception in executing valid arrest warrant), cert. dismissed, 364 U.S. 945 (1961). See also United States v. Beale, 436 F.2d 573 (5th Cir.), rev'd on rehearing, 445 F.2d 977 (5th Cir. 1971) (upholding a deceptive entry, emphasizing the absence of force).

Although the Beale court reversed its earlier decision on the basis that Sabbath v. United States, 391 U.S. 585 (1968), left peaceful entries undisturbed, and that the extension of the rule to such an entry should be left to the Supreme Court, its decision could, and perhaps should, have also been based on the substantial satisfaction of the knocking requirement before entry, and the announcement of authority and purpose prior to search.

[760] Smith v. United States, 357 F.2d 486, 488 (5th Cir. 1966).

assessor's office,[761] and friends of the defendant's associate.[762] Entry by ruse, however, satisfies only the "knock" element of the knock and announce rule; once entry is gained, police officers must announce their authority and purpose before proceeding with the search.[763]

While the courts have normally upheld entries obtained by ruse, they have looked askance on unconsented-to intrusions accompanied by even the slightest degree of force.[764] The opening of a closed but unlocked door,[765] entry gained by use of a passkey,[766] and entry through an open door where the screen is closed[767] constitute sufficient "breakings" to fall within the knock-and-announce require-

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[761] Leahy v. United States, 272 F.2d 487, 490 (9th Cir. 1959), cert. dismissed, 364 U.S. 945 (1961).

[762] United States v. Raines, 536 F.2d 796, 800 (8th Cir. 1976), cert. denied, 429 U.S. 925 (1976).

[763] In Bowers v. Coiner, 309 F. Supp. 1064, 1070 (D.C.W. Va. 1970), an FBI agent telephoned the defendant, telling him there were FBI agents at his door who wished to talk to him. When the defendant opened the door, the agents rushed inside, guns drawn. The court held the arrest invalid for failure to inform of purpose. This entry may also be distinguished from the ordinary deceptive entry in that, although the defendant voluntarily opened his door, there was no consent to any entrance.

[764] Sabbath v. United States, 391 U.S. 585, 589-90 (1968).

[765] Id.; People v. Rosales, 68 Cal. 2d 299, 303, 437 P.2d 489, 492, 66 Cal. Rptr. 1, 4 (1968).

[766] Ker v. California, 374 U.S. 23, 38 (1963); Munoz v. United States, 325 F.2d 23, 26 (9th Cir. 1963); United States v. Sims, 231 F. Supp. 251, 254 (D.C. Md. 1964).

[767] People v. Abdon, 30 Cal. App. 3d 972, 977, 106 Cal. Rptr. 879, 882 (2d Dist. 1972).

ment.[768]

That such a minimal use of force should bring the entry within the rule is not surprising. Entry by stealth, whether by passkey or the silent opening of a closed door, may be as conducive to violent confrontation as when the door is actually broken down.[769] Additionally, the occupant receives no opportunity to consent to the entrance. Thus, both the avoidance-of-danger and protection-of-privacy interests are violated by such an intrusion.[770]

Where entry is gained by ruse, however, there is no violation of these underlying principles. The occupant is aware of the presence of someone, although he is not informed of that person's true identity. Thus, the danger of violent confrontation is minimized. If the ruse is successful, the occupant consents to the entrance.[771] Thus, in admitting the officer, he has authorized an invasion of his privacy,

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[768] Cases vary regarding entrance through an open door. See note 744 supra.

[769] See note 743 supra.

[770] See People v. Carrington, 23 Crim. L. Rep. 2061-62 (D.C. Ct. App. March 23, 1978). The court noted that ruse "fulfills several purposes, all of which are consistent with the purposes of the announcement rule." Id. at 2062. Peaceful entry avoids the use of force, eliminates damage to the door, and decreases the likelihood that evidence will be destroyed, that the occupants will escape or arm themselves for violent resistance. Id.

[771] While in other contexts the law looks unfavorably on fraud, the purpose behind the knock and announce rule is not to obtain the informed consent of the person to be searched. Consensual search appears merely as an instrumentality of the broader policies of preventing unnecessary violence and preserving the integrity of the individual's home.

and the dangers noted by Justice Jackson, that an unannounced entry may catch the occupant undressed or otherwise embarrassingly engaged, are not present.[772]

It is also important to note that rules governing the consent exception to the general rule against warrantless searches are of little relevance to this issue;[773] in the "knock and announce" context, the officers already have the right to search; the ruse merely facilitates peaceable entry to carry out that responsibility.

In light of the ever-decreasing importance of the "breaking" aspect of the rule, courts may increasingly frown on entries by ruse. The better rule, however, holds that where the defendant voluntarily opens the door and the police then announce their authority and purpose, use of a ruse to gain the initial opening is permissible.[774]

2. Exceptions to the "Knock and Announce" Rule

Dissenting in Ker v. California,[775] Justice Brennan argued for strict limitations on exceptions to the "knock and announce" rule. Under Justice Brennan's view, a view

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[772]McDonald v. United States, 335 U.S. 451, 459-61 (1948) (concurring).

[773]See Bumper v. North Carolina, 391 U.S. 543 (1968) (consent obtained by fraud when officer misrepresented that he had a warrant results in suppression).

[774]Commonwealth v. Regan, 23 Crim. L. Rep. 2171 (Pa. Super. Ct. May 4, 1978).

[775]374 U.S. 23, 46 (1963).

later adopted by the entire Court in Sabbath,[776] only "emergency facts"--such as attempts to destroy evidence--justified relaxation of the rule.[777]

Many jurisdictions, while demanding compliance with the rule whenever feasible, have recognized limited exceptions to the announcement requirement. These exceptions are rooted in the type of activity reasonably believed to be engaged in and the probability that announcement will result in the destruction of valuable evidence or increase the officer's perils.[778] Of particular relevance in the loanshark context[779] is the emphasis courts have placed on the ready destructability of some forms of evidence in upholding no-knock raids.[780]

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[776]Sabbath v. United States, 391 U.S. 585, 588 (1968).

[777]374 U.S. 23, 47 (1963).

[778]On the increased peril exception, see State v. Ball, 249 So. 2d 748, 750 (Fla. Dist. Ct. App. 1971), in which the officer observed light in rear of business building at 3:00 a.m. The court found the officer's belief that a burglary was in progress and that announcement might increase his peril reasonable. The premises turned out to be the defendant's dwelling. The marijuana seized was admissible. See People v. Dumas, 9 Cal. 2d 871, 878, 512 P.2d 1208, 1213, 109 Cal. Rptr. 304, 309 (1973) (knowledge of presence of guns on premises excuses compliance with announcement statute where "officers reasonably believe weapon will be used against them if they proceed with ordinary announcements"). See generally notes 796-799 and accompanying text infra.

[779]See introduction to section VI supra.

[780]See, e.g., State v. Kelly, 287 So. 2d 13, 17 (Fla. Sup. Ct. 1973) (narcotics raid; recognizing exception to announcement requirement where testimony by police officers shows they had good reason to fear at time of entry that evidence would be destroyed); State v. Clarke, 242 So. 2d 791, 795 (Fla. Dist. Ct. App. 1970) (holding that where "the

Exceptions to the knock-and-announce requirement fall into two main categories. First, most jurisdictions permit police officers to forego adherence to the rule if specifically authorized to do so in the search or arrest warrant.[781] Second, all jurisdictions recognize an exception to the "knock and announce" rule in cases of "exigent circumstances."[782] Such circumstances include: (1) "the useless gesture," (2) "hot pursuit," (3) "increased peril," (4) "frustration of purpose," and (5) "felony being committed."

The jurisdictional variations in regard to recognition of exigent circumstances concern the breadth, rather than the nature, of these exceptions. As with the applicability of the general rule, the presence or absence

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evidence sought consists of relatively small amounts of contraband, and where a nearby bathroom or kitchen provides for easy disposal, it is not unreasonable for officers to conclude that an attempt will be made to dispose of the evidence if they announce their presence"). See generally notes 779-780 and accompanying text infra.

[781]The California Supreme Court has, however, rejected advance judicial approval of unannounced entries. Parsley v. Superior Court, 9 Cal. 3d 934, 938-39, 513 P.2d 611, 613, 109 Cal. Rptr. 553, 566 (1973). Giving extreme scope to fourth amendment requirements of specificity, the court has held that only the officer is capable of evaluating the relevant facts at the time of entry. People v. DeSantiago, 71 Cal. 2d 18, 28-29, 453 P.2d 353, 359-60, 76 Cal. Rptr. 809, 815-16 (1969).

[782]Although the Supreme Court has not specifically held that the exigent circumstances exceptions to the knock-and-announce rule apply to 18 U.S.C. § 3109 (1976), the Court has strongly implied that exceptions would be recognized. See Ker v. California, 374 U.S. 23, 47 (1963) (Brennan, J., dissenting); Miller v. United States, 357 U.S. 301, 310 (1958) (compliance with statute could be excused where the officer is "virtually certain" that the occupants already know of the officer's identity and purpose). See also Sabbath v. United States, 391 U.S. 585, 591 n.8 (1968) (adopting the "exceptions to any possible constitutional rule" as recognized in Ker).

of "exigent circumstances" will commonly depend on the specific facts of the case.

a. "No-Knock" Authorization

When specifically authorized by statute, a "no-knock" provision may be included in the search or arrest warrant. The affidavit must contain support for the belief that an unannounced entry is necessary, (1) to prevent the destruction of evidence; or, (2) because of a danger to the executing officers.[783]

Jurisdictions without "no-knock" provisions restrict the "destruction of evidence" exception to situations in which the destruction of evidence is being attempted;[784]

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[783] See, e.g., N.Y. Crim. Proc. Law § 690.35(3) (McKinney 1971):

> The application may also contain:
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> a) A request that the search warrant be made executable at any time of the day or night, upon the ground that there is reasonable cause to believe that (i) it cannot be executed between the hours of 6:00 A.M. and 9:00 P.M., or (ii) the property sought will be removed or destroyed if not seized forthwith; and
>
> b) A request that the search warrant authorize the executing police officer to enter premises to be searched without giving notice of his authority and purpose, upon the ground that there is reasonable cause to believe that (i) the property sought may be easily and quickly destroyed or disposed of, or (ii) the giving of such notice may endanger the life or safety of the executing police officer or another person.

[784] See, e.g., United States v. Likas, 448 F.2d 607 (7th Cir. 1971); State v. Mendoza, 104 Ariz. 395, 454 P.2d 140 (1969); Commonwealth v. DeMichel, 442 Pa. 553, 277 A.2d 159 (1971).

where "no-knock" provisions are authorized, it is sufficient that evidence may be destroyed.[785]

Thus, in People v. De Lago,[786] officers represented to the court by affidavit that gambling materials were likely to be found at the location to be searched. The appellate court upheld the order, reasoning that the lower court could take judicial notice of the fact that the materials were easily destructible and that persons unlawfully in possession of such items are on the alert for searches and arrests.[787]

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[785] See N.Y. Crim. Proc. Law § 690.35(3) (McKinney 1971), cited in note 783 supra. See also cases cited in note 787 infra. But see State v. Lien, 23 Crim. L. Rep. 2241 (Minn. Apr. 28, 1978) ("in order to obtain such authority the police must make a strong showing that an announced entry will result in the destruction of evidence or in danger to the officers executing the warrant").

[786] 16 N.Y.2d 289, 213 N.E.2d 659, 266 N.Y.S.2d 353 (1965), cert. denied, 383 U.S. 963 (1966).

[787] See Jones v. State, 127 Ga. App. 137, 193 S.E.2d 38 (1972) (use of no-knock warrant upheld where government informers heard defendant say "the next police that entered [his] residence would be shot"); People v. Garzia, 56 A.D.2d 635, 391 N.Y.S.2d 697, 698 (2d Dep't 1977) (no-knock warrant upheld where police represented that evidence sought was drugs "which could be easily and quickly disposed of" and that occupants were "known as hunters and might possess firearms"); People v. Brown, 46 A.D.2d 590, 364 N.Y.S.2d 512 (1st Dep't 1975) (use of no-knock warrant upheld where occupants operated "drug mill" in apartment and possessed firearms); People v. Galleges, 80 Misc. 2d 265, 269, 362 N.Y.S.2d 1000, 1004 (Kings County Crim. Ct. 1975) (court upheld "no knock" provision in warrant where officer testified that the contraband sought was heroin, that heroin is easily disposed of, and that the execution of a warrant involving heroin involved possible danger to the executing officer); People v. Mangialino, 75 Misc. 2d 698, 709, 348 N.Y.S.2d 327, 339 (County Ct. 1973) ("although there was nothing in the affidavit specifically indicating that marijuana would be likely . . . destroyed," magistrate issuing the warrant could draw such an inference); State v. Spisak, 520 P.2d 561 (Utah 1974) (no-knock warrant upheld where officer stated that he observed marijuana growing in the defendant's home and that marijuana plants were easily disposed of).

b. Exigent Circumstances

(i) The Useless Gesture. The law does not require the doing of a useless act.[788] Thus where the facts known to the officer inform him that those inside know of his authority and purpose, announcement is not required. For example, in United States v. Carter,[789] where the officer: (1) yelled "Sheriff's Department with a warrant" as he ran toward defendant's trailer; (2) heard someone inside yell "It's the cops!" and heard people running away from the door; and (3) again announced "Sheriff's Department with a warrant" as he entered the trailer, the court found that it would have been a "useless gesture" to await express refusal of entry.[790]

In United States v. Artieri,[791] where an informer told federal agents that heroin was being cut and bagged by the defendant, the court excused as a "useless gesture" the agents' failure to announce their purpose. The court noted

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[788]Courts recognize that the "knock and announce" rule does not apply to an entry to execute a search warrant where the officers know that the house is empty. United States v. Brown, 556 F.2d 304, 305 (5th Cir. 1977); Payne v. United States, 508 F.2d 1391, 1394 (5th Cir. 1975). On the other hand, entry pursuant to an arrest warrant where the officers have no reason to believe the premises are occupied is impermissible even after knocking and announcing. United States v. Watson, 307 F. Supp. 173, 175 (D.D.C. 1969).

[789]566 F.2d 1265 (5th Cir. 1978).

[790]Id. at 1267-68. In cases involving a high probability of evidence destruction, courts have not carefully distinguished between the "destruction" exception and "implied refusal." The result, however, is the same, regardless of the label placed on the analysis. See note 757 and accompanying text supra.

[791]491 F.2d 440 (2d Cir. 1974).

that where an officer knocks on the door of an experienced narcotics dealer's apartment and identifies himself as a federal agent, the dealer can have no doubt as to the agent's purpose.[792] Courts should take note of Artieri's common-sense approach to announcement of the officer's purpose. Frequently, the officer's purpose will be implicit in his mere presence. In such circumstances, courts should excuse the announcement of purpose as a useless act.

(ii) Hot Pursuit. Police officers are not required to knock and announce if they are in urgent pursuit of a suspect, based on probable cause. Noting that "hot pursuit" does not require an extended hue and cry throughout city streets, the Supreme Court in United States v. Santana[793] held that a proper arrest in a public place cannot be defeated by the defendant's retreat into her home.[794] Furthermore, a lawful entry made in "hot pursuit" is not rendered unlawful merely because the agent chose to announce his authority; it would be anomalous to condemn an otherwise valid entry merely because police took extra precautions.[795]

(iii) Peril to Life. Judicial recognition of the exigent circumstance of imminent peril to life dates back to at least

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[792] Id. at 444 (citing United States v. Manning, 448 F.2d 992, 1001-02 (2d Cir.), cert. denied, 404 U.S. 995 (1971).

[793] 427 U.S. 38 (1976).

[794] Id. at 42 (defendant standing in her doorway).

[795] United States v. Flores, 540 F.2d 432, 435-36 (9th Cir. 1976).

1822.[796] Citing this exception, the Ninth Circuit in Gilbert v. United States,[797] upheld an unannounced entry into the defendant's apartment since the officers had reasonable grounds to believe that at least one of three suspected armed robbers was present in the apartment.[798] Where there is nothing to indicate that the defendant is armed or will resist arrest, however, the mere possibility of resistance will not excuse a failure to announce.[799]

(iv) Frustration of Purpose. Where police officers have reasonable grounds to believe that announcement will lead to escape or the destruction of valuable evidence, announcement may be excused.[800] In People v. McIlwain[801] the police officer had probable cause to believe the defendant dealt in illicit narcotics. When the officer knocked at her door, he heard a "rustling about" or a "moving about" within and then heard a toilet flush. He opened the door and arrested the defendant; the search incident to arrest turned up heroin and narcotics paraphernalia. The court reasoned not only that compliance with the announcement requirement would have

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[796] Read v. Case, 4 Conn. 166 (1822).

[797] 366 F.2d 923 (9th Cir. 1966), cert. denied, 393 U.S. 985 (1968).

[798] Id. at 928.

[799] People v. Floyd, 26 N.Y.2d 558, 260 N.E.2d 815, 312 N.Y.S.2d 193 (1970).

[800] See notes 775-778 and accompanying text supra.

[801] 28 A.D.2d 711, 281 N.Y.S.2d 218 (2d Dep't 1967).

risked the destruction of valuable evidence, but also that announcing identity and purpose would have been a "useless gesture;" the defendant's activities revealed that she knew who was at the door and why he was there.

(v) Felony Being Committed. In cases where the officer has reasonable cause to believe a felony is being committed, there is no need to knock and announce before entering.[802] While this exception may ease law enforcement efforts in curbing "action-oriented" organized crimes, such as gambling or narcotics production, it is not likely to be of great help in loansharking investigations.

B. Interpreting Loanshark Records: Use of the Expert Witness

The complexity of criminal business records renders their use as evidence problematic. Loanshark records may include underworld jargon, confusing arrays of figures, and obfuscatory symbols specifically designed to exacerbate difficulties of interpretation.[803] In such instances, only the expert will be able to explain the significance of documentary evidence.[804]

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[802] People v. Solario, 19 Cal. 3d 760, 566 P.2d 627, 139 Cal. Rptr. 725 (1977).

[803] See generally Impact of Crime on Small Business-1968: Hearings Before the Select Comm. on Small Business, 90th Cong., 2d Sess. 93-120 (1968) (testimony of Charles Siragusa, Executive Director, Illinois Crime Investigating Comm'n).

[804] Drawing on his experience and training, the expert, unlike other witnesses, may offer his opinions on the meaning of documentary evidence. Effective qualification of the expert may impress the jury, inspiring reliance on the witness's testimony. Forays by the expert into complex, unfamiliar topics will generally reinforce this favorable impression.

Expert testimony concerning illegal business records normally falls into two broad categories: (1) testimony that deciphers symbols in the records,[805] and (2) testimony explaining the significance of the records themselves.[806]

1. The Development of Expert Testimony

Expert testimony evolved out of the adversary system of twelfth-century English trial courts.[807] Originally, the common law permitted witnesses to speak only from "personal observation."[808] The courts, however, developed

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These factors suggest methods of maximizing the expert's effectiveness; the expert, however, generally performs a more elementary role. Loanshark records may impress the layman as no more than jibberish. In such cases the expert is not only useful, but essential to the jury, for only the expert can lay bare the meaning of matters completely beyond common understanding.

[805] See, e.g., People v. Newman, 24 Cal. 2d 168, 170-71, 148 P.2d 4, 5-6 (1944); People v. Hinkle, 64 Cal. App. 375, 378, 221 P. 693, 694 (1924).

[806] People v. Newman, 24 Cal. 2d 168, 170-71, 176, 148 P.2d 4, 5-6, 8 (1944) (expert testimony concerning modus operandi "logical and reasonable"); State v. Grosso, 139 Conn. 229, 233, 93 A.2d 146, 148 (1952) (testimony concerning modus operandi helps to identify records and explain their use).

[807] In a 1345 appeal of a mayhem case (Anonymous, Liber Assisarum 28, pl. 5, 28 Ed. III (cited in Hand, Historical and Practical Considerations Regarding Expert Testimony, 15 Harv. L. Rev. 40 (1901)) the court summoned surgeons from London to determine whether or not a wound was fresh.

For general background on the development of the use of expert testimony in England, see id.

[808] Lord Coke in Adams v. Canon, 73 Eng. Rep. 117 (Ch. 1622), stated: "It is no satisfaction for a witness to say that he 'thinketh' or 'persuadeth himself'." See generally Ladd, Expert Testimony, 5 Vand. L. Rev. 414 (1952); 7 Wigmore, supra note 392, § 1917.

an exception to this rule, granting special concessions to the "skilled witness."[809] Although initially these special witnesses were called to aid the court rather than to assist the jury,[810] this limited role gradually expanded until the use of skilled witnesses became a recognized exception to the rule excluding "mere opinion" evidence.[811]

Due to the courts' continued infatuation with factual testimony, however, early experts could base opinions on only two sources of information: (1) first-hand observation (such as a doctor's treatment of a patient), or (2) observation of the trial testimony.[812] These restrictions on expert competency imposed burdensome costs on parties calling experts and limited the usefulness of opinion evidence.[813] Today, experts may base opinions not only on personal observation, but also on data gathered out of court.[814]

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[809] 7 Wigmore, supra note 392, § 1917, at 3.

[810] Id. at 4.

[811] Id.

[812] Id. at 6; McCormick, supra note 389, § 14, at 31; Fed. R. Evid. 702, Advisory Committee Notes.

[813] Requiring first-hand observation limited the field of experts the party could call. Requiring observation of trial testimony made the cost of using an expert nearly prohibitive. One solution--the use of hypothetical questions--presented nearly as many problems as it solved, including partisan slanting of questions, wordiness, and jury confusion. Ladd, supra note 808, at 427; McCormick, supra note 389, § 16, at 36-37.

[814] Fed. R. Evid. 703; Cal. Evid. Code § 801 (West 1966); Fla. Stat. Ann. § 90.704 (West Supp. 1978); N.Y. Civ. Prac. Law § 4515 (McKinney 1972).

Furthermore, expert testimony is no longer restricted to scientific and technical matters.[815]

2. The Admissibility of Expert Opinions

a. The Helpfulness Rule

Courts will admit expert testimony when "the subject matter be one about which special knowledge beyond that possessed by the ordinary juryman will aid the jury in their deliberations."[816] A test for "helpfulness," established by Ladd[817] and cited with approval in the Advisory Committee Notes to the Federal Rules of Evidence,[818] rests upon a "common sense in-

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[815] See Fed. R. Evid. 702, Advisory Committee Notes: "The fields of knowledge which may be drawn upon are not limited merely to the 'scientific' and 'technical' but extend to all 'specialized' knowledge." In the early English common law cases, experts were limited to those people who were "skilled in matters of science" (7 Wigmore, supra note 389, § 1917, at 4-5). Among those certified as experts were physicians (Alsop v. Bowtrell, 79 Eng. Rep. 464 (K.B. 1619)), engineers (Folkes v. Chadd, 99 Eng. Rep. 589 (K.B. 1782)), and grammarians (Anonymous, Y.B. 9 H.VI 16, pl. 8 (1493)).

[816] Commonwealth v. Boyle, 346 Mass. 1, 4, 189 N.E.2d 844, 846 (1963). See also Fed. R. Evid. 702; Cal. Evid. Code § 801 (West 1966); Fla. Stat. Ann. § 90.702 (West Supp. 1978); Maine R. Evid. 702 (West 1977); Wisc. Stat. Ann. § 907.02 (West 1975); McCormick, supra note 389, § 13, at 29-30; 2 Wharton's Criminal Evidence § 502 (12th ed. 1955) [hereinafter cited as Wharton]; 2 Wigmore, supra note 392, § 559, at 640.

[817] See Ladd, supra note 808, at 418 (1952).

[818] See Fed. R. Evid. 702:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify thereto in the form of an opinion or otherwise.

quiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute."[819] Given the ease of passing the helpfulness test, the trier of fact is normally free to either follow the expert's opinion or disregard it altogether.[820]

While marked by liberality, the helpfulness standard is not without limitations. Expert testimony must be "pertinent to the issues of the cases [and must be] founded upon facts which either are conceded or could warrantably be found upon other evidence."[821] The testimony must not be superfluous.[822]

Furthermore, testimony may be excluded if other factors

See also authorities cited in note 816 supra. An expansive reading of the common-knowledge requirement would exclude expert testimony if the jury has any knowledge of the subject matter (see 2 Wigmore, supra note 392, § 559, at 640). The courts, however, have not adhered to this rule. McCormick, supra note 389, § 13, at 30 & n.67.

[819] Fed. R. Evid. 702, Advisory Committee Notes.

[820] 2 H. Underhill, Criminal Evidence, § 307 (Cum. Supp. 1977) [hereinafter cited as Underhill]. See Hamling v. United States, 418 U.S. 87 (1974) (jury not bound by expert testimony in obscenity case).

[821] Commonwealth v. Boyle, 346 Mass. 1, 4, 189 N.E.2d 844, 846 (1963).

[822] 7 Wigmore, supra note 392, § 1918, at 10. See also Fla. Stat. Ann. § 90.702 note (West Supp. 1978): "In order for any opinion to be admissible it must be probative to an issue in dispute."

override its probative value.[823] By requiring courts to balance "the probative value of and need for evidence against the harm likely to result from its admission,"[824] Federal Rule of Evidence 403 and its state counterparts significantly extend the simple "waste of time" test emphasized by legal scholars.[825]

In prosecutions of illegal business activities,[826] the courts have consistently admitted expert testimony to explain the significance of business records or the meanings of

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[823]Federal Rule of Evidence 403 states, "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." See also statutes cited in note 814 supra.

[824]Fed. R. Evid. 403, Advisory Committee Notes.

[825]E.g., 7 Wigmore, supra note 392, § 1918, at 11. See also Wis. Stat. Ann. § 907.02 note (West 1975).

[826]Most cases discussed in this material deal with gambling or related offenses. Nevertheless, the same principles governing expert testimony would apply in the prosecutions of other illegal business operations such as loansharking. While several cases of loansharking have been prosecuted either under 18 U.S.C. § 892 (1976) or under various state loansharking statutes (see related topics), none of the reported cases has dealt with the need for expert testimony. Reasons for this lack of discussion include:

(1) many convictions center on the use of force, thus obviating the need for expert testimony,
(2) defendants often stipulate to the interest percentage,
(3) expert testimony, even when offered, frequently is not disputed.

See United States v. Spears, 568 F.2d 799 (10th Cir. 1978); Continental Mortgage Investors v. Sailboat Key, Inc., 354 So. 2d 67 (Fla. Dist. Ct. App. 1978).

abbreviations or other cryptic figures.[827] In People v. Hinkle,[828] for example, the California Court of Appeals required introduction of expert testimony to explain various figures on policy slips since "[c]ourts do not take judicial notice of the meaning of the signs and characters used by horse race gamblers."[829]

b. Establishing "Expertness"

Before he can supply expert opinions, a witness must possess "knowledge, skill, expertise, training or education" concerning the matter to which his testimony relates.[830] Determination of expert competency lies within the "wide

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[827] See notes 805-806 and accompanying text supra.

[828] 64 Cal. App. 375, 379, 221 P. 693, 694 (1923).

[829] Id. In Douglas v. State, 18 Ind. App. 289, 48 N.E. 9, 11 (1897), the court stressed the need for expert testimony in identifying policy slips and their use since "they were lawful in appearance." People v. Bardin, 148 Cal. App. 2d 776, 779, 307 P.2d 384, 386 (1957), stressed the limitations of common knowledge, stating: "[Symbols, numbers, and lists on horseracing papers] do not readily yield their significance to the uninformed reader."

The use of expert testimony to explain illegal gambling records is so widespread that gambling convictions are rarely reversed for lack of proper evidence. But see People v. Abelson, 309 N.Y. 643, 132 N.E.2d 884 (1956) (failure to explain jargon of taped phone conversation leads to reversal). Furthermore, even if expert testimony is stricken, the conviction may be upheld. See People v. Pruitt, 55 Cal. App. 2d 272, 130 P.2d 767 (1942).

[830] Fed. R. Evid. 702; Cal. Evid. Code § 801 (West 1966); Fla. Stat. Ann. § 90.702 (West Supp. 1978). For general discussions, see McCormick, supra note 389, § 13; 2 Wharton, supra note 816, § 505; 2 Wigmore, supra note 392, § 555-59.

discretion" of the trial judge,[831] whose decision is subject to reversal only for "an actual want of evidence to support [the determination] or a clear abuse of discretion."[832]

Given such a lenient standard, reversals based on admission or exclusion of expert testimony are rare;[833] nonetheless, the trial court must ensure that the witness meets certain minimum requirements before qualifying him as an expert. A witness may obtain the requisite expertise through either experience or study.[834] Existing case law suggests that "expertising" factors fall into seven major categories: (1) special education,[835] (2) prior testimony as an expert

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[831] State v. Johnson, 140 Conn. 560, 563, 102 A.2d 359, 361 (1954). See United States v. Sellaro, 514 F.2d 114, 119 (8th Cir. 1973), cert. denied, 421 U.S. 1013 (1975); People v. Hinkle, 64 Cal. App. 375, 379, 221 P. 693, 694 (1924); Sherrod v. State, 1 Md. App. 443, 438, 230 A.2d 679, 682 (1967); State v. Tutalo, 99 R.I. 14, 21, 205 A.2d 137, 142 (1964).

[832] People v. Hinkle, 64 Cal. App. 375, 379, 221 P. 693, 694 (1924). See also cases cited in note 831 supra.

[833] But cf. State v. Damico, 213 La. 765, 35 So. 2d 654 (1948) (conviction annulled for failure to attempt to qualify witness).

[834] Fed. R. Evid. 702; Cal. Evid. Code § 801 (West 1966); Fla. Stat. Ann. § 90.702 (West Supp. 1978); McCormick, supra note 389, § 13, at 30; 2 Underhill, supra note 820, § 311, at 73; 2 Wharton, supra note 816, § 505 (skill may be acquired as amateur or in pursuit of hobby) § 520, at 238-39, 345; 2 Wigmore, supra note 392, § 569, at 665-68.

[835] E.g., United States v. Sellaro, 514 F.2d 114, 118 (8th Cir. 1973) (FBI agent attended three schools on gambling methods); State v. Romano, 165 Conn. 239, 322 A.2d 64 (1973) (officer attended classes).

witness,[836] (3) service as an instructor in the relevant subject matter,[837] (4) assignment to exclusive duty,[838] (5) participation in related arrests,[839] (6) participation in related investigations,[840] and (7) years of service as a police officer.[841]

While most experts who testify as to illegal business

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[836] E.g., People v. Onofrio, 65 Cal. App. 2d 584, 590, 151 P.2d 158, 161 (1944) (testified as expert 125 times); People v. Oberlander, 109 Ill. App. 2d 469, 474, 248 N.E.2d 805, 808 (1969) (testified as expert 25 times); State v. DiVincenti, 232 La. 13, 22, 93 So. 2d 676, 680 (1957) (testified as expert 15-20 times).

[837] E.g., State v. DiVincenti, 232 La. 13, 22, 93 So. 2d 676, 680 (1957).

[838] E.g., Moore v. United States, 394 F.2d 818 (5th Cir. 1968) (one year almost exclusively devoted to investigating lotteries), cert. denied, 393 U.S. 1030 (1969). Mills v. State, 71 Ga. App. 353, 354, 30 S.E.2d 824, 826 (1944) (specially employed as detective in lottery investigations).

[839] E.g., People v. Onofrio, 65 Cal. App. 2d 584, 590, 151 P.2d 158, 161 (1944) (350 arrests); People v. Oberlander, 109 Ill. App. 2d 469, 474, 248 N.E.2d 805, 808 (1969) (50 arrests); State v. Tutalo, 99 R.I. 14, 21, 205 A.2d 137, 142 (1964) (300 gambling arrests within past three years).

[840] E.g., State v. Romano, 165 Conn. 239, 250, 332 A.2d 64, 69 (1973) (100 pool selling cases); Llerandi v. Blackburn, 97 So. 2d 247, 249 (Fla. Sup. Ct. 1957) (180 lottery cases over 2-1/2 years); Spriggs v. State, 226 Md. 50, 52, 171 A.2d 715, 716 (1961) (25 lottery cases over past 16 months); Heyward v. State, 161 Md. 685, 695, 158 A. 897, 900 (1932) (600 lottery cases over 18 months); Nolan v. State, 157 Md. 332, 338, 146 A. 268, 270 (1929) (75-100 cases over seven years); Commonwealth v. Boyle, 346 Mass. 1, 3, 189 N.E.2d 844, 845 (1963) (over 1,000 cases; had examined similar slips at least 50 times).

[841] E.g., Moore v. United States, 394 F.2d 818, 819 (5th Cir. 1968) (20 years as FBI agent), cert. denied, 393 U.S. 1030 (1969); Mills v. State, 71 Ga. App. 353, 353-54, 30 S.E.2d 824, 826 (1944) (eight years as a police officer); State v. DiVincenti, 232 La. 13, 22, 93 So. 2d 676, 680 (1957) (14 years as a police officer).

records are policemen,[842] merely being a policeman does not suffice to qualify a witness as an expert.[843] On the other hand, a policeman's reluctance to classify himself as an expert does not bind the court. In Sherrod v. State,[844] for example, the trial court allowed a police officer to identify pieces of paper found in the defendant's rear pocket. Although the officer admitted he was not an expert in numbers games, he based his identification upon previous viewings of numbers slips. On appeal, the court upheld the decision as falling within the trial court's discretion.

c. Possible Challenges to the Expert

The reported cases suggest a number of factors that tend to undermine expert testimony. In most cases in which these considerations have appeared, the courts have admitted the expert's opinion, ruling that the negative factor went only to the weight of the evidence. Cases in which these factors are of more significance, however, may require exclusion of expert evidence. Even if exclusion cannot be founded on a failure of the qualifications of the expert, balancing provisions, such as Federal Rule of Evidence 403,[845] may

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[842] A few cases such as People v. Kobey, 105 Cal. App. 2d 548, 554, 234 P.2d 251, 254 (1951), and People v. Moone, 334 Ill. 590, 598, 166 N.E. 481, 484 (1929) have involved use of accountants as experts.

[843] Carr v. State, 46 Ala. App. 4, 6, 237 So. 2d 116, 117 (1970).

[844] 1 Md. App. 433, 438, 230 A.2d 678, 682 (1967).

[845] See text accompanying note 823 supra.

require exclusion of expert opinions where special factors render probative value minimal.

(i) Geographic Location. Under general rules of qualification, an expert need not have obtained his experience in the same geographic locality in which he testifies.[846] In Lumpkin v. State,[847] however, the court stressed the need for similarity between the criminal modus operandi in the two locations. While the absence of strict locational limitations expands the field of available experts, regional differences may also produce erroneous testimony. In People v. Kobey,[848] for example, an accountant testifying as an expert in California stated that the term "JC" appearing on the defendant's ledger stood for "juice," or money paid for police protection. While this opinion might be correct in California, it would probably be erroneous in Chicago where "juice" normally denotes money lent by a loanshark.[849]

(ii) Outdated Training. In Commonwealth v. Adams,[850] the court allowed the expert to explain the use of policy slips and other gambling paraphernalia although he had not played the numbers game in over a year. In Adams the witness's awareness of recent changes in the game mitigated the prejudicial

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[846] See cases cited in notes 847 & 856 infra.

[847] 83 Ga. App. 831, 833, 65 S.E.2d 184, 186-87 (1951).

[848] 105 Cal. App. 2d 548, 558, 234 P.2d 251, 256 (1951).

[849] See Hearings, supra note 803, at 94.

[850] 160 Mass. 310, 311-12, 35 N.E. 851, 852 (1894).

effect this outdated and possibly erroneous testimony might have had upon the jury. Had the expert not played the numbers game in five years or more, it is doubtful that the court would have admitted the testimony. Not only would the likelihood of erroneous testimony have greatly increased; the probative value of the evidence would have similarly diminished.

(iii) Hearsay Basis. The expert's specialized knowledge need not be obtained "first-hand."[851] An expert may gain knowledge of the operations of illegal business activities from conversations with participants and others familiar with the operation.[852] Opinions based on such "hearsay knowledge" may be admitted into evidence.[853] In Hodges v. State,[854] for example, the witness, a police officer, obtained his knowledge of lotteries from arrests he had made and from conversations with participants ranging from bankers to players. Although he had no "direct and immediate experience of his own," the officer

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[851] Sable v. State, 48 Ga. App. 174, 176, 172 S.E.2d 236, 237 (1933).

[852] Id.; Moore v. United States, 394 F.2d 818, 819 (5th Cir. 1968), cert. denied, 393 U.S. 1030 (1969); Hodges v. State, 100 Ga. App. 607, 608, 112 S.E.2d 226, 227 (1959); Thomas v. State, 85 Ga. App. 868, 870, 70 S.E.2d 131, 133 (1952).

[853] See cases cited in note 859 infra. In Sable v. State, 48 Ga. App. 174, 176, 172 S.E.2d 236, 237 (1933), the court took a slightly different approach to this problem:

> This court is unwilling to hold that all information not gained first hand is hearsay . . . . All knowledge is in one sense hearsay, and yet the testifying to such facts as knowledge gained, either by experience or from others, does not make them hearsay.

[854] 100 Ga. App. 607, 112 S.E.2d 226 (1969).

qualified to testify as an expert.[855]

An expert may also obtain his knowledge from tests and analyses performed by others upon the illegal records in question. In United States v. Morrison,[856] an FBI agent and senior examiner based his testimony on an analysis of betting slips and records performed by other examiners. In admitting his testimony, the court stressed the agent's performance of sample checks to ascertain the validity of the tests. Since the testimony "did not go beyond the reasonable reliance on the reports of others permitted an expert who customarily relies on such reports,"[857] it was admissible.

(iv) Lack of Certainty. The expert need not be capable of interpreting all symbols in the records he seeks to explain.[858] In fact, he need not be absolutely certain of his identification of the paper. In Commonwealth v. Boyle,[859] although the witness

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[855] Id. at 608, 112 S.E.2d at 227. In Thomas v. State, 85 Ga. App. 868, 70 S.E.2d 131 (1952), the court held that the expert witness did not have to divulge the names of his sources of information.

[856] 531 F.2d 1089, 1094 (1st Cir. 1976).

[857] Id. at 1095. See also Fed. R. Evid. 703; Fla. Stat. Ann. § 90.704 (West Supp. 1978). The test of reasonable reliance applies to any testimony based upon reports of others. See Fed. R. Evid. 703, Advisory Committee Notes; McCormick, supra note 389, § 15, at 36.

[858] People v. Derrick, 85 Cal. App. 406, 408, 259 P. 481, 482 (1927) (expert's inability to decipher figures on reverse side of paper did not render testimony inadmissible).

[859] 346 Mass. 1, 3, 189 N.E.2d 844, 845 (1963).

conceded that the slips in question might relate to "an unlimited number of other financial activities," but nonetheless concluded that they were "obviously bookmaking paraphernalia," the court accepted the expert's opinion.

(v) Absence of Underlying Evidence. Through judicious use of expert testimony, prosecutors may compensate for deficiencies in proof. In McGee v. State,[860] the defendant, while being arrested, had eaten inculpatory lottery slips. Nonetheless, the court found that the arresting officer's testimony concerning the nature of the papers sufficed to establish the defendant's guilt.

Expert testimony, however, cannot serve as a substitute for relevant and obtainable factual evidence. In United States v. Sette,[861] the court refused to allow the investigating officer's testimony identifying the defendant as a "banker" in a lottery game. The court stated:

> The agents in the course of their long investigation had the opportunity to follow Sette, and determine what if anything he did with the slips he collected. . . . Having utterly failed to do so, they could not remedy this obvious defect in proof by assuming the role of experts and stating their opinions on what they had to prove.[862]

d. Permissible Expert Testimony

(i) General Limitations. Once qualified, the expert may

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[860] 1 Md. App. 238, 242-43, 229 A.2d 432, 433-34 (1967).

[861] 334 F.2d 267 (2d Cir. 1964).

[862] Id. at 269.

testify concerning only his area of expertise. According to Wigmore:

> The expert's capacity is in every case a relative one, i.e., relative to the topic about which the person is asked to make his statement. The object is to be sure that the question to the witness will be answered by a person who is fitted to answer. His fitness, then, is a fitness to answer on that point. He may be fitted to answer about countless other matters, but that does not justify accepting his views in the matter in hand.[863]

Thus, an accountant testifying about loanshark documents might be qualified to comment on the meaning of various bookkeeping terms, but unqualified to explain the operation of a loansharking enterprise.[864] The expert's opinion must be based upon fact and not upon mere conjecture.[865] There is a split of authority concerning the need for the witness to detail on direct examination the facts underlying his opinion;[866] clearly, however, he must set out the underlying

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[863] 2 Wigmore, supra note 392, § 555, at 634. See also 2 Wharton, supra note 816, § 505, at 328-30.

[864] For cases involving expert accountants, see note 842 supra.

[865] In State v. DiVincenti, 232 La. 13, 23, 93 So. 2d 676, 680 (1957), the trial court properly excluded a question calling for the personal opinion of the witness. The witness had previously admitted that he could not form an expert opinion of the meaning of the figure "6" on a horseracing slip. The court asserted that any personal opinion of the witness would be mere conjecture and further stated that expert opinions must be based upon facts and data which amount to substantial and probative evidence. Id. at 24, 93 So. 2d at 680.

[866] Many jurisdictions do not require an explanation of the underlying basis for an opinion. See, e.g., People v. Crossland, 9 N.Y.2d 464, 467, 174 N.E.2d 604, 605-06, 214 N.Y.S.2d 728, 731 (1961) ("The facts upon which the

facts if requested to do so on cross-examination.[867]

(ii) Ultimate Fact v. Legal Conclusions. Under the traditional rule, experts may not testify as to ultimate issues of fact.[868] While courts have justified this restriction by citing fear of invasion of the province of the jury,[869] this characterization is somewhat misleading. Expert testimony only usurps the jury's role if the court advises the jury to consider expert testimony conclusive.[870] In fact, courts fear that the jury "might forego independent analysis of the facts and bow too readily to the opinion of an expert."[871] Repudiating the common-law rule, courts and legislatures have increasingly allowed expert testimony on ultimate issues of

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opinion was based inhered in the object in evidence"); Fed. R. Evid. 705; Cal. Evid. Code § 802 (West 1966) (court, however, has discretion to require examination concerning matter upon which expert's opinion is based); Fla. Stat. Ann. § 90.705 (West Supp. 1978); N.J. Rules of Evid. 57 (1972) (judge, however, may require examination); N.Y. Civ. Prac. Law § 4515 (McKinney 1963). But see La. Stat. Ann. § 15-465 (West 1967) (requiring expert to state facts underlying opinion).

[867]Fed. R. Evid. 705 provides: "The expert may in any event be required to disclose the underlying facts or data on cross-examination." See also Fla. Stat. Ann. § 90.705 (West Supp. 1978).

[868]For an excellent discussion of the development of the ultimate-fact rule, see Stoebuck, Opinions on Ultimate Facts: Status, Trends, and a Note of Caution, 41 Denver L.C.J. 226 (1964). See generally McCormick, supra note 389, § 12, at 27.

[869]McCormick, supra note 389, § 12, at 27.

[870]7 Wigmore, supra note 392, §§ 1920-21, at 18-20.

[871]McCormick, supra note 389, § 12, at 27.

fact.[872] Under the Federal Rules, as under common law, however, experts may not testify as to "legal conclusions."[873]

It is often not easy to determine whether a statement constitutes a legal conclusion. Clearly, a witness may not state his opinion concerning the defendant's guilt or innocence.[874] In Grismore v. Consolidated Products,[875] the court outlined this basic rule:

> No witness should be permitted to give his opinion directly that a person is guilty or innocent, or is criminally responsible or irresponsible. . . . [T]he reason is that such matters are not subjects of opinion testimony. They are mixed questions of law and fact. When a standard, or a measure, or a capacity has been fixed by law, no witness whether expert or non-expert, nor however qualified, is permitted to express an opinion as to whether or not the person or the conduct, in question, measures up to that standard. On that question the court must

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[872] See, e.g., Fed. R. Evid. 704; Cal. Evid. Code § 805 (West 1966); Fla. Stat. Ann. § 90.703 (West Supp. 1978); Mich. Stat. Ann. Rule 605 (1976); Utah Code Ann. § 56(2) (1977); Wis. Stat. Ann. § 907.04 (West 1972). But see Hubbard v. Quality Oil Co., 268 N.C. 489, 494, 151 S.E.2d 71, 76 (1966); Barger v. Mizel, 424 P.2d 41, 47 (Okla. 1967); Redman v. Community Hotel Corp., 138 W. Va. 456, 469, 76 S.E.2d 759, 766 (1953); State ex rel. Kirk v. Gail, 373 P.2d 955, 957 (Wyo. 1962) (expert may not give testimony concerning ultimate issues in fact).

[873] See authorities cited in notes 869 & 872 supra and notes 874-877 infra. In United States v. Milton, 555 F.2d 1198, 1203 (5th Cir. 1977), the court emphasized the need for caution in applying the newly promulgated Federal Rule: "Rule 704 abolishes the per se rule against testimony regarding ultimate issues of fact. By the same token, however, courts must remain vigilant against the admission of legal conclusions."

[874] See, e.g., Boyde v. State, 513 S.W.2d 588, 590 (Tex. Crim. App. 1974).

[875] 232 Iowa 328, 5 N.W.2d 646 (1942).

> instruct the jury as to the law, and the jury must draw its own conclusion from the evidence.[876]

Despite this limitation, courts have permitted expert testimony that establishes the defendant's commission of a crime other than the offense in issue. The testimony must, however, meet the basic criterion of relevance and cannot be introduced to show "merely criminal disposition."[877]

Moreover, under the "legal conclusion rule," an expert may not assume the court's role and interpret a statute or charge the jury regarding the applicable law.[878]

C. Computing Illegal Interest Rates

The usurious character of a loan depends on the amount of interest charged or contracted for, rather than the amount actually paid.[879] Since both federal and state statutes define prohibited interest charges in terms of an annual rate, prosecutions of usury violations generally necessitate conver-

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[876] Id. at 361, 5 N.W.2d at 663.

[877] People v. Kozakis, 102 Cal. App. 2d 662, 665, 228 P.2d 58 (1951).

[878] Stoebuck, supra note 868, at 237. See United States v. Milton, 555 F.2d 1198, 1203 (5th Cir. 1977); Heiff v. United States, 273 F.2d 56, 61 (5th Cir. 1959).

[879] See, e.g., 18 U.S.C. § 891(1) (1976); Fla. Stat. Ann. § 687.071 (West Supp. 1978); Ill. Rev. Stat. ch. 38, § 39-1 (1977); Mass. Ann. Laws ch. 271, § 49(a) (Michie/Law Co-op 1978); N.J. Stat. Ann. § 2A:119A-1 (West Supp. 1977): N.Y. Penal Law §§ 190.40, 190.42 (McKinney Supp. 1977); United States v. Totaro, 550 F.2d 957, 958 (4th Cir.), cert. denied, 431 U.S. 920 (1977); Dixon v. Sharp, 276 So. 2d 817, 820 (Fla. 1973); People v. Gallo, 54 Ill. 2d 343, 356, 297 N.E.2d 569, 576 (1973).

sion of assessments based on shorter periods. While calculation of the annual rate in some cases requires no more than simple multiplication, in others it entails significant complexities. Unhappily, loansharks seldom structure transactions with an eye toward easing the prosecutor's task; indeed, loansharks may intentionally obfuscate the actual rate of interest to avoid prosecution.[880]

Loan arrangements vary widely in character and complexity. A single transaction may require repayment of principal in a lump sum or installments, equal or varying payments, uniform or variable interest rates, and regular or irregular payment periods. In addition, the loan may entail discounts, bonuses, deferments, acceleration, forfeitures, penalties, and a variety of supplementary interest charges commonly concealed as other forms of consideration. All of these factors affect the computation of interest rates.[881]

Loanshark transactions generally fall into two categories: the simple or "vig" loan whereby the debtor agrees to pay a specific rate of interest--such as 20% per week--and to repay the principal in a single lump sum; and the installment, or

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[880] Cf. United States v. Andrino, 501 F.2d 1373, 1377 (9th Cir. 1974) (absence of formal "loans" and specified "interest" rates inconsequential, provided that evidence sufficiently displays actual extension of credit, accrual of debt, and manifestation of coercion to collect loan).

[881] On computing interest rates for the most common loan arrangements, see Hearings on the Consumer Credit Protection Act, H.R. 11601, Before the Subcomm. on Consumer Affairs of the House Comm. on Banking and Currency, 90th Cong., 1st Sess., pt. 2, 905 (1967) (statement of Joseph W. Barr, Under Sec., Dep't of the Treasury).

"knockdown," loan whereby the debtor pays off both interest and principal according to a prearranged schedule of installments.[882]

1. Proving Excessive Rates

a. Stipulation

Since the interest charged by loansharks generally far exceeds legal limits, the defense will commonly offer to stipulate that the rate assessed exceeded the statutory maximum.[883] Where the prosecution must show intent to violate the usury laws or the presence of an extortionate "understanding," however, the actual interest charges are both relevant and likely to inform the jury's deliberations. Since the government need not accept an offer to stipulate,[884] the prosecution can either insist on a stipulation specifying the level of interest charged or prove the rate of interest in open court.

b. Expert Testimony

The testimony of experts is admissible in cases involving complicated financial matters.[885] Thus, in United States v.

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[882] See note 82 and accompanying text supra.

[883] United States v. Totaro, 550 F.2d 957, 958 (4th Cir.), cert. denied, 431 U.S. 920 (1977) (annual rates of 300% and 520% introduced by stipulation).

[884] United States v. Brinklow, 560 F.2d 1003, 1006 (10th Cir. 1977). For a general treatment of the government's obligation to accept an offer to stipulate, see 4 L. Orfield, Criminal Procedure Under the Federal Rules § 26.777, at 376 (1967).

[885] United States v. Augustine, 189 F.2d 587, 589 (3d Cir. 1951) (bookkeeping and tax returns); United States v. Fischer, 245 F. 477, 479, (E.D. Pa. 1917) (value of stocks); Continental Mortgage Investors v. Sailboat Key, Inc., 354 So. 2d 67, 70 (Fla. Dist. Ct. App. 1977) (certified public accountant appointed special master to compute interest rate).

Spears,[886] the Tenth Circuit upheld testimony of several special agents of the FBI who had analyzed the interest rates charged by the defendants.[887] Since expert testimony is admissible only to aid the untrained layman, however, courts may exclude expert opinions where the challenged transaction amounts to only a straightforward "vig" loan.[888]

c. Judicial Notice

Prosecutors in several cases have asked the court to take judicial notice of annual interest rates.[889] For the courts to comply with this request, the government must establish the existence of the loan as well as the principal, finance charge, and the loan period.[890] Given this information, the trial judge may perform the calculations necessary to determine the annual rate.

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[886] 568 F.2d 799 (10th Cir. 1978).

[887] Id. at 800.

[888] See Fed. R. Evid. 702. See generally Ladd, supra note 808, at 419.

[889] United States v. Martorano, 557 F.2d 1, 7 (1st Cir. 1977); United States v. Natale, 526 F.2d 1160, 1165 (2d Cir. 1975), cert. denied, 425 U.S. 950 (1976); accord, United States v. Sacco, 563 F.2d 552, 554 (2d Cir. 1977); United States v. Nakaladski, 481 F.2d 289 (5th Cir. 1973); United States v. Annoreno, 460 F.2d 1303 (7th Cir.), cert. denied, 409 U.S. 852 (1972); United States v. Stefano, 429 F.2d 344,345 (2d Cir. 1970), cert. denied, 402 U.S. 972 (1971); State v. Tillem, 127 N.J. Super. 421, 424, 317 A.2d 738, 740 (Super. Ct. App. Div.), cert. denied, 419 U.S. 900 (1974).

[890] See notes 891-901 and accompanying text infra.

2. Elements of Interest Computation

a. Principal

For purposes of interest-rate computations, principal equals the net amount borrowed.[891] Sums charged as discounts, bonuses, and similar consideration do not constitute repayments of principal;[892] because they amount to costs imposed for the use of money, these charges are added to the finance charge.[893] Moreover, advance payments of interest must be pro-rated over the life of the loan.[894] If, for example, the loanshark agrees to lend the borrower $100 for one month, but advances only $90, the transaction amounts to a $90 loan from the time the borrower received the money (with the $10 advance payment treated as interest amounting to 11.1% on a $90 one-month loan, or 133% per annum).[895]

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[891] See American Acceptance Corp. v. Schoenthaler, 391 F.2d 64, 73 (5th Cir.), cert. denied, 392 U.S. 928 (1968). See also Bosko, Usury Computations: A Primer, 51 Cal. S.B.J. 383, 384 (1976).

[892] For the effect of bonus payments on interest rate computations, see Cusick v. Ifshin, 70 Misc. 2d 564, 567-68, 334 N.Y.S.2d 106, 109-10 (Civ. Ct. N.Y. County 1972), aff'd, 73 Misc. 2d 127, 341 N.Y.S.2d 280 (Sup. Ct. 1973).

[893] See generally Warren, Regulation of California Housing Financing: A Forgotten Consumer, 8 U.C.L.A. L. Rev. 555, 574 (1961).

[894] On the problem of discounting and taking interest in advance as constituting usury, see Annot., 57 A.L.R.2d 630 (1958).

[895] This rule may appear to penalize the lender twice, since the advance payment is deducted from the nominal principal amount and added to the interest charge:

> Notwithstanding the intuitive attractiveness

b. The Loan Period

The loan period continues for as long as the borrower has use of the borrowed funds. The period commences on the date the borrower receives the money[896] and runs through the entire term of the loan.[897] For purposes of converting a short-term loan into an equivalent annual rate, the general rule requires application of a 30-day month and 360-day year, unless the statute specifies the calendar year as the operative period.[898]

c. The Finance Charge

Most statutes expressly define the finance charge. While statutory formulations differ, most resemble the Fed-

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> of the "double penalty" argument, each of the two rules would seem to be required in order to avoid easy evasion of the usury law. Although their combined effect may seem unfair to the lender, perhaps it may be argued that the spirit and intent of the usury law require protecting borrowers even in situations where some unfairness may result to lenders.

Bosko, supra note 891, at 384-85.

[896] If, for example, the loanshark demands additional consideration in the tenth month of a one-year loan, the value of the additional consideration is determined from the date the loan was made and is not discounted to present value. Id. at 383.

[897] The period of the loan is not diminished where the debtor repays the loan prior to maturity; the argument is that a debtor cannot bring his creditor under the guns of the usury statutes by his own voluntary conduct. See Warren, supra note 893, at 575-76. See also Annot., 66 A.L.R.3d 650 (1975).

[898] See Annot., 35 A.L.R.2d 842 (1954). But cf. American Timber & Trading Co. v. First Nat'l Bank, 511 F.2d 980 (9th Cir. 1973) (Oregon bank's computation of interest based on a 360-day year, resulting in a higher rate than on a 365-day calendar year, violated Oregon usury statute), cert. denied, 421 U.S. 921 (1975).

eral Truth-in-Lending definition:

> [T]he sum of all charges, payable directly or indirectly by the person to whom the credit is extended, and imposed directly or indirectly by the creditor as an incident to the extension of credit, including any of the following types of charges which are applicable: (1) Interest, time price differential, and any amount payable under a point, discount, or other system of additional charges. (2) Service or carrying charge. (3) Loan fee, finder's fee, or similar charge. (4) Fee for an investigation or credit report. (5) Premium or other charge for any guarantee or insurance protecting the creditor against the obligor's default or other credit loss.[899]

In Mondik v. DiSimo,[900] the district court construed the language "incident to the extension of credit" to require a relationship between the imposition of the finance charge and the extension of credit.[901] Thus, in cases where the loanshark disguises the true amount of the finance charge by demanding consideration in the form of retail goods, negotiable instruments, or other non-cash consideration, it must be shown that the borrower gave the consideration in exchange for the use of money borrowed and for no other purpose.

3. Vig Loans--Computing the Annual Rate

Most reported loanshark prosecutions involve vig loan transactions in which the borrower agrees to repay the principal in a lump sum. Converting the interest charge

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[899] 15 U.S.C. § 1605(a) (1976).

[900] 386 F. Supp. 537 (W.D. Pa. 1974), aff'd, 521 F.2d 1399 (3d Cir. 1975).

[901] Id. at 538.

on a vig or simple loan is usually straightforward, requiring only multiplication of the periodic rate by the number of periods in the year.[902] Consider, for example, a loan of $1,000 with a promise to repay $1,100 in two weeks. The equivalent annual rate equals the periodic rate ($100 divided by $1,000 or 10%) times the number of relevant periods in a year (26 two-week periods), or 260% per annum. In other cases, the parties will not specify a date for repayment of principal. Given a loan of $1,000 carrying interest charges of $70 per week with each weekly payment going solely to pay interest, the equivalent annual rate equals the periodic rate ($70 divided by $1,000 or 7%) times the number of periods in a year (52), or 364% per annum.

4. Knockdown Loans--Computing the Annual Rate

In an installment, or "knockdown" loan arrangement, the borrower agrees to repay the principal in a series of periodic payments. Few reported loanshark cases involve loans of this type, but the increasing sophistication of loanshark operations and growing market for illicit loans to businesses suggest that "knockdowns" may soon replace "vigs" as the predominant form of loanshark transaction.

a. The Actuarial Method

Most criminal usury provisions that prohibit extortionate extensions of credit[903] require use of the "actuarial method"[904]

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[902] See, e.g., 12 C.F.R. § 226.5(a)(1) (1977).

[903] 18 U.S.C. §§ 891-896 (1976).

[904] This method is also called "declining balance" or "effective"

in computing the annual rate on installment loans. Under the actuarial method, each installment payment first applies toward discharging interest due; only surplus applies to discharge the principal.[905] Use of annual percentage rate tables published by the Federal Reserve System simplify calculations.[906]

b. Sources of Law in Applying the Actuarial Method

Although all states permit or require use of the actuarial method in computing annual rates, statutory formulations differ in their definitions of principal, period, and finance charge. The federal criminal statute[907] incorporates by reference Regulation Z of the Federal Truth-in-Lending provisions.[908] New York's criminal usury provisions[909] and Connecticut's extortionate-extension-of-credit statute[910] also incorporate

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interest rate. See Botts and Garlock, Interest Rates Charged on Installment Purchases, 30 Accounting Rev. 607, 608-09 (1955).

[905]"Calculation of interest on the unpaid balance involves computing each month the amount of interest due on the balance outstanding since the previous month." Fed. Res. Sys. Bd. of Governors, Consumer Installment Credit, pt. 1, at 50 (1957).

[906]Regulation Z Annual Percentage Rate Tables, 12 C.F.R. § 226.5(c) (1977) (published in two volumes, available at Federal Reserve System Board of Governors in Washington, D.C., 20551).

[907]18 U.S.C. §§ 891-896 (1976).

[908]Truth in Lending Regulations, 12 C.F.R. §§ 226.1 to .1001 (1977). On the incorporation of Regulation Z into the federal statute, see 15 U.S.C. § 1606(a)(1)(B) (1976) (corresponds to Consumer Credit Cost Disclosure Act of 1968, ch. 1, § 107, 82 Stat. 146, 149 (1968)).

[909]N.Y. Penal Law §§ 190.40, 190.42 (McKinney Supp. 1977).

[910]Conn. Gen. Stat. §§ 53-390 to -391 (1977).

the federal definitions.[911] In other states, Regulation Z appears applicable by analogy,[912] while still other states supply their own statutory or regulatory provisions for computing annual rates on installment loans.[913]

c. Illustration

In his testimony before a Senate subcommittee in 1963, Joseph Valachi related the advantages of refinancing usurious loans.[914] Quoting his subject, Peter Maas, in The Valachi Papers,[915] used the following example:

> There is this guy Hugo who is a bookmaker. One day he's hit hard, and he's still into me for $300 on a $500 loan. Now I go over to see him to make my regular collection. He is paying me $50 a week, but now he's in trouble, and he wants a reloan of $500. He already owes me $300, so all I have to do is hand him $200 more. But I charge him $100 as though he had just borrowed it all because that's the

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[911] 1969 N.Y. Laws, ch. 1141, § 1 (repealed N.Y. Gen. Oblig. Law §§ 6-101 to -108 and adopted the federal Truth in Lending Regulations); Conn. Gen. Stat. § 36-395(b) (1977).

[912] N.J. Stat. Ann. § 17:3B-1 (West Supp. 1977).

[913] Cal. Civ. Code §§ 1916 to 1916-6 (West 1954 & Supp. 1977); Colo. Rev. Stat. § 5-3-304 (1973); Ill. Rev. Stat. ch. 74, §§ 4, 4(a), 10 (1975); Mass. Ann. Laws ch. 140C (Michie/Law. Co-op 1972 & Supp. 1977); Ohio Rev. Code Ann. § 1321.13 (Page Supp. 1977); R.I. Gen. Laws §§ 6-27-1 to -9 (Supp. 1977); Utah Code Ann. §§ 70B-3-101 to -605 (Supp. 1977); Wis. Stat. Ann. §§ 422.201 - .209 (West 1974).

[914] Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Subcomm. on Investigations of the Senate Comm. on Government Operations, 88th Cong., 1st Sess., pt. 1, 267 (1963) (testimony of Joseph Valachi) [hereinafter cited as Hearings].

[915] Maas, supra note 77, at 168.

> vigorish on $500. This is why the cream is in the reloaning. All I'm really doing is giving him $200 in cash to get back $100.[916]

In Senate hearings, Valachi was asked the interest rate on the first loan. His response: "[t]wenty percent--for instance, if I gave you $1,000, you have to pay me $1,200, for 12 weeks $100 a week."[917] This off-the-cuff computation grossly understated the actual interest charge. It ignored the principle that the interest rate on installment loans must be computed on a declining balance.[918] An analysis of the true interest on the Valachi loans follows: To compute the annual rate on the initial loan, divide the principal ($500) by the periodic amount ($50); which yields a ratio of 10.0. Using an annuity table,[919] determine the interest rate which corresponds to a 10.0 figure for a twelve-period term (2.9%). Multiply this by the number of periods in a year (52) to compute the annual rate on the initial loan (152%).

On the "second" loan (during the sixth week) the loanshark advances only $200, discharging the "$300" debt outstanding on the first loan, and commences a new twelve-week loan payable in $50 installments.

However, using the declining balance analysis, at the end of six weeks, at 2.9% per week, the outstanding princi-

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[916] Id. at 161.

[917] Hearings, supra note 914, at 268.

[918] See text accompanying notes 903-906 supra.

[919] To obtain copies of tables, see note 906 supra.

pal on the initial loan is only $271. Requiring, that, as a condition of the new loan, the debtor repay the entire $300 six weeks prematurely, in effect provides the loan-shark with a $29 bonus.[920] The principal for the new loan is, therefore, $471: $271 to repay the old debt and $200 given to the debtor. The schedule of payments $50/week for 12 weeks is still in effect, thus the ratio of principal to payment is $471/50 or 9.42. The annuity table shows this to be an effective rate of 208%/year. No wonder Valachi termed this transaction a "sweet loan."

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[920] See text accompanying note 894 supra.

APPENDIX A: LOANSHARKING STATUTES OF THE STATES

The following chart schematically presents all state credit-related criminal laws potentially applicable to the loanshark. These statutes included in the chart fall into eight categories: extortionate credit transactions, criminal usury, financing extortionate credit transactions, financing criminal usury, possession of records of extortionate credit transactions, possession of records of criminal usury, collection of extensions of credit by extortionate means, and assault and battery for the purpose of collecting a loan. While individual states do not always apply the labels used in this chart to identify their statute, these labels serve to categorize statutes by functional characteristics.

Although the chart does not include the small loans laws or statutes modeled after the Uniform Consumer Credit Code, these statutes contain provisions of possible value in controlling loanshark activities. These statutes require that a person who engages in the business of making loans must obtain a license and must annually provide appropriate state authorities with information concerning the business. The statutes usually set limits on interest rates and require disclosure, usually in writing, to the customer of all charges and rates.[921] The chart also does not include statutes pro-

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[921] Criminal penalties for violation of these provisions are set forth in the following statutes:

Small loans statutes: Ala. Code tit. 5, § 5-18-24 (1975),

scribing racketeering[922] or engaging in organized crime.[923]

The statutes in the chart have been separated into elements to facilitate structural comparison. With only one exception, these analyses incorporate no case law.

Alaska Stat. § 06.20.320(1962), Ariz. Rev. Stat. § 6-133 (Supp. 1977), Cal. Fin. Code § 24651 (West 1968), Del. Code tit. 5, §§ 2110, 2112 (1974) § 2111 (Supp. 1977), Fla. Stat. Ann. § 516.19 (West Supp. 1978), Ga. Code Ann. § 25-9903 (1976), Haw. Rev. Stat. § 409-31 (1976), Ill. Rev. Stat. ch. 74, § 37 (Supp. 1978). Iowa Code § 536.19 (1977), Ky. Rev. Stat. § 288.991 (1962), Md. Ann. Code art. 58A, § 14 (Supp. 1977) & Md. Com. Law Code Ann. § 12-316 (Supp. 1977), Mass. Ann. Laws ch. 140, § 110 (Michie/ Law. Co-op 1972), Mich. Stat. Ann. § 23.667(19) (1971), Minn. Stat. Ann. § 56.19 (West 1970), Miss. Code Ann. §§ 75-67-35, 75-67-119 (1972), Mo. Ann. Stat. § 367.200 (Vernon 1968), Mont. Rev. Codes Ann. § 47-228 (1961), Neb. Rev. Stat. § 45-128 (Supp. 1977), Nev. Rev. Stat. §§ 675.470, 675.480 (1973), N.H. Rev. Stat. Ann. §§ 399-A:2, 399-A:24 (Supp. 1977), N.M. Stat. Ann. § 48-17-32 (Supp. 1975) (See also N.M. Stat. Ann. §§ 48-21-9 (1966), 50-6-14, 50-6-19 (1962)), N.Y. Banking Law § 358 (McKinney 1971), N.C. Gen. Stat. § 105-88 (1972), N.D. Cent. Code §§ 13-03-22, 13-03.1-18 (Supp. 1977), Ohio Rev. Code Ann. § 1321.99 (Page Supp. 1977), Pa. Stat. Ann. tit. 7, § 6218 (Purdon Supp. 1977), R.I. Gen. Laws § 19-25-36 (1968) (See also R.I. Gen. Laws § 19-25.3-26 (1968)), S.C. Code § 34-29-250 (1977) (See also S.C. Code § 37-5-301 (Supp. 1977)), S.D. Compiled Laws Ann. § 54-4-27 (1967), Vt. Stat. Ann. tit. 8, § 2233 (1970), Va. Code § 6.1-308 (1973), Wash. Rev. Code Ann. § 31.08.210 (1961), W. Va. Code § 46A-5-103 (1976), D.C. Code Encycl. § 26-607 (West 1967).

Statutes modeled after Uniform Consumer Credit Code: Colo. Rev. Stat. §§ 5-5-301, 5-5-302 (1973), Idaho Code §§ 28-35-301, 28-35-302 (Supp. 1977), Ind. Code Ann. §§ 24-4.5-5-301, 24-4.5-5-302 (Burns 1974), Iowa Code §§ 537.5301, 537.5302 (1977), Kan. Stat. §§ 16a-5-301, 16a-5-302 (1974), La. Rev. Stat. Ann. § 9:3553 (West Supp. 1977), Me. Rev. Stat. tit. 9A, § 5.301 (Supp. 1977), Okla. Stat. Ann. tit. 14A, §§ 5-301, 5-302 (West 1972), S.C. Code §§ 37-5-301 (1977), 37-5-302 (1976), Utah Code Ann. §§ 70B-5-301, 70B-5-302 (Supp. 1977), Wis. Stat. Ann. § 425.401 (West 1974), Wyo. Stat. §§ 40-14-540, 40-14-541 (1977).

[922] See, e.g., Fla. Stat. Ann. §§ 943.46 to 943.463 (West Supp. 1978) and 18 Pa. Cons. Stat. Ann. § 911 (Purdon 1973 & Supp. 1978).

[923] See, e.g., Ohio Rev. Code Ann. § 2923.04 (Page 1975).

Statutes	Conduct	Attendant Circumstances	Result	State of Mind		Penalties
				Conduct	Att'd Circ's	
ALABAMA	NO RELEVANT STATUTES					
ALASKA	NO RELEVANT STATUTES					
ARIZONA						
Extortionate Credit Transactions Ariz. Rev. Stat. § 13-2302 (Special Pamphlet 1977)[1]	making extension of credit[2]	understanding that creditor could enforce loan by violence[3]		intentionally, knowingly, or recklessly[4]	intentionally, knowingly, or recklessly[4]	felony
Criminal Usury Ariz. Rev. Stat. § 13-2708 (Special Pamphlet 1977)[1]	engaging	business of making loans at a higher rate of interest than authorized by law[5]		knowingly	knowingly	felony
Financing Extortionate Credit Transactions Ariz. Rev. Stat. § 13-2303 (Special Pamphlet 1977)[1]	advancing	money or property to a person with grounds to believe that the person intends to use the money or property to make an extortionate extension of credit		knowingly	reasonable grounds	felony

ARIZONA continued					
Financing Criminal Usury Ariz. Rev. Stat. § 13-2208 (Special Pamphlet 1977)[1]	providing	directly or indirectly financing for the business of making loans at excessive rate of interest[6]	knowingly	knowingly	felony
Collection of Extension of Credit by Extortionate Means Ariz. Rev. Stat. § 13-2304 (Special Pamphlet 1977)[1]	participates or conspires	use of extortionate means[7] to collect or attempt to collect any extension of credit or to punish non-repayment	knowingly	knowingly	felony

[1]Effective October 1, 1978.

[2]Ariz. Rev. Stat. § 13-2302(B) allows the prosecutor to establish a prima facie case by showing four factors: (1) repayment of the extension of credit is unenforceable through the civil judicial process, (2) the rate or interest is over 45%, (3) the debtor reasonably believed, at the time the extension of credit was made, that the creditor had used or attempted to use extortionate means to collect loans or punish a failure to pay or that the creditor had a reputation for so doing, and (4) the outstanding credit extensions exceeded $100.

[3]Ariz. Rev. Stat. § 13-2301(3) defines extortionate extension of credit as "any extension of credit with respect to which [it] is is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person."

[4]Per Ariz. Rev. Stat. § 13-202(B) (Special Pamphlet 1977) Effective October 1, 1978.

[5]Set at 10% per annum, Ariz. Rev. Stat. § 44-1202(A) (Supp. 1977).

[6]See note 5, supra.

[7]Ariz. Rev. Stat. § 13-2301(4) defines this as "the use, or an express or implicit threat of use, if violence or other criminal means to cause harm to the person, reputation or property of any person."

ARKANSAS NO RELEVANT STATUTES

CALIFORNIA

Criminal Usury Cal. Civ. Code § 1916-3 (b) (West Supp. 1978)	makes, negotiates and charges, contracts for, or receives	for self or another loan of money, credit, etc. directly or indirectly interest or charge in excess of lawful rate[1]	willfully	willfully	felony

[1]Set at 10% per annum by Cal. Const. art. 15 § 1.

COLORADO

Extortionate Credit Transactions Colo. Rev. Stat. § 18-15-102 (1973)	makes extension of credit[1]	understanding of creditor and debtor that delay in repayment will result in extortionate means of collection[2]	---[3]	---[3]	felony
Criminal Usury Colo. Rev. Stat. § 18-15-104 (1973)	charges, takes, receives	money, property as loan finance charge exceeding 45% per annum	knowingly	knowingly	felony
Financing Extortionate Credit Transactions Colo. Rev. Stat. § 18-15-105 (1973)	advances	money or property to any person with grounds to believe that the person intends to use the money or property to make an extortionate extension of credit	knowingly	reasonable grounds	felony
Financing Criminal Usury Colo. Rev. Stat. § 18-15-106 (1973)	advances	money or property to a person with grounds to believe that the person intends to use the money or property to engage in criminal usury	knowingly	reasonable grounds	felony

COLORADO continued

Collection of Extensions of Credit by Extortionate Means Colo. Rev. Stat. § 18-15-107 (1973)	participate or conspire	use of extortionate means[4] to collect or attempt to collect any extension of credit or to punish non-repayment	knowingly	knowingly	felony
Possession or Concealment of Records of Criminal Usury Colo. Rev. Stat. § 18-15-108 (1973)	possesses, conceals	any writing, paper, instrument, or article used to record criminally usurious transactions			
		contents have been used, are being used to conduct a criminally usurious transaction		knows or has reasonable grounds to know	felony
	or possesses, conceals	any writing, paper, instrument, or article used to record criminally usurious transactions		with intent to aid, assist, or facilitate criminal usury	

[1]Colo. Rev. Stat. § 18-15-101(4)(1973) defines this as making, renewing, or entering an agreement, express or implied, that debt repayment will be deferred. Colo. Rev. Stat. § 18-15-103 (1973) allows the prosecutor to establish a presumption that the extension of credit was extortionate by showing three factors: (1) the finance charge was in excess of that established for criminal usury, (2) the debtor reasonably believed, at the time the extension of credit was made, that the creditor had used or attempted to use extortionate means to collect loans or punish a failure to pay, (3) that at the time the extension of credit was made, the total outstanding extensions by the creditor to the debtor exceeded $100.

[2]Colo. Rev. Stat. § 18-15-101(5)(1973) defines this as any means "which involves the use, or an explicit or implicit threat of use, of violence or other criminal means."

[3]State of mind requirement unclear, see generally Colo. Rev. Stat. § 18-1-503 (1973).

[4]See note 2, supra.

CONNECTICUT

Extortionate Credit Transactions Conn. Gen. Stat. § 53-390 (1977)	makes or conspires to make extension of credit[1]	understanding that creditor could enforce loan by violence[2]	---	---	felony

CONNECTICUT continued

Criminal Usury Conn. Gen. Stat. §§ 37-4, 37-7 (1977)	charge, demand accept, receive	interest at a rate greater than 12% per annum	---	---	unclassified misdemeanor
Financing Extortionate Extensions of Credit Conn. Gen. Stat. § 53-391 (1977)	advances	money or property to any person with grounds to believe that the person intends to use the money or property to make extortionate extensions of credit	willfully	reasonable grounds	felony
Collection of Extensions of Credit by Extortionate Means Conn. Gen. Stat. § 53-392 (1977)	particpates or conspires	use of extortionate means[4] to collect or attempt to collect any extension of credit or to punish non-repayment	knowingly	knowingly	felony

[1]Conn. Gen. Stat. § 53-390(b) (1977) allows the prosecutor to establish a prima facie case by showing four factors: (1) repayment of the extension of credit is unenforceable through the civil judicial process, (2) the rate of interest was in excess of 12%, (3) the debtor reasonably believed, at the time the extension of credit was made, that the creditor had used or attempted to use extortionate means to collect loans or punish a failure to pay or that the creditor had a reputation for so doing, and (4) the outstanding credit extensions exceeded $10.

[2]Conn. Gen. Stat. § 53-389(6) (1977).

[3]Per Conn. Gen. Stat. § 53a-26(c) (1977).

[4]Defined by Conn. Gen. Stat. § 53-389(7) (1977).

DELAWARE NO RELEVANT STATUTES

FLORIDA

Extortionate Credit Transactions Fla. Stat. Ann. § 687.071(4) (West Supp. 1978)	make or conspire to make extension of credit	understanding of creditor and debtor that delay in repayment could result in extortionate means[1] of collection	knowingly and willfully		felony
Criminal Usury Fla. Stat. Ann. §§ 687.071(2), 687.071(3) (West Supp. 1978)	charge, take, receive	interest exceeding 25% but less than 45% per annum	willfully and knowingly		misdemeanor
		interest exceeding 45% per annum	willfully and knowingly		felony
Possession of Records Fla. Stat. Ann. § 687.071(5) (West Supp. 1978)	possess or maintain or conspire to do so	books of account or other documents recording extensions of credit in violation of the extortionate credit transaction statute or the felonious criminal usury statute	knowingly and willfully		misdemeanor

[1]Fla. Stat. Ann. § 687.071(1)(e) (West Supp. 1978) defines this as the use of violence or other criminal means to cause harm to the person, reputation, or property of any person.

GEORGIA

Criminal Usury Ga. Code Ann. § 57-117 (1977)	reserve, charge, take	directly or indirectly rate of interest for any loan or forebearance greater than 5% per month.	---	---	misdemeanor[1]

[1]Per Ga. Code Ann. § 57-9901 (1977).

HAWAII						
Criminal Usury Haw. Rev. Stat. § 478-6 (1976)	receives	directly or indirectly interest, discount or consideration on a loan or forbearance at a rate greater than 1% per month	receipt	intentionally, knowingly, or recklessly[1]	intentionally, knowingly, or recklessly[1]	misdemeanor
	or receives or arranges to receive	by any method or device interest or profit greater than 1% per month				
IDAHO	NO RELEVANT STATUTES					
ILLINOIS						
Juice Racketeering Transaction Ill. Rev. Stat. ch. 38, §§ 39A-1, 39A-2 (1975)	makes	express or implied loan or forbearance with intent of receiving more in repayment whether by interest or increase in principal loaned than authorized by law[1]		knowingly	corrupt intent	felony
	and resorts	on default of borrower to intimidation, threats, or any violent or criminal act to enforce collection or as a means of retribution				

[1] Per Haw. Rev. Stat. § 702-204 (1976).

ILLINOIS continued

	or makes	agreement to loan money or forbear collection of any existing debt with intent of taking, receiving, demanding or charging a rate of interest or an increase in the amount of principal	knowingly	corrupt intent	felony
	and resorts	for collection purposes to one or more acts of intimidation[2]			
Criminal Usury Ill. Rev. Stat. ch. 38, §§ 39-1[3] 39-2 (1975)	contracts for, receives	directly or indirectly interest, discount, or other consideration in exchange for either loan of money, property, forbearance from collection of a loan	knowingly	knowingly	felony
		rate greater than 20% per annum			

[1]Set at 8% per annum, Ill. Rev. Stat. ch. 74, § 4 (Supp. 1976).

[2]Enumerated by Ill. Rev. Stat. ch. 38 § 12-6 (1975). Violation of § 12-6 is itself a felony.

[3]According to § 39-1(b) personal or constructive possession of records, memoranda, or other documentary record of usurious loans is prima facie evidence of a violation of § 39-1.

INDIANA	NO RELEVANT STATUTES				
IOWA					
Criminal Usury Iowa Code § 535.6 (1977)	take, receive or agree to take, receive	directly or indirectly by means of commission or brokerage charges or otherwise for the for- bearance or use of money in the amount of more than five hundred dollars interest greater than 2% per month	---	---	misdemeanor[1]
KANSAS	NO RELEVANT STATUTES				
KENTUCKY	NO RELEVANT STATUTES				
LOUISIANA	NO RELEVANT STATUTES				

[1]Per 1976 Iowa Act ch. 1245 § 461 amending Iowa Code § 535.6 a violation is made a serious misdemeanor effective January 1, 1978.

MAINE	NO RELEVANT STATUTES				
MARYLAND	NO RELEVANT STATUTES				
MASSACHUSETTS					
Criminal Usury Mass. Ann. Laws. ch. 271, § 49(a) (Michie/Law. Co-op Supp. 1978)	contracts for, charges, takes, receives	directly or indirectly in exchange for either a loan of money or other property interest and expenses[1] the aggregate of which exceeds 20% per annum	knowingly	knowingly	felony
Possession of Records of Criminal Usury Mass. Ann. Laws. ch. 271, § 49(b) (Michie/Law. Co-op Supp. 1978)	possesses	any writing, paper, instrument or article used to record a criminally usurious transaction	knowledge of contents	knowledge of contents	felony
Assault and Battery for Purpose of Collecting Loan Mass. Ann. Laws. ch. 265, § 13C (Michie/Law. Co-op 1968)	commits an assault and battery	for purpose of collecting a loan	---	---	felony

[1]Includes any amounts paid to any person for the making or securing of the loan if such charge was known to the lender at the time of making the loan, or might have been ascertained by reasonable inquiry.

MICHIGAN					
Criminal Usury Mich. Stat. Ann. § 19.15(51) (1975)	charges, takes, receives	any money or property as interest greater than 25% simple interest per annum not authorized or permitted by law	knowingly		felony
Possession of Records of Criminal Usury Mich. Stat. Ann. § 19.15(52) (1975)	possesses	any writing, paper, instrument or article used to record criminally usurious transactions	---	knowledge of the contents	misdemeanor
MINNESOTA	NO RELEVANT STATUTES				
MISSISSIPPI	NO RELEVANT STATUTES				
MISSOURI					
Criminal Usury Mo. Ann. Stat. § 563.800 (Vernon Supp. 1977)	take or receive or agree to take or receive	directly or indirectly by means of commissions or brokerage charges or otherwise interest greater than 2% per month	purposely, knowingly, or recklessly[1]		misdemeanor

[1]Per Mo. Ann. Stat. § 562.021 (Vernon Special Pamphlet 1978), effective January 1, 1979.

CONTINUED

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MONTANA	NO RELEVANT STATUTES			
NEBRASKA	NO RELEVANT STATUTES			
NEVADA	NO RELEVANT STATUTES			
NEW HAMPSHIRE	NO RELEVANT STATUTES			
NEW JERSEY				
Criminal Usury N.J. Stat. Ann. § 2A:170-102 (West 1971)	loans, agrees to loan	directly or indirectly money or other property rate of interest in excess of maximum rate[1] not authorized by law	---	misdemeanor
	or takes, agrees to take, receives	money, property, or other thing of value as interest on a loan of for the forbearance of any money or other property at a rate in excess of maximum rate[1] not authorized by law	---	

NEW JERSEY continued

Loansharking N.J. Stat. Ann. § 2A:119A-1 (West Supp. 1977)	loans, agrees to loan	directly or indirectly in the amount of $1,000 or more interest exceeding the maximum rate[1] but not exceeding 50% per annum	---	---[2]	misdemeanor
	or takes, agrees to take, receives	money, property, or other thing of value as interest on a loan or forbearance in an amount of $1,000 or more interest exceeding the maximum rate[3] but not exceeding 50% per annum			misdemeanor
	charges, takes, receives	interest exceeding 50% per annum not authorized or permitted by law			high misdemeanor
Force or fear in connection with loan N.J. Stat. Ann. § 2A:119A-2 (West 1969)	participates or conspires	use of actual or threatened force, violence, or fear in connection with a loan or forbearance prohibited by N.J. Rev. Stat. § 2A:119A-1 (West Supp. 1977)	knowingly		high misdemeanor
Engaging in business of loansharking N.J. Stat. Ann. § 2A:119A-3 (West 1969)	engages or conspires	in the business of loans or forbearances prohibited by N.J. Stat. Ann. § 2A:119A-1 (West Supp. 1977)	---		high misdemeanor
Records of prohibited loans N.J. Stat. Ann. § 2A:119A-4 (West 1969)	possesses, maintains, exercises control over	any paper, writing, instrument or other thing used to record any loan or forbearance, or any part of such transaction, prohibited by N.J. Stat. Ann. § 2A:119A-1 (West Supp. 1977)	knowingly		misdemeanor

NEW JERSEY continued

[1]Per N.J. Stat. Ann. § 31:1-1 (West Supp. 1977): 6% maximum rate; Commissioner of Banking can set by regulation up to 9.5%.

[2]Only general intent required, State v. Tillem, 127 N.J. Super. 421, 426, 317 A.2d 738, 741 (1974) cert. denied, 419 U.S. 900.

[3]See note 1, supra.

NEW MEXICO

Criminal Usury N.M. Stat. Ann. § 50-6-15 (1953)	take, reserve, receive, charge	directly or indirectly interest, discount, or other advantage except at rates permitted in this act[1]	---	misdemeanor
Excessive Commission for procuring loan N.M. Stat. Ann. § 50-6-13 (1953)	charge, collect, receive	for negotiating or receiving any loan commission in excess of specified amounts[2]	---	misdemeanor

[1]Per N.M. Stat. Ann. § 50-6-16 (1953) the interest rate shall not exceed 12% per annum.

[2]On any loan not exceeding $500, 4%, on any loan exceeding $500 but not exceeding $2,000, 4% on first $500, 3% on the remainder; on any loan exceeding $2,000, 4% on the first $1,000, 2% on the remainder.

NEW YORK

Criminal Usury in the second degree N.Y. Penal Law § 190.40 (McKinney Supp. 1977)	charges, takes receives	interest at a rate exceeding 25% per annum not authorized or permitted by law	knowingly	knowingly	felony

NEW YORK continued					
Criminal Usury in the first degree N.Y. Penal Law § 190.42 (McKinney Supp. 1977)	charges, takes, receives	interest at a rate exceeding 25% per annum not authorized or permitted by law and previous conviction for the crime or the attempt to commit the crime of criminal usury or conduct was part of a scheme or business of making or collecting usurious loans	knowingly	knowingly	felony
Possession of Record of Criminal Usury N.Y. Penal Law § 190.45 (McKinney 1975)	possesses	any writing, paper, instrument or article used to record criminally usurious transactions	---	knowledge of the contents	misdemeanor
NORTH CAROLINA	NO RELEVANT STATUTES				

NORTH DAKOTA

Criminal Usury N.D. Cent. Code § 47-14-11 (Supp. 1977)	take, receive, or charge	usurious rate of interest[1]	intentionally, knowingly, or recklessly[2]	knowingly, or recklessly[2]	misdemeanor
Engaging in or financing criminal usury business N.D. Cent. Code § 12.1-31-02(1) (1976)	engages in or provides financing for	business of extending credit directly or indirectly rate of interest such that repayment is unenforceable through civil process	knowingly	knowledge[3]	felony

[1]N.D. Cent. Code § 47-14-09 (Supp. 1977) sets this as 3% per annum higher than the maximum rate of interest payable on time deposits maturing in thirty months, but that in any event the maximum rate shall not be less than 7% and that the interest will not be compounded.

[2]Per N.D. Cent. Code § 12.1-02-02 (1976).

[3]N.D. Cent. Code § 12.1-31-02(2) (1976) establishes a presumption of knowledge of the civil unenforceability in the case of a person engaging in the business, if any of the following exist, and in the case of a person directly or indirectly providing financing, if he knew any of the following: (1) it is an offense to charge, take, or receive interest at the rate involved, (2) the rate of interest involved is 50% or more greater than the maximum enforceable rate, (3) the rate of interest involved exceeds 45% per annum.

OHIO — NO RELEVANT STATUTES

OKLAHOMA — NO RELEVANT STATUTES

OREGON	NO RELEVANT STATUTES				
PENNSYLVANIA					
Extortionate Credit Transactions 18 Pa. Cons. Stat. Ann. app. § 4806.2 (Purdon 1973)	makes or conspires to make extension of credit[1]	understanding of creditor and debtor that delay in or failure of repayment may result in extortionate means of collection[2]	intentionally, knowingly, or recklessly[3]	intentionally, knowingly, or recklessly[3]	felony
Criminal Usury 18 Pa. Cons. Stat. Ann. app. § 4806.3 (Purdon 1973)	engages or conspires to engage	in criminal usury, interest at a rate exceeding 36% per annum[4]	intentionally, knowingly, or recklessly[3]	intentionally, knowingly, or, recklessly[3]	felony
Financing Extortionate Credit Transactions 18 Pa. Cons. Stat. Ann. app. § 4806.4 (Purdon 1973)	advances or conspires to advance	money or property to a person with grounds to believe that the person intends to use the money or property to make an extortionate extension of credit	willfully	reasonable grounds	felony
Financing Criminal Usury 18 Pa. Cons. Stat. Ann. app. § 4806.5 (Purdon 1973)	advances or conspires to advance	money or property to a person with grounds to believe that the person intends to use the money or property to engage in criminal usury	willfully	reasonable grounds	felony

PENNSYLVANIA continued

Collection of Extensions of Credit by Extortionate means 18 Pa. Cons. Stat. Ann. app. § 4806.6 (Purdon 1973)	participates or conspires to participate	use of extortionate means[5] to collect or attempt to collect any extension of credit or to punish non-repayment	knowingly		felony
Receiving Proceeds of Extortionate Credit Transactions or Collection of Extensions of Credit by Extortionate Means 18 Pa. Cons. Stat. Ann. app. § 4806.7 (Purdon 1973)	receives or conspires to receive	the proceeds of an extortionate credit transaction or the collection of an extension of credit by extortionate means	knowingly		felony
Receiving Proceeds of Criminal Usury 18 Pa. Cons. Stat. Ann. app. § 4806.8 (Purdon 1973)	receives or conspires to receive	the proceeds of criminal usury	knowingly		felony
Possession of Records of Criminal Usury 18 Pa. Cons. Stat. Ann. app. § 4806.9 (Purdon 1973)	maintains, causes to be maintained, conspires to maintain, possesses	any writing, paper, book, instrument or article used to record criminally usurious transactions contents record a criminally usurious transaction	intentionally, knowingly, or recklessly[3]	knows or has reasonable grounds to know	felony

[1]18 Pa. Cons. Stat. Ann. app. § 4806.2(b) (Purdon 1973) allows the prosecutor to establish a prima facie case by showing three factors: (1) the rate of interest was at least equal to that established for criminal usury, (2) the debtor reasonably believed, at the time the extension of credit was made, that the creditor had used or attempted to use extortionate means to collect loans or punish a failure to pay or punish a failure to pay or that the creditor had a reputation for so doing, and (3) the outstanding credit extensions exceeded $100.

[2]18 Pa. Cons. Stat. Ann. app. § 4806.1(g) (Purdon 1973) defines this as any means which involves the use, or an express or implicit threat of use, of violence or other criminal means.

PENNSYLVANIA continued

[3]Per 18 Pa. Cons. Stat. Ann. § 302(c) (Purdon 1973).

[4]Per 18 Pa. Cons. Stat. Ann. app. § 4806.1(h) (Purdon 1973).

[5]See note 2, supra.

RHODE ISLAND

Criminal Usury R.I. Gen. Laws §§ 6-26-2, 6-26-3 (1970 & Supp. 1977)	reserve, charge, take	directly or indirectly interest and expenses the aggregate of which exceeds 21% simple interest per annum	willfully and knowingly		felony
Possession of Records of Criminal Usury R.I. Gen. Laws § 6-26-9 (Supp. 1977)	possesses	any document, record, paper, instrument or other writing which records or evidences a usurious debt	---	knowledge of the contents[1]	misdemeanor
Assault and Battery in the collection of a loan R.I. Gen. Laws § 11-5-6 (Supp. 1977)	commits an assault and battery	purpose of collecting any loan	---	---	felony

[1]Per R.I. Gen. Laws § 6-26-10 (Supp. 1977), possession of usury records is presumptive evidence of possession with knowledge of the contents.

SOUTH CAROLINA

Criminal Usury S.C. Code § 34-31-100 (1976)	charging, collecting, receiving	usurious rate of interest[1]	knowingly, intentionally, and willfully		misdemeanor

[1]Per S.C. Code § 34-31-30 (Supp. 1978), 6% maximum rate; if written contract, 8% maximum permitted; 10% permitted, on loans greater than $50,000 but less than $100,000; 12% permitted on loans greater than $100,000 but less than $500,000; no maximum rate on loans greater than $500,000.

SOUTH DAKOTA

Criminal Usury S.D. Compiled Laws Ann. § 54-3-9 (1967)	receives	directly or indirectly interest, discount, or consideration greater than allowed by law[1]	receipt	---	---	misdemeanor

[1]Per S.D. Compiled Laws Ann. § 54-3-7 (Supp. 1977), 10% simple interest per annum.

TENNESSEE

Criminal Usury Tenn. Code Ann. §§ 39-4601, 4602 (1975)	receive	compensation for the use of money at a rate greater than 6% per annum unless provided for by law	receipt	---	---	misdemeanor

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TEXAS

Criminal Usury Tex. Rev. Civ. Stat. Ann. art. 5069-1.06(2) (Vernon 1971)	contracts for, charges or receives	interest in excess of double the interest allowed by law[2]		intentionally, knowingly, or recklessly[1]	---	misdemeanor

[1]Per Tex. Penal Code Ann. tit. 2, § 6.02(c) (Vernon 1974).

[2]Per Tex. Rev. Stat. Ann. art. 5069-1.02 (Vernon 1971), 10% per annum maximum rate.

UTAH				
Criminal Usury Utah Code Ann. § 76-6-520 (Supp. 1977)	engages in or provides financing for	directly or indirectly the business of making loans greater interest than authorized by law[1]	knowingly	felony

[1] Per Utah Code Ann. § 70B-3-201 (Supp. 1977), 18% per annum maximum rate.

VERMONT				
Criminal Usury Vt. Stat. Ann. tit. 9, § 50(c) (1970)	contracts for, collects	excess of legal rate[1] unauthorized by law	knowingly, willfully	misdemeanor

[1] Per Vt. Stat. Ann. tit. 9, § 41(a) (Supp. 1977), 8-1/2% per annum legal rate.

VIRGINIA	NO RELEVANT STATUTES

WASHINGTON	NO RELEVANT STATUTES

WEST VIRGINIA	NO RELEVANT STATUTES			
WISCONSIN				
Extortionate Credit Transactions Wis. Stat. Ann. § 943.28(2) (West Supp. 1977)	makes, conspires to make extension of credit	understanding of creditor and debtor that delay in repayment will result in extortionate means of collection[2]	---	felony
Criminal Usury Wis. Stat. Ann. §§ 138.05, 138.06 (West 1974)	contract for, take, receive	directly or indirectly money, goods, or things in action at a rate greater than the maximum rate,[1] except as authorized by other statutes	---	misdemeanor
Financing Extortionate Credit Transactions Wis. Stat. Ann. § 943.28(3) (West Supp. 1977)	advances	money or property, in any way	purpose of making extortionate extensions of credit	felony
Collection of Extensions of Credit by Extortionate Means Wis. Stat. Ann. § 943.28(4) (West Supp. 1977)	participates	use of extortionate means[3] collect or attempt to collect any extension of credit or to punish non-repayment	knowingly	felony

WISCONSIN continued

[1]Set at 12% per annum computed on the declining principal balance, Wis. Stat. Ann. § 138.05(1)(a) (West 1974).

[2]Wis. Stat. Ann. § 943.28(1)(c) (West Supp. 1977), defines this as any means "which involves the use, or an explicit or implicit threat of use, of violence or other criminal means."

[3]See note 2, supra.

WYOMING NO RELEVANT STATUTES

DISTRICT OF COLUMBIA NO RELEVANT STATUTES

APPENDIX B: EXTORTION STATUTES OF THE STATES

Statutes	Conduct	Attendant Circumstances	Result	State of Mind		Penalties
				Conduct	Att'd Circ's	
ALABAMA (N)						
Ala. Code tit. 13A §§ 8-13 to 15 (1975)	obtains control by threat to injure, confine, accuse, expose, etc.	property of another	obtains control	knowingly intent to deprive owner permanently	knowledge[1]	felony
[1]Per Ala. Code tit. 13A § 2-4 (1975).						
Note: Per Ala. Code tit. 13A § 8-15(b) honest claim for restitution or indemnification is a defense.						
ALASKA						
Alaska Stat. § 11.20.345 (Supp. 1977)	obtains by threat to injure, cause official action, etc.	property of a person	obtains			felony
Note: See also Alaska Stat. § 11.15.300 (1970) (Blackmail) (threat with intent to extort a completed offense). Per Alaska Stat. § 11.20.345(d) (Supp. 1977) honest claim for restitution is a defense.						
ARIZONA (N)						
Ariz. Rev. Stat. § 13-1804 (Supp. 1977)*	obtains or seeks to obtain by threat to injure, accuse, expose, etc.	property		knowingly	knowledge[1]	felony
*Code effective October 1, 1978.						
[1]Per Ariz. Rev. Stat. § 13-202 (Special Pamphlet 1977).						

(N) denotes new code

ARKANSAS (N)

Ark. Stat. Ann. §§ 41-2202, 2203 (1977) (Theft by)	obtains by threat	property of another	obtains	knowlingly and with intent to deprive another of property	knowledge	felony

[1]Per Ark. Stat. Ann. § 41-204 (1977).
Note: Per Ark. Stat. Ann. § 41-2201(9)(i) (1977) honest claim for restitution or indemnification is an alternative defense.

CALIFORNIA

Cal. Penal Code §§ 518, 519 (West 1970)	obtains by use of force or fear induced by threat to injure accuse, expose.	property from another with induced consent wrong folly	obtains fear			felony

Note: See also Cal. Penal Code § 524 (West Supp. 1978) (Attempt to Extort).

COLORADO

Colo. Rev. Stat. § 18-3-207 (Supp. 1976) (Criminal Extortion)	threatens to confine, injure, expose	without legal authority		intent to induce another to act against his will		felony
Colo. Rev. Stat. § 18-4-401 (Supp. (1976) (Theft)	obtains, exercises control by threat	anything of value of another	obtains, exercises control	knowlingly and with intent to deprive other permanently	knowledge[1]	felony (if value exceeds $200)/misdemeanor

[1]Per Colo. Rev. Stat. § 18-1-503 (1973).

CONNECTICUT (N)

Conn. Gen. Stat. Ann. § 53a-119(5) (West Supp. 1978)	Compels or induces delivery by fear of injury, accusation	property of another wrongfully	delivery fear	intent to deprive another of property	knowledge[1]	felony

[1]Per Conn. Gen. Stat. Ann. § 53a-5 (1972)

DELAWARE (N)

Del. Code tit. 11, § 846 (1974)	compels or induces delivery by fear of injury, accusation, exposure, etc.	property of another wrongfully	delivery fear	intent to deprive another of property		felony

Note: Per Del. Code tit. 11, § 847(a) (1974) claim of right is a defense to prosecution for extortion.

FLORIDA

Fla. Stat. Ann. § 836.05 (West 1976)	threatens to injure, accuse, expose	verbally or in writing		maliciously intent to extort money or pecuniary advantage or to coerce behavior.		felony
Fla. Stat. Ann. § 812.021(1)(e) (West Supp. 1978)	obtains by threat to accuse, expose	property of another	obtains	intent to deprive permanently		felony (if value exceeds $100)/misdemeanor.

GEORGIA (N)

Ga. Code Ann. § 26-1804 (1978) (Theft by)	obtains by threat to injure, expose, etc.	property of another unlawfully	obtains			felony

Note: Per Ga. Code Ann. § 26-1804(c) (1978) honest claim of right is an affirmative defense.

HAWAII (N)

Haw. Rev. Stat. § 708-830(3) (1976) (Theft by)	obtains by threat to injure, expose, etc.	property or service of another	obtains	intent to deprive another permanently	knowledge[1]	felony

[1]Per Haw. Rev. Stat. § 702-207 (1976).
Note: Per Haw. Rev. Stat. § 708-834(4) (1976) honest claim for restitution is an affirmative defense.

IDAHO

Idaho Code §§ 18-2801, 2802 (1948)	obtains by use of force or fear induced by threat to injure, accuse, expose, etc.	property from another wrongfully	obtains fear			felony[1]

[1]Per Idaho Code § 18-2803 (1948).
Note: See also Idaho Code §§ 18-2808 (Supp. 1977) (Attempt to Extort) (misdemeanor), 18-2806 (1948) (Extortion not otherwise provided for).

ILLINOIS (N)

Ill. Rev. Stat. ch. 38 § 16-1 (Supp. 1976) (Theft)	obtains control by threat to injure, accuse, expose, etc.	property of another	obtains control	knowlingly and with intent to deprive owner of property	knowledge[1]	felony (if value exceeds $150)/misdemeanor

[1]Per Ill. Rev. Stat. ch. 38, § 4-3(b) (1975).

INDIANA

Ind. Code Ann. § 35-43-4-2 (Burns Supp. 1977) (Robbery)	exerts control (e.g. obtains) by threat to damage property or impair the rights of any other person	property of another	exerts control (e.g. obtains)	knowlingly or intentionally intent to appropriate		felony

---

IOWA (N)

Iowa Code Ann. § 711.4 (West Special Pamphlet 1978)	threatens to injure, accuse, expose, etc.			intent to obtain thing of value for self or another		felony

Note: Per Iowa Code Ann. § 711.4(7) (West Special Pamphlet 1978) honest claim for restitution is an affirmative defense.

KANSAS (N)

Kan. Stat. Ann. § 21-3701(c) (1974) (Theft by)	obtains control by threat	property of another	obtains	intent to deprive		felony (if value exceeds $50)/ misdemeanor

Note: See also Kan. Stat. Ann. §§ 21-3428 (Blackmail), 21-4401 (Racketeering) (1974).

KENTUCKY (N)

Ky. Rev. Stat. Ann. § 514.080 (Baldwin 1975)	obtains by threat to injure, accuse, expose, etc.	property of another	obtains	intentionally		felony (if value exceeds $100)/ misdemeanor

Note: See also Ky. Rev. Stat. Ann. §§ 509.080 (Criminal Coercion), 508.080 (Terroristic Threatening) (Baldwin 1975). Per Ky. Rev. Stat. Ann. § 514.080(2) (Baldwin 1975) honest claim for indemnification is an affirmative defense.

LOUISIANA (N)

La. Rev. Stat. Ann. § 14.66 (West 1974)	communicates a threat to injure, accuse, expose, etc.			intent to obtain thing of value.		felony

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MAINE (N)

Me. Rev. Stat. tit. 17A, § 355 (Supp. 1977) (Theft)	obtains by threat to injure or harm in any way	property of another	obtains	intent to deprive another of property	knowledge[1]	felony

[1]Per Me. Rev. Stat. tit. 17A, § 11(2) (Supp. 1977).

Note: See also Me. Rev. Stat. tit. 17A, § 209 (Supp. 1977) (Criminal Threatening).

MARYLAND

Md. Ann. Code art. 27, §§ 561-563 (1976) (Threats and Threatening Letters)	threatens to injure, accuse or accuse falsely			knowingly and with intent to extort money or other valuable thing	felony

Note: See also Md. Ann. Code art. 27, § 562A (1976) (Coercion to Contribute).

MASSACHUSETTS

Mass. Ann. Laws ch. 265, § 25 (Michie/Law. Co-op 1968)	threatens to injure person or property or accuse.	verbally or in writing		maliciously intent to extort money or other pecuniary advantage or compel behavior	felony

Note: See also Mass. Ann. Laws ch. 265, § 26 (Supp. 1978) (Kidnapping).

MICHIGAN

Mich. Comp. Laws § 750.213 (Mich. Stat. Ann. § 28. 410 (1962)).	threatens to injure, accuse, etc.	orally or in writing		maliciously intent to extort money or other pecuniary advantage or compel behavior	felony

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MINNESOTA

Minn. Stat. Ann. § 609.27 (West 1964 & Supp. 1977)	threatens to injure, accuse, expose, etc. and causes another to act against his will.	orally or in writing	causes another to act against his will		felony

Note: See also Minn. Stat. Ann. § 609.275 (West 1964) (Attempt to coerce).

MISSISSIPPI

Miss. Code Ann. § 97-3-77 (1972) (Robbery)	takes through fear induced by threat to injure person, family or property	property of another in presence of from person.	takes fear	feloneously		felony

Note: See also Miss. Code Ann. §§ 97-3-81 (Robbery-Threatening Letters), 97-23-83 (Threats Against Business), 97-29-51 (Procuring Prostitutes by Threat) (1972).

MISSOURI (N)*

Mo. Ann. Stat. § 570.030 (Vernon Special Pamphlet 1978) (Stealing)	appropriates by coercion (e.g. threat to injure, accuse, expose, etc.)	property or services of another	appropriates	purpose to deprive		felony (if value exceeds $150)/ misdemeanor

*Code effective January 1, 1979.
Note: Per Mo. Ann. Stat. § 570.010(4) (Vernon Special Pamphlet 1978) claim of restitution or indemnification is an affirmative defense.

MONTANA (N)

Mont. Rev. Codes Ann. § 94-6-302 (Crim. Code Supp. 1973) (Theft by)	obtains control by threat to injure, accuse, expose, etc.	property of another	obtains control	purposely or knowingly purpose to deprive another of property	knowledge	felony (if value exceeds $150)/ misdemeanor

Note: See also Mont. Rev. Codes Ann. § 94-5-203 (Crim. Code Supp. 1973) (Intimidation).

NEBRASKA (N)

Neb. Rev. Stat. § 28-513 (Supp. 1977)	obtains by threatening to injure, accuse, expose, etc.	property of another	obtains	intent to deprive owner		felony

Note: Per Neb. Rev. Stat. § 28-513(2) (Supp. 1977) claim of restitution or indemnification is an affirmative defense.

NEVADA

Nev. Rev. Stat. § 205.320 (1975)	threatens to injure, accuse, expose or publish libel or a secret			intent to extort money or property or to compel behavior		felony

Note: See also Nev. Rev. Stat. § 207.190 (1975) (Coercion) (felony/misdemeanor).

NEW HAMPSHIRE (N)

N.H. Rev. Stat. Ann. § 637.5 (1974) (Theft by)[1] Per § 626:2(I)	obtains or controls by extortion through threat to injure, accuse, expose, etc.	property of another	obtains or controls	intent to deprive another of property	knowledge[1]	felony[2] (if value exceeds $500 or threat to person of injury/misdemeanor

[1]Per N.H. Rev. Stat. Ann. § 626:2(I) (1974).

[2]Per N.H. Rev. Stat. Ann. § 637:11 (1974 & Supp. 1977).

NEW JERSEY

N.J. Stat. Ann. § 2A:105-4 (West 1969)	threatens or demands with threat, to injure, or kill, kidnap, etc.	money or other valuable thing		intent to extort money or other valuable thing		felony

Note: See also N.J. Stat. Ann. § 2A:105-5 (West 1969) (Use of threats in collecting a debt) (high misdemeanor).

NEW MEXICO (N)

N.M. Stat. Ann. § 40A-16-8 (1953)	communicates threats to injure, accuse, expose, etc.	wrongfully		intent to obtain thing of value or to compel person to act against his will.		felony

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NEW YORK (N)

N.Y. Penal Law § 155.05(2)(e) (McKinney 1975) (Larceny by)	compels or induces delivery by fear through threat to injure or kill, kidnap, etc.	property of another	delivery fear	intent to deprive another of property	knowledge[1]	felony

[1]Per N.Y. Penal Law § 15.15(1) (McKinney 1975)
Note: See also N.Y. Penal Law §§ 135.60 (McKinney 1975) (Coercion in the second degree), 240.25 (McKinney 1967) (Harassment).

NORTH CAROLINA

N.C. Gen. Stat. § 14-118.4 (Supp. 1977)	threatens or communicates a threat	wrongfully		intent to obtain anything of value		felony

Note: See also N.C. Gen. Stat. § 14-118 (1969) (Blackmail).

NORTH DAKOTA (N)

N.D. Cent. Code § 12.1-23-02 (1976) (Theft)	obtains by threat to injure, accuse, expose, etc.	property of another	obtains	knowingly and with intent to deprive owner of property	knowledge	felony (if value[1] exceeds $50) [1]/misdemeanor

[1]Per N.D. Cent. Code § 12.1-23-05 (1976).

OHIO (N)

Ohio Rev. Code Ann. § 2905.11 (Page 1975)	threatens to expose, commit a felony; menaces, utters calumny			intent to obtain valuable thing or benefit or to induce unlawful act.		felony

Note: See also Ohio Rev. Code Ann. §§ 2905.12 (Coercion), 2903.21-2903.22 (Menacing), 2921.03 (Intimidation) (Page 1975).

OKLAHOMA

Okla. Stat. Ann. tit. 21, §§ 1481. 1482 (West 1958)	obtains by use of force or fear induced by threat to injure, accuse, expose	property of another with his induced consent	obtains fear		felony

Note: See also Okla. Stat. Ann. tit. 21, §§ 1487 (1958) (attempted extortion) (misdemeanor), 1488 (Supp. 1977) (Blackmail) (felony).

OREGON (N)

Or. Rev. Stat. § 164.075 (1977)	compels or induces delivery by fear from threat to injure, accuse, expose, etc.	property of another	delivery fear	intent to deprive another of property	felony

Note: Per Or. Rev. Stat. § 164.035(1)(2) (1977) good faith belief in restitution or indemnification is an affirmative defense.

PENNSYLVANIA (N)

Pa. Cons. Stat. Ann. tit. 18, § 3923 (Purdon Supp. 1978) (Theft)	obtains or withholds by threat to commit another criminal offense, expose, take or withhold official action, etc.	property of another	obtains or withholds	intentionally	felony (if value of property exceeds $200)/ misdemeanor

[1]Per Pa. Cons. Stat. Ann. tit. 18, § 3903 (Purdon 1973 & Supp. 1978).
Note: Pa. Cons. Stat. Ann. tit. 18, § 3923(b) (Purdon Supp. 1978) honest claim for restitution is an affirmative defense. See also Pa. Cons. Stat. Ann. tit. 18, § 2906 (Purdon 1973) (Criminal Coercion).

RHODE ISLAND

R.I. Gen. Laws § 11-42-2 (1969) (Extortion and Blackmail)	threatens to injure person or property or to accuse	verbally or in writing		maliciously intent to extort money or pecuniary advantage or to compel behavior	felony

SOUTH CAROLINA					
S.C. Code § 16-17-640 (1977) (Blackmail)	attempts, threatens, or actually accuses, exposes or compels act against his will	verbally or in writing		intent to extort money or other valuable thing	felony
SOUTH DAKOTA (N)					
S.D. Compiled Laws Ann. § 22-30A-4 (Special Supp. 1977) (Theft by)	obtains by threat to injure, accuse, expose, etc.	property of another	obtains	intent to deprive another of property	felony (if value exceeds $200)/[1] misdemeanor [1]
TENNESSEE					
Tenn. Code Ann. § 39-4301 (1975)	threatens to injure person, property or reputation, or to accuse			maliciously intent to extort money, property or pecuniary advantage, or to compel behavior	felony
TEXAS (N)					
Tex. Penal Code Ann. tit. 7, §§ 31.01 to 31.03 (Vernon 1974 & Supp. 1978) (Theft by)	appropriates by threat to injure, accuse, expose, etc.	property of another unlawfully	appropriates	intent to deprive owner of property	felony (if value exceeds $200)/ misdemeanor

[1] Per S.D. Compiled Laws Ann. § 22-30A-17 (Special Supp. 1977).
Note: Per S.D. Compiled Laws Ann. §22-30A-16 (Special Supp. 1977) honest claim of right or ignorance that property belonged to another is an affirmative defense.

UTAH (N)					
Utah Code Ann. § 76-6-406 (Special Pamphlet 1977) (Theft by)	obtains or controls by extortion by threat to injure, accuse, expose, etc.	property of another	obtains or controls	purpose to deprive another of property	felony (if value exceeds $250)/ misdemeanor
VERMONT					
Vt. Stat. Ann. tit. 13 § 1701 (1974)	threatens to injure person or property or to accuse			maliciously intent to extort money or other pecuniary advantage, or to compel behavior	felony
VIRGINIA (N)					
Va. Code § 18.2-59 (1975)	threatens to injure or accuse and extorts	money, property or pecuniary benefit	threatens and extorts		felony
WASHINGTON (N)					
Wash. Rev. Code Ann. § 9A.56.110 (1977) (Theft)	obtains or attempts to obtain by threat (e.g. to injure, accuse, expose, etc.)	property or services of owner		knowingly[1]	felony

[1]Per Utah Code Ann. § 76-6-412 (Special Pamphlet 1977).
Note: Per Utah Code Ann. § 76-6-402(3) (Special Pamphlet 1977) honest claim of right is an affirmative defense.

[1]Per definition of "threat" in Wash. Rev. Code Ann. § 9A.04.110(25) (1977).
Note: Wash. Rev. Code Ann. § 9A.56.130 (1977) (extortion in the second degree) provides an affirmative defense for a good faith claim of right. Wash. Rev. Code Ann. § 9A.20.030 (1977) provides for restitution to victim of amount not exceeding double damages.

WEST VIRGINIA				
W. Va. Code § 61-2-13 (1977)	threatens to injure or accuse and extorts	money, property or pecuniary benefit	threatens and extorts	felony
WISCONSIN (N)				
Wis. Stat. Ann. § 943.30(1) (West Supp. 1977)	threatens or commits injury to person or property, threatens to accuse or accuses	verbally or in writing	maliciously intent to extort money or pecuniary advantage, or to compel behavior	felony
WYOMING				
Wyo. Stat. § 6-7-601 (1977) (Blackmail)	demands with menaces of injury, accusations, or exposure or sends or delivers letter containing threats	verbally or in writing chattel, money or other valuable thing of any person	intent to extort or gain chattel etc., or to compel behavior letter sent or delivered knowingly	felony
DISTRICT OF COLUMBIA				
D.C. Code Encycl. §22-2305 (West 1967) (Blackmail)	accuses or threatens to accuse or expose	verbally or in writing	intent to extort thing of value or to compel behavior	felony

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