Controlling the Contemporary Loanshark: The Law of Illicit Lending and the Problem of Witness Fear

Ronald Goldstock
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CONTROLLING THE CONTEMPORARY LOANSHARK: THE LAW OF ILLICIT LENDING AND THE PROBLEM OF WITNESS FEAR

Ronald Goldstock†
Dan T. Coenen††

TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Introduction</td>
<td>131</td>
</tr>
<tr>
<td>I. Contemporary Loansharking: Origins, Effects, and Methods of Operation</td>
<td>134</td>
</tr>
<tr>
<td>A. The Dominant Role of Organized Crime</td>
<td>134</td>
</tr>
<tr>
<td>B. The Economics of Loansharking</td>
<td>137</td>
</tr>
<tr>
<td>C. The History of Loansharking</td>
<td>139</td>
</tr>
<tr>
<td>1. Early History of Interest Assessments</td>
<td>139</td>
</tr>
<tr>
<td>2. Loansharking in America</td>
<td>141</td>
</tr>
<tr>
<td>a. The Post-Civil War Period: The Salary Lender</td>
<td>141</td>
</tr>
<tr>
<td>b. 1915-1935: Organized Crime and Consumer Credit</td>
<td>144</td>
</tr>
<tr>
<td>c. Post-1935: The Maturation of Organized Loansharking</td>
<td>146</td>
</tr>
</tbody>
</table>

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D. Loansharking Operations .......................................................... 147
  1. The Transaction ..................................................................... 147
  2. Collection of the Debt ......................................................... 148
  3. The Structure of the Operation ............................................ 151
E. Loansharking Customers .......................................................... 153
  1. The Legitimate Individual .................................................... 153
  2. The Criminal Borrower ....................................................... 156
  3. The Legitimate Businessman ................................................ 157
F. Loanshark Infiltration of Businesses ........................................ 158
  1. Methods of Loanshark Infiltration ........................................ 160
  2. Purposes of Syndicate Infiltration of Businesses ................. 162
    a. Operating a "Front" ....................................................... 162
    b. Obtaining Services and Concessions ................................ 164
    c. "Busting Out" a Legitimate Business ............................... 164
    d. Skimming Company Profits ........................................... 166
II. The Law of Loansharking ......................................................... 167
A. Extortionate Credit Transaction Laws ...................................... 167
  1. Historical Development and Basic Principles ....................... 167
  2. Elements of the Offense ..................................................... 168
    a. Conduct ........................................................................ 169
    b. The Creditor's Understanding ........................................ 170
    c. The Debtor's Understanding ......................................... 171
    d. State of Mind ............................................................. 172
B. Laws Prohibiting the Collection of Credit by Extortionate Means ......................................................... 173
  1. Historical Development and Basic Principles ....................... 173
  2. Elements of the Offense ..................................................... 173
    a. Conduct ........................................................................ 174
    b. Attendant Circumstances ............................................... 175
    c. Result ........................................................................... 179
    d. State of Mind ............................................................. 179

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Special thanks go to Bruce Garren, student research supervisor.

The footnotes in Section I direct the reader to the most important sources on loansharking, a body of scholarship far less than adequate. In preparing Section I, 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 crime. 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.
IV. PROTECTING INFORMANTS AND WITNESSES—THE PRACTICAL PROBLEMS OF DEALING WITH FEAR IN OBTAINING CITIZEN ASSISTANCE .............................................................. 206
A. The Duty to Report .......................................................... 206
B. The Duty to Protect .......................................................... 209
   1. Fact Patterns ............................................................. 209
   2. Maturation of the Duty to Protect ................................. 210
   3. Scope of the Duty to Protect ........................................ 211
   4. Practical Considerations ............................................. 212
   5. Implications for Law Enforcement Officers ..................... 213
C. Nondisclosure of Witness Identities ................................. 213
   1. Constitutional Dimensions of the Duty to Disclose ........... 214
   2. Judicial Discretion to Compel Disclosure ....................... 216
      a. Sources of Discretion ............................................ 216
      b. Balancing Interests .............................................. 218
      c. Impact of the Tort-Based Duty to Protect ................. 221
      d. Use of Continuances to Facilitate Preparation ............ 221
      e. Effect of Rules and Statutes Upon the Disclosure Question ............................................... 223
      f. Relation of Informant-Disclosure Balancing ............... 224

V. PROOF PROBLEMSPOSED BY WITNESS FEAR—EVIDENTIARY OBSTACLES AND ALTERNATIVES IN COPING WITH THE RECALCITRANT WITNESS ............................................. 229
A. Calling the Frightened Witness: Recalcitrance and Fifth Amendment Rights ............................................. 230
   1. Goals in Calling The Recalcitrant Witness ..................... 231
   2. The Prohibition Against Calling the Recalcitrant Witness ............................................. 232
      a. Prejudicial Effect ................................................. 233
      b. Protecting the Confrontation Right ......................... 234
      c. Deterrence of Prosecutorial Misconduct .................... 234
   3. The Recalcitrant Immunized Witness ............................. 237
B. Admissibility of Out-of-Court Statements ......................... 237
   1. Exceptions to the Hearsay Rule Not Requiring Unavailability ............................................. 238
   2. Unavailability-Based Hearsay Exceptions ....................... 239
      a. Former Testimony ................................................. 240
      b. Statements Against Interest ................................... 241
      c. The “Catch-All” Exception .................................... 243
   3. Constitutional Limits on Admissibility of Out-of-Court Statements ............................................. 245
      a. Unavailability and Confrontation ............................. 245
Introduction

In 1596, Shakespeare depicted the unsavory creditor in the person of Shylock, who demanded a pound of a desperate borrower’s flesh as collateral for his loan. Illiterate street hoodlums in the early part of this century slurred the term “shylock” into “shark.” Thus was born the work “loanshark,” denoting the lender who demands the borrower’s body as security for repayment.

---

2 W. Shakespeare, The Merchant of Venice, supra note 1, at Act I, Scene III, lines 141-46:

If you repay me not on such a day,
In such a place, such sum or sums as are
Express’d 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 This etymology may be more a matter of lore than fact. Others have indicated that the work “loanshark” derives from the illicit lenders’ shark-like characteristics; loansharks like their aquatic namesakes prey on people and are given to violence. The term “shark” has long denoted a greedy and parasitic person—a meaning which, some linguists theorize, preceded and accounted for the name assigned the fish. See E. Partridge, Origins: A Short Etymological Dictionary of Modern English 614 (1958); W. W. Skeat, Etymological Dictionary of the English Language 545 (1882); E. Weekly, Etymological Dictionary of Modern English 1328 (1921). Given this meaning of the word “shark,” it seems likely that the work “loanshark” is a simple compound tying the characteristics of the “shark” to the practice of making loans.

The term "loanshark" lacks a precise definition; neither linguists nor lawyers have concentrated on the term, and different generations have assigned the term differing connotations. There was no common-law crime of "loansharking," and modern statutes aimed at the problem proscribe a wide array of practices. In current usage, however, "loansharking" plainly embodies two central features: the assessment of exorbitant interest rates in extending loans and the use of threats and violence in collecting them.

Contemporary loansharking, however defined, exacts significant social costs. Estimates in 1967 placed loansharking as the fifth-ranking crime in financial cost to society. In addition to transferring wealth to criminal elements and burdening law enforcement budgets, loansharking causes economic inefficiencies. Moreover, loansharking feeds upon and reinforces the climate of violence and fear perpetuated by organized crime.

Crime Investigating Comm'n [hereinafter cited as Small Business Hearings].

5 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 (1966) defines "loanshark" as "a person who lends money at excessive rates of interest; usurer" (id. at 840), and "shark" as, "a person who preys greedily on others, as by cheating or usury" (id. at 1311). WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1326 (3d ed. 1961) defines "loan shark" as "one who lends money to individuals at extortionate interest rates." 2 OXFORD ENGLISH DICTIONARY 712 (Supp. 1971) defines the term as one "who exacts usurious rates of interest from the person of small means."

6 See generally notes 57-87 and accompanying text infra.

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

8 One commentator has identified 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 ruthless criminal organizations.


9 U.S. TASK FORCE ON ASSESSMENT, PRESIDENT'S COMM'N ON LAW ENFORCEMENT & ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: CRIME AND ITS IMPACT—AN ASSESSMENT 43 n.6 (1967) [hereinafter cited as Task Force Report].

10 Undoubtedly some element of monopoly power, possibly transient, exists in most loansharking transactions. Interest rates are accordingly higher than those 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 "dead-weight" economic loss. See E. GELLHORN, ANTITRUST LAW AND ECONOMICS 94-97 (1976).

11 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.
borrowers, especially the poor, the offspring of loansharking is hopelessness, which fuels the fires of inner city unrest and breeds additional crime. Finally, loansharking provides organized crime with a steady supply of capital with which to finance other illegal operations.

This Article discusses the origins of, practices typifying, and laws directed at contemporary loansharking. Loansharks prosper by exploiting their victims' fears, and in case after case this same fear threatens to silence key government witnesses. The result is problems for the prosecutor, who must attempt to protect his witnesses and develop alternative methods of proof. The Article explores prosecutorial difficulties caused by witness fear and identifies options the prosecutor may use in attempting to neutralize the problem.

Natale, 526 F.2d 1160, 1166 (2d Cir. 1975) (debtor told "he had better come up with the money . . . or . . . Natale 'will just waste you, and not worry about the money at all.'"), cert. denied, 425 U.S. 950 (1976); 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]"), cert. denied, 420 U.S. 948 (1975); United States v. Nakaladski, 481 F.2d 289, 293 (5th Cir.) ("you better have our money there at one o'clock or I'll feed you your eyeballs"), cert. denied, 414 U.S. 1064 (1973); United States v. Keresty, 465 F.2d 36, 39 (3d Cir.) (introduced friend to debtor as "a syndicate enforcer," made blatant, threatening demands for repayment), cert. denied, 409 U.S. 991 (1972); United States v. Palmieri, 456 F.2d 9, 11 (2d Cir.) (threats to "hang [borrowers] from the rafters" if they did not pay), cert. denied, 406 U.S. 945 (1972).

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). Furthermore, "victims are often coerced into the commission of criminal acts in order to repay their loans . . . ." Perez v. United States, 402 U.S. at 156. For example:

The gambling in the plant—mainly on sports—had been taken over by a Mafia mobster. Over a month John X overextended himself and lost much more than he could afford. The underworld character was willing to loan him $100 but John X would have to pay back $125 at the end of the week. He couldn't. Another loan. The debt grew. The threats came. Two musclemen visited X's home at dinnertime. They threatened X's wife and children. The next day an envoy from the mobster met him with a smile. "Everything will be considered square," he said, if X would finger the next shipment of television sets. X was so frightened that he did it. The hijacking misfired and X was arrested. Organized Crime Control: Hearings Before Subcommittee #5 of the House of Representatives, 91st Cong., 2d Sess. 423 (1970) (quoting five part series by H. Kelly for Hearst newspapers, pt. 4) [hereinafter cited as Subcommittee #5 Hearings]. See United States v. Zito, 467 F.2d 1401, 1403 (2d Cir. 1972) (borrower forced to assist in truck hijacking and bank robbery to pay off loan).

See 114 Cong. Rec. 14490 (1968) (remarks of Sen. Proxmire) ("One of the principal sources of revenue of organized crime comes from loan sharking."). See also note 19 infra.
I
CONTEMPORARY LOANSHARKING: ORIGINS, EFFECTS, AND METHODS OF OPERATION

A. The Dominant Role of Organized Crime

Organized crime dominates contemporary loansharking.14 Syndicate access to vast stores of capital allows the underworld to pour substantial amounts of cash into the credit market.15 The strength and reputation of organized operations lends credence to threats of reprisals, thereby producing the aura of fear critical to success in the loansharking business.16 And organized crime's intolerance of competition militates strongly against successful independent operations.17

The demand for credit by the underworld further ensures the preeminence of organized crime in the loansharking market; underworld criminals frequently seek, as well as provide, illegal credit. Organized loansharks are likely to have contacts with these

15 See Seidl, supra note 8 at 33-34.
Huge amounts of cash from illegal sources pose two problems. Its true ownership must be hidden, and it must be put to work. The greedy overlords consider the need to put the money to work quickly equal in importance to the need to hide its ownership. The money mover provides this service.... Loansharks often play the role of Money Mover, and in this regard they have become at least as important as "toughs."

PRESIDENT'S COMM'N ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: ORGANIZED CRIME 54 (1967) [hereinafter cited as TASK FORCE REPORT: ORGANIZED CRIME].

16 Creditors who would ordinarily appear to be incapable of collection can successfully instill fear in the debtor by making known their syndicate connections. The Chicago Tribune reported:

Prosecutors 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.


17 "Independent operators like fences and loansharks are known to La Cosa Nostra, and when their business becomes significant, they are absorbed." Furstenberg, Violence and Organized Crime, in 13 CRIMES OF VIOLENCE—A STAFF REPORT SUBMITTED TO THE NAT'L COMM'N ON THE CAUSES & PREVENTION OF VIOLENCE app. 18, at 922 (1969) [hereinafter cited as CRIMES OF VIOLENCE].
prospective borrowers, who generate a ready market for syndicate loansharking services. Just as important, mob-backed borrowers are unlikely to repay loans obtained from independent operators; indeed, the syndicate 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. The President's Commission on Law Enforcement and Administration of Justice in 1968 pegged loansharking as the second most profitable branch of organized crime—an industry viewed as skimming off as much as two percent of the gross national product. Other observers estimated that the loansharking business produces over $10 billion a year on a $5 billion investment. Current income from loansharking is uncertain, but there is no indication that the growth of illegal lending has abated. Indeed, increased law enforcement efforts to curb other criminal ventures may be channeling underworld activity into lending and increasing the loansharking take.

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 capitalize on opportunities that result from connections with diverse actors and activities.

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

Loansharking is generally believed to be the second largest revenue source for organized crime. This is an immensely profitable business where interest rates vary from 1 to 150 percent per week with 20 percent being common for small borrowers. Profit margins are thought to be higher than gambling and many officials classify the business in the billion dollar or higher range. At a minimum the amount exceeds the $350 million narcotics figure.


R. Salerno & J. Tompkins, supra note 19, at 228.

Task Force Report, supra note 9, at 100.


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);
sharking expands and reinforces syndicate contacts with illegitimate and quasi-legitimate businesses and individuals, especially since such borrowers can seldom turn to legitimate lenders.

More importantly, loansharking allows syndicate members to extract profits from a variety of illicit businesses while avoiding the ownership or control that previously exposed them to prosecution. The syndicate remains in the background, insulation and security are increased, and profits remain high. In fact, a monopoly on the financing of a business may provide the syndicate with most of the profits usually available through direct control of the underlying operation.\(^{25}\)

Extortionate credit transactions also provide underworld elements with an ideal vehicle for infiltrating legitimate businesses and gaining control over "outside" individuals.\(^{26}\) Once in the grip of organized crime, businesses may be run legitimately as fronts, run for profit with illegal competitive advantages, or stripped of assets at the expense of unsuspecting creditors.\(^{27}\) Individuals may be forced to commit crimes, abuse their discretion

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\(^{25}\) Phillip Areeda explains how monopolists can "reach through" an intervening vertical level of distribution:

[C]onsider the costs 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.


\(^{26}\) Organized crime has infiltrated a significant number of legitimate businesses. One newspaper report claimed that organized crime has a strong influence in over 10,000 "legitimate" businesses, including construction companies, bakeries, and banks. 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, involvement in legitimate businesses decreases the possibility of detection by law enforcement officials.

Wall St. J., Apr. 19, 1968, at 48, col. 1. See also notes 176-79 and accompanying text infra.

\(^{27}\) See notes 170-75, 180-85 and accompanying text infra.
as public servants,\(^28\) or provide other useful services for the loan-shark.\(^29\)

**B. The Economics of Loansharking**

As with all markets, economic analysis of lending focuses on the dynamics of supply and demand. In simplest terms, loansharking exists because a demand for the loanshark's services exists.\(^30\) This demand results at least in part from legally imposed interest-rate ceilings that preclude legal lenders from satisfying the demand of high-risk borrowers.\(^31\) A free market would respond to such demand by generating high-interest loans. Usury laws, however, prohibit financial institutions from servicing these borrowers. The loanshark fills the resulting gap between market demand and legal supply.

Factors other than the borrowers' inability to obtain legal credit help explain the intense demand for loanshark services. Complexity, formality, and a lack of secrecy drive some borrowers away from financial institutions to uncomplicated, convenient transactions with loansharks.\(^32\) Rarely, however, do the advantages of loanshark transactions outweigh the exorbitant rates and risk of violence that mark this form of borrowing. Desperation, not convenience, accounts for the prosperity of the "juice man." As one former loanshark stated:

> People who borrow from a juice operation do so only because they really need it after they have been frozen out of

\(^{28}\) See, e.g., McClellan, *Weak Link in Our War on the Mafia*, READERS DIGEST REPRINT, reprinted in Subcommittee #5 Hearings, *supra* note 12, at 112-13 (New York City Water Commissioner forced to give $40,000 kickback).

\(^{29}\) See notes 134-39, 171-79 and accompanying text infra.

\(^{30}\) No comprehensive analysis has ever been made of what kinds of customers loan sharks have, or of how much or how often each kind borrows. Enforcement officials and other investigators do have some information. Gamblers borrow to pay gambling losses; narcotics users borrow to purchase heroin. Some small businessmen borrow from loan sharks when legitimate credit channels are closed. The same men who take bets from employees in mass employment industries also serve at times as loan sharks whose money enables the employees to pay off their gambling debts or meet household needs. *Task Force Report: Organized Crime*, *supra* note 15, at 3 (footnotes omitted).

\(^{31}\) See Seidl, *supra* note 8, at 88-89.

\(^{32}\) *Id.* at 90-95. Seidl cites four characteristics as important to the loanshark's success: secrecy of the transaction, informality, speed and convenience, and regular availability of funds. *Id.* See also Furstenberg, *supra* note 17, at 925-26: "Usury is a crime, but there are thousands of Americans—businessmen, consumers, gamblers—who need short-term credit without reference, collateral, or questions. . . . As long as Americans enact their consciences and live their tastes organized crime will be needed."
other sources for 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.\textsuperscript{33}

Ironically, usury laws are commonly justified as useful \textit{weapons} in the fight against illicit lending.\textsuperscript{34} While the desirability of usury laws depends on more than their causal relation to criminal activity,\textsuperscript{35} there can be little doubt that they help create the market the loanshark supplies.\textsuperscript{36}

Rates charged by loansharks vary considerably—from less than 52\% to more than 1000\% per year.\textsuperscript{37} The absence of a well-defined market in which supply and demand functions can be reasonably ascertained partially explains this wide variation. The credit market is composed of submarkets, each defined by the status of the borrower—his ability to repay, his planned use for the money, and assorted other variables. Furthermore, the desperation of the loanshark’s customers and their inability to obtain legal credit make the demand for illicit funds highly inelastic. Loansharks thus have a substantial range within which to set their prices.

Other, more subtle factors may also influence loanshark interest rates. For example, territorial allocations or spheres of influence within certain industries often give the loanshark a quasi-monopolistic position.\textsuperscript{38} Consequently, variations in loanshark interest rates may result from price discrimination facilitated by localized monopolies. In addition, interest assessments may reflect goals other than mere monetary return on investments. The loanshark may, for example, adjust interest charges to

\textsuperscript{33} \textit{The Confessions of a 6 for 5 “Juice Man,”} BURROUGHS CLEARING HOUSE, April 1965, at 40-41.

\textsuperscript{34} \textit{See N.Y. Commission, supra} note 18, at 82-83; \textit{Note, supra} note 20, at 105-06; \textit{Comment, Syndicate Loan-Shark Activities and New York’s Usury Statute, 66 COLUM. L. REV. 167, 170} (1966).

\textsuperscript{35} \textit{See Nugent, The Loan Shark Problem,} 8 L. & CONTEMP. PROB. 3, 12-13 (1941) (usury laws help equalize bargaining power between lender and borrower and protect borrower’s family, employer, and community from ripple effect created by his imprudent indebtedness).

\textsuperscript{36} \textit{See generally North & Miller, The Economics of Usury Laws, in An Economic Analysis of Crime} 193 (L. Kaplan & D. Kessler eds. 1976).

\textsuperscript{37} \textit{See notes} 89-91 and accompanying text infra.

\textsuperscript{38} \textit{See generally Furstenberg, supra} note 17, at 915: “The loanshark operating outside of [La Cosa Nostra] can be brought under its control by the promise of protection from law enforcement (bought with money), additional working capital, and an exclusive and secure franchise on his territory.”
increase his chances of making a loan and gaining a toehold in the business of a borrower.

C. The History of Loansharking

1. Early History of Interest Assessments

Since the earliest codes of the ancient Babylonians, lawmakers have imposed interest ceilings\(^\text{39}\) in an attempt to protect debtors from overbearing moneylenders.\(^\text{40}\) Although the Old Testament prohibited the charging of interest,\(^\text{41}\) the New Testament apparently condoned the practice at a commercial level.\(^\text{42}\) The Greeks allowed the charging of interest despite Aristotle's protes-

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\(^{39}\) The terms "interest" and "usury" have not always had their modern meanings. In Roman law, interest (\textit{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 \textit{usura} sometimes also called \textit{formus} and in Greek \textit{takos}, i.e., "issue" or "produce," after Aristotle'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 \textit{mutuum}, i.e., a loan of a consumption or "fungible" good. But as a loan of money was classified as a \textit{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.

T. Divine, \textit{Interest} 3-4 (1959). 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.


If a merchant [lent] grain at interest, he shall receive sixty qu of grain per kur as interest. If he lent money at interest, he shall receive one-sixth (shekel) six se (i.e. one-fifth shekel) per shekel of silver as interest.

\ldots\]

If the merchant increased the interest beyond [sixty qu] per kur [of grain] (or) one-sixth (shekel) six se [per shekel of money] and has collected (it), he shall forfeit whatever he lent.


tations,\textsuperscript{43} but sometimes established maximum rates.\textsuperscript{44} The Romans similarly tolerated interest charges while regulating permissible rates.\textsuperscript{45}

Early Christian teaching uniformly condemned the charging of interest, and clerics who ignored the ban risked excommunication.\textsuperscript{46} In the eighth century, Charlemagne implemented church policy by making assessment of interest a criminal offense.\textsuperscript{47} Papal pronouncements through the twelfth and thirteenth centuries repeatedly declared interest transactions legally void and provided for restitution.\textsuperscript{48} In 1311, Pope Clement V authorized the excommunication of any civil authority who enacted legislation authorizing the charging or collection of interest.\textsuperscript{49}

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.\textsuperscript{50} Traditionalists could no longer condemn capital as “barren” since it was frequently used for productive purposes. As loans became less personal and began to be viewed as crucial to the advancement 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 of lending to the poor\textsuperscript{51} and by the 1700's explicitly refused to interfere in civil decisions regarding commercial assessments of interest.\textsuperscript{52}

The modern distinction between “usury” and “interest”\textsuperscript{53} emerged in the sixteenth and seventeenth centuries, and by the

\textsuperscript{43} Aristotle based his objections in part on the theory that money was barren, \textit{i.e.}, unlike a flock or a field, it produced nothing; it was merely a medium of exchange. \textit{See} T. Divine, \textit{supra} note 39, at 11-19.

\textsuperscript{44} For a table of interest rates charged at various times in the history of the world, \textit{see} R. Johnson, \textit{The Realities of Maximum Ceilings on Interest and Finance Charges} 7-8 (1969).

\textsuperscript{45} A prohibition of interest, instituted in 342 B.C., 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. T. Divine, \textit{supra} note 39, at 20.

\textsuperscript{46} \textit{Id.} at 34-35.

\textsuperscript{47} A. Birnie, \textit{The History and Ethics of Interest} 4 (1952).

\textsuperscript{48} T. Divine, \textit{supra} note 39, at 60-62.

\textsuperscript{49} \textit{Id.} at 63.

\textsuperscript{50} R. Johnson, \textit{supra} note 44, at 10-11.

\textsuperscript{51} T. Divine, \textit{supra} note 39, at 58.

\textsuperscript{52} R. Johnson, \textit{supra} note 44, at 10.

\textsuperscript{53} \textit{See} note 39 \textit{supra}. 
eighteenth century, economists began to question the soundness of usury laws.\textsuperscript{54} Nevertheless, English law continued to recognize the offense of usury.\textsuperscript{55} The American colonies initially enforced the English rules and eventually enacted their own legislation imposing interest rate ceilings.\textsuperscript{56}

2. \textit{Loansharking in America}

Loansharking in the United States has gone through three distinct stages.\textsuperscript{57} Although the types of loansharking activities characterizing each period shade into one another, this breakdown reflects logical distinctions and historical reality. The three-stage 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.\textsuperscript{58} At each of these junctures, loansharking in the United States had a different character.

a. \textit{The Post-Civil War Period: The Salary Lender}. Following the Civil War, 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.

Against this backdrop of increased demand, two forces catalyzed the development of loansharking in America. First, longstanding religious and social beliefs continued to condemn consumer borrowing as immoral or indicative of the borrower’s


\textsuperscript{55} J. Murray, \textit{The History of Usury} 33-52 (1866).

\textsuperscript{56} Id. at 68-69.

\textsuperscript{57} The section on the history of loansharking in the United States draws heavily on Haller & Alviti, \textit{Loansharking in American Cities: Historical Analysis of a Marginal Enterprise}, 21 \textit{Am. J. Legal Hist.} 125 (1977).

inability to manage his budget.\(^5^9\) Second, low-limit usury laws pervaded state statute books.\(^6^0\) Since financial institutions found consumer lending neither respectable nor profitable,\(^6^1\) numerous upstanding citizens who were sound risks found themselves foreclosed from legitimate sources of credit. The market responded to this unsatisfied demand with “salary lending,” a new credit device that prospered from about 1880 through 1915.\(^6^2\) Unlike modern day loansharks, who run patently illegal, covert businesses, salary lenders operated on the fringe of the law and often advertised in urban newspapers.\(^6^3\) Salary lenders screened their customers carefully, requiring references and employing detailed application and agreement forms.\(^6^4\) They relied on legal artifices and bargaining superiority rather than the loanshark’s strong-arm tactics to exploit their customers. To avert the reach of state usury laws, salary lenders often structured transactions as “purchases” of a portion of the borrower’s future salary—thus the name “salary lending.”\(^6^5\) In addition, lenders often required wage assignments from “guarantors,” usually friends or relatives of the borrower.\(^6^6\)

Once in the salary lender’s net, the borrower rarely escaped. Salary lenders, like contemporary loansharks, relied heavily on fear to ensure collection of debts. But unlike modern loansharks, salary lenders rested their threats on legal consequences, not physical violence. Salary lenders would threaten to sue for breach of contract, to garnish the debtor’s wages, or to simply contact the debtor’s employer.\(^6^7\) Such threats impressed upon the hapless debtor the disastrous specter of losing his job; employers—solicitous of their employees’ moral standing, averse to the expense and risks of handling wage assignments, and fearful of po-

\(^5^9\) Haller & Alviti, \textit{supra} note 57, at 127.
\(^6^0\) For a discussion of usury statutes in each of the states in the 1800’s, see J. Murray, \textit{supra} note 55, at 70-91.
\(^6^1\) Haller & Alviti, \textit{supra} note 57, at 127.
\(^6^2\) \textit{Id.}
\(^6^3\) \textit{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.” \textit{Id.}
\(^6^4\) \textit{Id.} at 131.
\(^6^5\) Nugent, \textit{supra} note 35, at 10-11.
\(^6^6\) Haller & Alviti, \textit{supra} note 57, at 132.
tential embezzlements—often adopted a policy of releasing all employees discovered to be in debt.  

Other factors abetted these threats in rendering customer defaults uncommon. First, the quasi-legal nature of salary-loan transactions and the seeming propriety of salary-lender operations impressed the debtor with the sense of a legal and moral obligation to repay. Second, despite the dubious legality of their enterprise, salary lenders could frequently invoke judicial processes with success. Finally, salary lenders frequently provided debtors with refinancings or extensions rather than demanding immediate payment upon default. 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 commonly entangled short-term borrowers in long-term obligations.

Reform efforts aimed at salary lending—largely the product of the Russell Sage Foundation—commenced at the beginning of

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68 See Haller & Alviti, supra note 57, 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 67, 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."

69 Haller & Alviti, supra note 57, at 134.

70 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.

Id. at 134-35.

71 "However high its rates of charge, the loan-shark business would not have created so 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." Nugent, supra note 35, at 5.

72 Haller & Alviti, supra note 57, at 133.
the twentieth century.\textsuperscript{73} 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 1915, and Illinois followed suit three years later. By 1933, a majority of states had adopted 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 3½ percent.\textsuperscript{74}

Passage of small loan acts sounded 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.\textsuperscript{75} But notwithstanding the best efforts of reformers, adoption of small loan acts contributed to a disastrous development: the entry of organized crime into the illicit credit business.\textsuperscript{76}

b. 1915-1935: Organized Crime and Consumer Credit. Small loan acts eliminated salary lending. No longer could salary lenders rely on the legal ambiguities that previously had lent them credence. Public opinion now held them in disfavor, and heightened penalties for illegal extensions of credit deterred brushes with the newly extended reach of the law. The lending institutions

\textsuperscript{73} 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 & Matteis, supra note 54, at 182; Nugent, supra note 35, at 6-7.

\textsuperscript{74} See Hubachek, The Development of Regulatory Small Loans, 8 L. & CONTEMP. PROB. 108, 111-14 (1941).

\textsuperscript{75} Newspapers ran these and similar headlines when the National City Bank of New York entered the personal loan field in 1928:
Loan Sharks Doom Sound 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 (L. Kaplan & D. Kessler eds. 1976).

\textsuperscript{76} There are indications that some variation of organized crime was involved with early loansharking activities prior to the adoption of small loan acts. See F. IANNI, supra note 14, at 66. For example, Guiseppe, an immigrant from Sicily, set up a "bank" in his home in New York's lower East Side, and lent money to neighbors.
No one talks directly about what occurred when someone defaulted, but there are suggestions that Giuseppe 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.

Id. See also H. NELLI, THE BUSINESS OF CRIME 110 (1976).
spawned by the small loan acts, however, only partially filled the void created by the elimination of the salary lenders. One factor accounting for this result was that the fixed costs of making any loan—such as labor costs associated with investigation and collection—were approximately the same regardless of the size of the loan. Thus, the smaller the loan, the higher the ratio of fixed costs to principal lent. Because small loan acts precluded lenders from compensating for these disproportionate costs by charging service fees or profitable interest rates, legitimate credit sources often found it unprofitable to make small loans.

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 demand for small loans remained unsatisfied in major cities. This unmet demand 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 and threats of mere legal sanctions characterize consumer lending. Loansharking became the province of organized crime, and fear of physical reprisals for nonpayment became its predominant feature. In response to this development, then-special prosecutor Thomas E. Dewey initiated a wave of prosecutions in 1935 aimed at racketeers providing illegal credit—and often bloody

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77 North & Miller, *supra* note 36, at 195.
78 Haller & Alviti, *supra* note 57, at 140. Loansharks quickly stepped into this gap. “No loan seems to have been too small for Guiseppe’s consideration in the early days; one informant reports that he always borrowed $2.00 from Guiseppe on Wednesdays and repaid $2.50 on Saturdays. Some loans were as low as fifty cents in the days before 1920.” F. IANNI, *supra* note 14, at 96.
79 Haller & Alviti, *supra* note 57, at 141; see also Nugent, *supra* note 35, at 7 (enactment of small loan acts in certain states increased loansharking activities in unregulated areas). One commentator has argued, questionably, that small loan laws had only a limited effect on the incursion of organized crime into loansharking. See Note, *supra* note 20, at 103.
80 Thomas Dewey 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.

beatings—to consumer borrowers.\textsuperscript{81} Despite Dewey's efforts, syndicate loansharking proliferated.

c. Post-1935: The Maturation of Organized Loansharking. Loansharking in the early 1930's was characterized by large-scale illicit consumer lending. Once established, however, consumer-oriented loansharking enterprises expanded into new markets. Although historians have documented incidents of underworld loans to legitimate businesses and criminal borrowers as early as the 1920's,\textsuperscript{82} a marked expansion in this area occurred during the next decade. 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.\textsuperscript{83} Furthermore, the Depression caused both a scarcity of capital for legal loans and a staggering demand for credit, particularly among undercapitalized small businesses.\textsuperscript{84}

These factors allowed organized crime to make substantial inroads into markets other than consumer credit. Most importantly, racketeer loansharks began pouring cash into legitimate businesses. The growing gambling industry also produced two significant new groups of customers: unlucky (or unskilled) bettors and bet-takers.\textsuperscript{85} Syndicate members thus began lending to

\textsuperscript{81} 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.

\ldots

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 \ldots 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.

\textit{Id.} at 180, 182-83.

\textsuperscript{82} See Haller & Alviti, \textit{supra} note 57, at 141; N.Y. COMMISSION, \textit{supra} note 18, at 7.

\textsuperscript{83} N.Y. COMMISSION, \textit{supra} note 18, at 7. Richard Hammer has also recognized this point. R. HAMMER, PLAYBOY'S ILLUSTRATED HISTORY OF ORGANIZED CRIME 136 (1965). ("[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.").

\textsuperscript{84} See R. HAMMER, \textit{supra} note 83, at 137 ("[A]fter the Wall Street debacle, the shylocks' clientele expanded to include many respectable men in business and industry who had nowhere else to turn \ldots").

\textsuperscript{85} See N.Y. COMMISSION, \textit{supra} note 18, at 7; R. HAMMER, \textit{supra} note 83, at 133.
each other, a development that radically altered the nature and extent of loansharking in the United States. By the 1950's substantial loansharking operations existed in numerous American cities. In 1964 one state investigatory commission concluded that loansharking had become "a major and most lucrative operation of the criminal underworld," and three years later a presidential commission estimated the volume of the loanshark business to be in the "multi-billion dollar range."

D. Loansharking Operations

1. The Transaction

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. The loanshark, upon making the loan, instructs the borrower to return one week later with six dollars for each five dollars borrowed. 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 "knockdown," involves a specified schedule of repayment, including both interest and principal; a $1,000 loan, for example, might be repaid in thirteen weekly installments of $100.

As previously noted, interest rates vary widely for both types of loans. A favorable relationship with the loanshark or a reputation for punctual payments may entitle the borrower to lower rates. Sizeable loans to businesses or prominent individuals also bear lower rates, and the loanshark will frequently consider the intended use of the money when assessing interest on substantial loans.

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86 See Seidl, supra note 8, at 62-79.
87 N.Y. COMMISSION, supra note 18, at 7.
88 "[T]he President's Commission on Law Enforcement and Administration of Justice declined to specify profits obtained from loan-sharking, except to 'classify the business in the multi-billion-dollar range.'" H. NELLI, supra note 76, at 262 (footnote omitted).
89 N.Y. COMMISSION, supra note 18, at 7.
91 See D. CRESEY, THEFT OF THE NATION 81 (1969). But see JOEY, KILLER: AUTOBIOGRAPHY OF A MAFIA HIT-MAN 95 (1974): "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."
2. Collection of the Debt

On the whole, however, credentials and collateral are secondary considerations to the loanshark; he holds the physical well-being of the borrower and his family as security for the loan.\(^{92}\) One loanshark frankly advised a prospective customer that "[y]our body is your collateral."\(^{93}\) 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."\(^{94}\)

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.\(^{95}\) Alternatively, the loanshark's physique, weapons, or

\(^{92}\) 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, then added: "Worse 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) (loanshark threatened father of debtor who fled: get son to return or he "would be killed so that his son would come home for the funeral"), cert. denied, 402 U.S. 972 (1971). See also 11 CRIMES OF VIOLENCE, supra note 17, at 196-97 (footnote omitted):

... [A woman's] husband was loaned $300 for medical bills. He frequently had difficulty meeting the 10-percent weekly interest payments. One night he was dropped at their doorstep badly beaten. In May 1964, the shark to whom they were in debt tried to kidnap their 5-year-old son, and the wife begged $30 from her employer after a threatening telephone call. On another occasion she was told that, if they continued to have difficulty meeting the payments, enough male customers would be found to enable her to earn $100 a day as a prostitute. Eventually, the husband, having paid $1,000 in interest without ever having reduced the principal, despaired and committed suicide.

\(^{93}\) Cook, Just Call "The Doctor" for a Loan, N.Y. Times, Jan. 28, 1968, § 6 (Magazine), at 19, 68.

\(^{94}\) JOEY, supra note 91, at 97.

\(^{95}\) One shark said that he couldn't afford to permit any default. Although $100 meant nothing to him, "If you let $100 slip by, soon $200 accounts slip by. You can't let anybody slip by. So we kill for $100." This man became known as the toughest loanshark in his city; and people who borrowed from him understood that defaulting was out of the question.

Furstenburg, supra note 17, at 915-16 (emphasis in original).
accomplices\textsuperscript{96} may instill the necessary fear in borrowers reluctant to repay.\textsuperscript{97}

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 occasional violence maintains the reputation of the loanshark\textsuperscript{98} and discourages default,\textsuperscript{99} excessive force intimidates prospective borrowers and increases the likelihood of police investigations.\textsuperscript{100}

\textsuperscript{96} “Charles Stein, one of the biggest loansharks in New York City, would say to debtors, ‘If you can’t meet the payment this week, Jiggs [Nicholas Forlano] will be around next week.’ Jiggs seldom had to come around.” \textit{Id.} at 934 n.21.

\textsuperscript{97} \textit{JOEY, supra} note 91 at 95-96:

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.

\ldots

\ldots 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.

\textit{See also} Seidl, \textit{supra} note 8, at 51 n.3.

\textsuperscript{98} As one prosecutor has observed:

The juice victim is taken for a ride, riddled with bullets, and thrown into the trunk of his own car. The juice gangsters arrange for the car to be parked so that the police find it. Discovery of the murder is a warning to other delinquent juice customers. They get the message with stark emphasis. The news headlines don’t cost these gangsters a dime of advertising space.


\textsuperscript{99} “The use of violence by syndicated criminal groups has been careful, calculated, and controlled \ldots [and] has been so successful that the fear instilled by it has actually reduced the need to use force.” \ldots Organized crime need not make good its threats in every case. That it does so in a few is sufficient to compel obedience nearly all the time. Henry Ruth wrote, “Selective fulfillment of threats gives the appearance of an ability to make any threat an actuality. Thus, only occasional violence is needed by organized crime to exploit in full the opportunities that the threat of violence affords.

\textit{Furstenberg, supra} note 17, at 915-16 (footnotes omitted). \textit{See also} United States v. Benedetto, 558 F.2d 171, 174 (3d Cir. 1977) (debtor threatened with pistol, struck on head, “smacked around,” house ransacked).

\textsuperscript{100} With no objective yearly estimates of the violence due to organized crime, there can obviously be no rigorous national approximations of trends. Nonetheless, there is nearly unanimous agreement by law enforcement officials and other experts on the basis of case experience that there has been a distinct decline in the most serious forms of organized violence—gangland beatings and killings. In Chicago, where organized crime was probably more violent than in many other places, there were 765 “gang murders” between 1919 and 1934, an average of 38 per year. From 1935 to 1967, a period twice as long, there were 229 such murders, an average of seven per year.

The reason for the decline is not that [organized crime] is reducing its activities—on the contrary, the above observations have indicated that its bases have broadened and strengthened—but simply that it has changed to more sophisticated management techniques. Its leaders have learned that violence
Rather than inflict serious physical damage, the loanshark prefers to impose financial penalties on the delinquent borrower. 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.

Loansharks can also protect themselves by requiring the equivalent 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."

Occasionally, a loanshark customer unable to meet his obligation is allowed to renegotiate his loan through the device of a "sit-down." Although sit-downs are used primarily to resolve intrasyndicate disputes, loansharks sometimes direct delinquent outsiders to this forum to be "let off the hook." In these sit-downs, a syndicate arbitrator establishes a figure for full settlement. This figure normally exceeds the initial loan and often ranges as high as three to four times that amount.

In lieu of a final settlement at a sit-down, a loanshark who has stripped the borrower of all resources may agree to "stop the clock." By temporarily suspending "vigorish" payments, the loanshark allows the borrower to improve his financial position.

only exposes them to public attention and law enforcement pressure. A continuing effort has been made to avoid violence, and much of the actual force has been replaced by a system of rational alternatives, which apply to both external and internal organized violence.

11 CRIMES OF VIOLENCE, supra note 17, at 201-02 (footnote omitted). See also F. GRAHAM, THE ALIAS PROGRAM 19 (1976) (victim of loansharks wrote letters to F.B.I. after receiving threats of death and mutilation).

101 See, e.g., United States v. Zito, 467 F.2d 1401, 1402-03 (2d Cir. 1972) (after payment missed, principal and interest treated as new loan with new interest added on).

102 Joseph Valachi explained, "You find, as you go along, that most of these people get in the habit of reborrowing before they pay up." P. MAAS, THE VALACHI PAPERS 161 (1968).

103 P. MAAS, supra note 102, at 159-60.


105 But see United States v. DeCarlo, 458 F.2d 358, 361 (3d Cir. 1972) (victim beaten at "sit down" and told "to pay $5,000 every Thursday and the entire $200,000 by December 13, 1968 or [he] 'would be dead.'"), cert. denied, 409 U.S. 843 (1972).

106 N.Y. COMMISSION, supra note 18, at 13. See also F. GRAHAM, supra note 100, at 18.

107 Small Business Hearings, supra note 4, at 6 (statement of Ralph F. Salerno, Consultant, Nat'I Council on Crime and Delinquency).

108 See text accompanying note 90 supra.
After a set period of time, however, the borrower must resume repayment. Generous loansharks will not compound interest during the leniency period. Frequently, however, loansharks add missed vigorish to the principal, thereby increasing both future installments and the balance of the loan.

3. The Structure of the Operation

Profits produced by loansharking and other illicit underworld operations provide organized crime with large cash reserves with which to finance lending operations. Loansharks, however, may also utilize legitimate lending institutions to generate capital. 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. Shunned by commercial creditors, a borrower sought a business loan from Massiello. In exchange for a $6,000 loan, Massiello demanded a promissory note for $8,000. The 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 $1,520. Thus Massiello received instant repayment of principal plus a generous rate of interest; meanwhile, collection was deferred to the bank. In 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.

Unlike some activities of organized crime, loansharking requires no extensive operational organization; nor does it require

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109 D. Cressy, supra note 91, at 84.
110 Organized crime figures in Massachusetts do not appear to believe in "stopping the clock." Charles Rogovin, expert on organized crime for the Massachusetts attorney general, stated:

   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 loan-shark debts.

111 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 skimmed off the top. The borrower is responsible only to the bank, and the loanshark has completed his transaction at no personal risk. See N.Y. Commission, supra note 18, at 73-75; Seidl, supra note 8, at 33-34.
112 N.Y. Commission, supra note 18, at 72-73.
113 Id.
an established facility, a marked degree of experience, or specialized training. Access to capital generally suffices to operate a loansharking business. Organized crime contacts or affiliations, however, are helpful and frequently necessary to ensure collection of overdue accounts.

As in almost all sophisticated syndicate crime, the major 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 1 percent per week. In larger corporate loans, 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 1.5 to 2.5 percent weekly. This "third echelon" handles street loans and is free to charge whatever rate of interest the market will bear.

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 a borrower default or an intrasyndicate dispute arise. Such support may evaporate when a syndicate loanshark lends his own money and fails to share the profits with his bosses.

At the lowest levels of loansharking, distributors sometimes press delinquent debtors into soliciting new business as part of

114 See 115 CONG. REC. 5874 (1969) (remarks of Sen. McClellan); R. Salerno & J. Tompkins, supra note 19, 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..."

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.

115 Note, supra note 20, at 94.

116 R. Salerno & J. Tompkins, supra note 19, at 229.

117 Some underworld figures like to have it both ways:

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

their obligation. Alternatively, loan sharks may utilize contacts in the community to track down prospective borrowers. These "runners," frequently employed in factories or in service industries, work for the loan shark 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.

Despite the similarities in the organization of their operations, individual loan sharks tend to cater to specialized types of clients. While some deal only with legitimate businessmen, others prefer outlaw entrepreneurs. One medium-level loan shark dealt mainly with fur dealers; another lent funds almost solely to bookmakers. The reasons for this phenomenon probably relate to the loan shark'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 of credit risks and disposition of collateral).

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 loan shark. Usually considered a "victim" rather than a "customer," the individual borrower is often unaware that illicit activities provide the source of the loan shark's capital. Similarly, the customer frequently fails to recognize that the extortionate interest he surrenders contributes to the capital base supporting further illegal operations.

118 One heavily indebted borrower, Nathan Sackin, agreed to become a "frontman" for his loan shark, John Sonny Franzese. Sackin recruited Gerald Wolff. When Wolff fell behind in his payments, he in turn was forced to recruit new customers for Sackin. Small Business Hearings, supra note 4, at 40 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County). See also id. at 67.

119 Kapland & Matteis, supra note 54, at 183.

120 "In one documented case a New York bank loan official turned down loan applicants and at the same time he indicated that a certain loan shark might be able to help the prospective borrowers. For his cooperation, the bank officer received a finder's fee." Senate Select Comm. on Small Business, Nineteenth Annual Report, S. Rep. No. 627, 91st Cong., 1st Sess. 67 (1969) [hereinafter cited as SMALL BUSINESS REPORT]. See also Small Business Hearings, supra note 4, at 9-10 (statement of Ralph F. Salerno, Consultant, Nat'l Council on Crime and Delinquency).

Typically, the individual borrower seeking non-business credit is a lower class urban laborer. For years, the waterfront has provided a lucrative market for loansharks extending 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. The pier operator, known as the "pusher," must account to the financier for profits on a weekly basis. The pusher charges a standard interest rate and is fully responsible for the collection of payments. Late fees, penalty charges, and occasional strong-arming are employed to encourage prompt payments.

Another collection technique draws directly upon the longshoreman's salary. Because of the transient nature of his job, the longshoreman is known to his employers primarily by his social security number. Employers credit earnings to this number, and the worker collects his wages by presenting a payroll identification card. By confiscating the delinquent worker's card, the loanshark can take payments directly from the employer.

The docks have proven especially lucrative for the loanshark. Although individual loans are small, the large volume of pushers generates sizeable profits. Longshoremen's access to cargo may

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122 Note, supra note 20, at 97.

The urban poor can be victim-criminal, but they are, as well, purely victims. Five uneducated laborers, employees of a glue factory, got usurious loans from a clothing store at which they shopped. They agreed to pay 20 percent interest per week, and signed blank wage assignments, which were served on their employer. Each week, 15 percent of their salaries was withdrawn, and paid to the clothing store through which they had taken the loans. One of them had been the subject of wage assignments for 19 years, the entire length of his employment; the others for 10 years.

Furstenberg, supra note 17, at 924 (footnote omitted).

123 F. IANNI, supra note 14, at 97-98. But see id. at 99 (comments of Patsy Lupollo, Brooklyn loanshark):

I wouldn't put out any money even at 15 percent now because operating costs are so high. Half the guys who borrow are on dope and, no matter what you do, they aren't going to pay you back because they end up on Rikers Island or getting shot by the cops.

124 N.Y. COMMISSION, supra note 18, at 77.

125 Id.

126 Id.

127 Id. at 78.

128 Two brothers working as dock watchmen in New York were estimated to have operated a $150,000-per-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.
also attract the loanshark; pilfered goods are frequently accepted in settlement of overdue debts. The longshoreman delivers the stolen merchandise to the loanshark who credits the borrower’s overdue account with a fraction of the goods’ legitimate value.\textsuperscript{129}

Prominent citizens impoverished by gambling debts are another profitable source of non-business loans. Operators of bookmaking rings often enter into ongoing relationships with loansharks\textsuperscript{130} to whom losers, unable to pay, are referred for immediate credit. Other loansharks station themselves at dice and card games to assist unlucky players.\textsuperscript{131} Resulting on-the-spot loans, sometimes payable within 24 hours, involve interest rates as high as ten percent.\textsuperscript{132}

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. The loanshark offered the hopelessly indebted victim a solution. Following the accidental electrocution of the borrower’s son in a railroad yard, the loanshark persuaded the borrower to sue the property owner and assign the damages recovered to the shark.\textsuperscript{133}

Loansharks frequently coerce delinquent customers into committing criminal acts to satisfy their debts. Individuals working at brokerage houses are forced to steal or sell stolen negotiable securities.\textsuperscript{134} In one case, a loanshark forced an attorney to serve as a bookmaker in repayment of his debt.\textsuperscript{135} A sportscaster unable to meet his loan obligations was asked to steer affluent associates to a fixed dice game.\textsuperscript{136} 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.\textsuperscript{137} A city commissioner awarded lucrative public contracts to a loanshark’s designee.\textsuperscript{138}

\textsuperscript{129} N.Y. COMMISSION, supra note 18, at 79.

\textsuperscript{130} Seidl, supra note 8, at 46.

\textsuperscript{131} F. IANNI, supra note 14, at 97.

\textsuperscript{132} D. CRESSEY, supra note 91, at 80.

\textsuperscript{133} Small Business Hearings, supra note 4, at 53 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County).

\textsuperscript{134} Furstenberg, supra note 17, at 915; see also 115 CONG. REC. 5874 (1969) (remarks of Sen. McClellan).

\textsuperscript{135} D. CRESSEY, supra note 91, at 85.

\textsuperscript{136} Id.

\textsuperscript{137} N.Y. COMMISSION, supra note 18, at 42.

\textsuperscript{138} United States v. Corallo, 413 F.2d 1306 (2d Cir. 1969).
And a businessman offered to burn down his establishment in order to collect the insurance proceeds to satisfy his debt.\textsuperscript{139}

2. The Criminal Borrower

Joseph Valachi, in explaining his technique for selecting customers, indicated 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...."\textsuperscript{140}

The loanshark provides necessary working capital and emergency funds to the criminal who is largely foreclosed from obtaining capital from legitimate sources.\textsuperscript{141} This monetary web, woven among loansharks and criminal borrowers, supports a vast array of criminal ventures, bolstering and stabilizing the underworld economy.\textsuperscript{142}

Bookmakers in particular depend on the loanshark. Despite his edge, the bookmaker may absorb periodic losses of tens of thousands of dollars.\textsuperscript{143} At three to four percent interest per week, the cost of a sizeable loan may ultimately channel the long-term gambling profits into the pockets of the loanshark.\textsuperscript{144}

Drying up capital supplies by investigating and prosecuting loansharks may thus have unique adverse effects on other criminal activities; the bookmaker who cannot cover losses, for example, will not stay in business long.

Successful investigation of loansharks can also provide valuable leads and evidence for prosecuting other criminals.\textsuperscript{145} In one case, records confiscated from a Chicago loansharking operation listed 25 previously unknown criminals among customers with outstanding obligations.\textsuperscript{146}

\begin{itemize}
\item \textsuperscript{139} Transcripts of the conversations of Samuel DeCavalcante, June 3, 1965 (on file at Cornell Institute on Organized Crime).
\item \textsuperscript{140} P. Maas, \textit{supra} note 102, at 160.
\item \textsuperscript{141} See Note, \textit{supra} note 20, 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."
\item \textsuperscript{142} See \textit{Task Force Report: Organized Crime}, \textit{supra} note 15, at 43.
\item \textsuperscript{143} \textit{Joey, supra} note 91, at 89.
\item \textsuperscript{144} Goldstock, \textit{Letting the Loan Shark off the Hook}, Newsday, Sept. 9, 1977, at 67.
\item \textsuperscript{145} See T. Dewey, \textit{supra} note 80, 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."
\item \textsuperscript{146} Chicago Tribune, Mar. 6, 1974, at 7, col. 2.
\end{itemize}
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 often secure usurious loans by providing as collateral the very businesses they seek to advance.147

Businesses characterized by chronic cash flow problems are particularly vulnerable to loanshark predation. Garment manufacturers, for example, produce seasonal fashions well in advance of sales. The volatility of fashions renders the goods unattractive collateral for conventional loans. Large orders and incoming shipments, however, require significant cash outlays.148 Cash-short dealers may not qualify for legitimate loans to cover outstanding checks, and even creditworthy merchants may be hampered by time constraints. Rather than ruin relationships with suppliers and legitimate creditors, the merchant turns to the loanshark to obtain necessary working capital.149 When the merchant sells his newly purchased goods, his revenues amply cover the principal and interest. Fashion trends or business fluctuations, however, may delay disposal of merchandise and prevent timely repayment. Scissored by exorbitant interest rates and an inability to move his merchandise, the overextended businessman may become an unwilling partner of the loanshark.

Regardless of his creditworthiness, any businessman may occasionally meet with unexpected but urgent capital demands. The businessman may therefore seek short-term funding from the loanshark while arranging for long-term legitimate financing. In one case, a manufacturer of double knit clothing had purchased eight machines for $128,000. The seller provided temporary financing, taking notes payable on demand. The double knit business prospered, but the manufacturer, scrambling to meet or-

147 "[F]requently the loanshark is the only available source of a needed loan. Like his ocean dwelling namesake, the loanshark feeds upon the weak victims. A business in financial trouble is the natural prey of a loanshark." SMALL BUSINESS REPORT, supra note 120, at 67 (testimony of Michael Metzger, Asst. Dist. Atty., N.Y. County).
148 Small Business Hearings, supra note 4, at 66 (statement of Louis C. Cottell, Chief, Central Investigation Bureau, N.Y. Police Dep't).
149 Miller, supra note 75, at 202-03.
ders, found itself in a cash-short position. 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 $80,000, faced two unpleasant alternatives: employ the services of a loanshark or submit to the ruination of his business. Charging five percent weekly interest, the loanshark was expensive. In two weeks, however, the manufacturer secured legitimate bank financing and eliminated his debt. He was fortunate; his gamble culminated in the satisfaction of all parties and only cost him $8,000.150

The susceptibility of businesses to loansharks, however, 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 legitimate enterprises. Money borrowed from loansharks by businessmen for personal reasons such as gambling debts or hospital bills can precipitate business disaster.

F. Loanshark Infiltration of Businesses

The syndicate dabbles in a wide range of businesses.151 In 1951, the Kefauver Committee of the United States Senate identified approximately fifty industries infiltrated by organized crime.152 This list runs the gamut of American businesses—among them manufacturing, services, finance, entertainment, and media. The business affiliations of criminals attending the 1957 meeting at the Apalachin estate of underworld figure Joseph Barbara illustrate 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, entertain-

150 Joey, supra note 91, at 91-92.

For three brothers in business together, financial obligations to a loanshark proved less satisfactory. After borrowing $165,000 from a loanshark for a business venture, they allowed the interest to accumulate. Within a year, having paid $169,000 in principal and interest, the brothers still owed $124,000. After kidnapping two of the brothers, the loanshark demanded and received an additional promissory note for $140,000. Small Business Hearings, supra note 4, at 114-19 (statement of Robert J. Walker, Chief Investigator, Ill. Crime Investigation Comm'n).

151 See McClellan, Weak Link in Our War on the Mafia, READERS DIGEST REPORT, reprinted in Subcommittee #5 Hearings, supra note 12, at 112-13; see also text accompanying notes 169-88 infra.

ment, funeral homes, horses and racetracks, linen and laundry enterprises, trucking, waterfront activities, and bakeries.\textsuperscript{153} Organized crime's business operations clearly constitute a sizeable intrusion into the marketplace;\textsuperscript{154} some observers contend that organized crime's profits from legitimate operations surpass those from its illegal activities.\textsuperscript{155}


154 "The cumulative effect of the infiltration of legitimate business in America cannot be measured. Law enforcement officials agree that entry into legitimate business is continually increasing and that it has not decreased organized crime's control over gambling, usury and other profitable, low-risk criminal enterprises." \textit{See Task Force Report: Organized Crime, supra} note 15, at 5 (footnote omitted). Loansharking also provides a vehicle for taking over small independent criminal ventures. \textit{Id.} at 3 n.33.

155 Grutzner, \textit{supra} note 23, at 49.

While this Article focuses on extortionate and usurious credit transactions, loansharking is only one tool employed by organized crime to penetrate the business community. \textit{See} Woetzel, \textit{An Overview of Organized Crime: Mores versus Morality}, 347 \textit{Annals} 1, 6-7 (1963); \textit{see also} Peterson, \textit{Chicago: Shades of Capone}, 347 \textit{Annals} 30, 32-39 (1963). The syndicate has infiltrated the marketplace through legitimate purchases of ongoing businesses, although less amicable tactics are usually employed. Regardless of the technique used, the businesses targeted for infiltration invariably possess one or more of the following characteristics:

1. Unorganized, inaccurate bookkeeping and records. Using embezzlement, theft, and pilferage, employees connected with organized crime can siphon off business assets. Stock brokerage houses, plagued by internal security problems, often fall into this category. W. Mullan, \textit{The Theft and Disposition of Securities by Organized Crime} 24 (1975).

2. Inventory or cash control difficulties. These problems typically occur in businesses like discotheques, restaurants and bars, and facilitate "skimming" of profits through pilferage and fraud. Furstenberg, \textit{supra} note 17, at 917.

3. Dependence upon a single supplier. By establishing localized monopolies, the syndicate forces businessmen to turn to it to obtain products otherwise unobtainable. This leverage is then employed gradually to take over the business.

4. Dealings with powerful unions. By dominating local unions, syndicates can force profitable concessions from businesses forced to deal with unions but eager to avoid labor problems. For example, Terry and Gene Catena, owners of the Best Sales Company, attempted to market detergent to the Great Atlantic and Pacific Tea Company. The expected commissions for the transaction totaled $1.5 million over ten years. "Sales agents" Joe Pecora and Irving Kaplan negotiated for Best Sales. Pecora, an organized crime figure, was the boss of Teamster Local 863; Kaplan headed Amalgamated Meat Cutter's Local 464 and supervised contracts with A&P. Kaplan advised A&P officials that the upcoming renegotiation of the meat cutters' contract might be hindered if the detergent were not purchased. Pecora asserted that Teamsters would not cross meat cutters' picket lines. Melvin, \textit{Mafia War on the A&P}, Readers Digest, July, 1970, at 71-76.

5. Substantial credit buying. Businesses that normally carry large accounts payable provide excellent vehicles for bankruptcy schemes and other frauds. \textit{See}
1. Methods of Loanshark Infiltration

Using ostensibly legitimate means, the loanshark may simply assume ownership of a business in satisfaction of the owner's debt.\(^{156}\) For example, Joseph Valachi, in need of a tax cover to explain his affluent lifestyle, entered the dress manufacturing industry. A Bronx factory owner, a regular customer of Valachi's loansharking operation, was delinquent in his weekly payments. Valachi supplied additional investment capital and labor "counseling"\(^{157}\) and cancelled the manufacturer's debt in return for full partnership status.\(^{158}\)

The loanshark can also infiltrate a business through strategic placement of a confederate.\(^{159}\) In the million-dollar Murray Packing "bust-out,"\(^{160}\) Joseph Pagano played this role for a high ranking syndicate member.

In other cases, loansharks infiltrate businesses secretly. An employee of a "target" business may steal company property or surreptitiously provide company services to satisfy his obligation to the loanshark.\(^{161}\) Inadequately protected securities kept in

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\(^{156}\) See N.Y. Commission, supra note 18, at 68; notes 148-49 and accompanying text supra.


\(^{158}\) P. Maas, supra note 102, at 166-68. Valachi's "counseling" included preventing union workers from entering the shop.


\(^{160}\) "One organized crime group offered to lend money to a business on condition that a racketeer be appointed to the company's board of directors and that a nominee for the lenders be given first option to purchase if there were any outside sale of the company's stock." Task Force Report: Organized Crime, supra note 15, at 4 (footnote omitted).

\(^{161}\) R. Salerno & J. Tompkins, supra note 19, at 235; see text accompanying notes 181-83 infra.

\(^{155}\) An employee of the Gilette Safety Razor Company regularly paid off his debt by setting up weekly thefts of razor blades.

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 debtor-employee that the blades had been shipped to a salvage company in Boston Harbor, the shark arranged to buy millions of blades for a half a cent each. He eventually sold them for 2.5 cents each, a 400% profit. V. Teresa, My Life in the Mafia 135-36 (1973).

In another case "hijackers learned that a night supervisor was heavily in debt. A contact man approached him with a $500 loan. When the supervisor could not pay it off he was forced to let the hijackers load up a trailer from the warehouse." Each trailer load was
brokerage houses are prime targets. To satisfy his debt, the brokerage house employee delivers stolen securities to the loan-
shark, who reduces the borrower's obligation by a small percent-
age of the securities' value. A more invidious form of infiltr-
tion occurs when the insider pays his debt by manipulating the securities markets.

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 plots.

Maurice Minuto, the president of Nylo-Thane Plastics Corp., required capital for a business expansion. 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 accomplices confronted Minuto with knives and a gun, and announced, "We're going to kill you unless you give us $25,000."
After a night’s confinement in a motel room, Minuto issued a $25,000 Nylo-Thane check to his captors. To arrange for the reimbursement of the company, 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 $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 Massiello, and pledged to the bank, Nylo-Thane stock worth $1.3 million.168

2. Purposes of Syndicate Infiltration of Businesses

The syndicate has numerous reasons for infiltrating legitimate businesses. The four most common are: (a) establishing a “front” to conceal illicit activities, (b) obtaining specific services or concessions from employees or other insiders, (c) “busting out” the business to profit at the expense of company creditors, and (d) “skimming” pre-tax dollars from company profits.169

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.170 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 with unfair competitive advantages, such as control of well-placed labor officials171 or access to stolen prop-

168 Id.
169 Of course, infiltrators may simply run the business for profit. Such entrepreneurial moves are often accompanied by the use of extortion to create a monopoly and reap oligopolistic profits. “When organized crime moves into a business, it usually brings to that venture all the techniques of violence and intimidation which it used in its illegal businesses.” 115 Cong Rec. 5874 (1969) (remarks of Sen. McClellan).
171 Access to the right person may prove extremely beneficial to a businessman. For example, 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
The operation of legitimate businesses can conceal illegality in other ways. Loan sharks and other racketeers can use these businesses to launder illegally obtained cash. Similarly, by serving as highly paid “consultants” to these businesses, they can collect loan sharked debts or receive extorted payments with ostensible legitimacy.

Contact with a legitimate business also creates an air of respectability for the organized crime figure. After acquiring the Lido, a fashionable restaurant, Joseph Valachi 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.” More 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,” any business provides the loan sharker with an office to conduct his illicit operations, a secure location to hold meetings, and an explanation for contacts with businessmen, other criminals, or public officials.

b. Obtaining Services and Concessions. Small-scale infiltrations can also generate large-scale profits for the loan sharker. Such arrangements usually involve neither racketeer ownership nor racketeer control; rather, the legitimate businessman grants spe-

plagued the construction; absenteeism, padded payrolls, pilferage, timeclock cheating and slow work were rampant. Bateson’s efforts to resolve the problems resulted in labor walkouts, threats of violence and a mysterious on-site fire. At the suggestion of union members, Bateson hired John Cammillieri, a reputed “capo” in Buffalo’s Magadino crime family. Cammillieri was paid $7.10 an hour for his assistance as a “job coordinator.” Almost immediately, the laborers resumed work with greater efficiency than even the Bateson officials had anticipated. TIME, Aug. 30, 1971, at 21.

172 “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.” V. TERESA, supra note 161, at 137.

173 One indebted restaurant owner 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 4, at 48-49 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County).

174 P. MAAS, supra note 102, at 207.

175 The infiltration of a small luncheonette exemplifies this technique. 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. The proprietors, desperately in need of working capital, borrowed from a local loan shark at rates of up to twenty-five percent interest per week. The couple’s debt was taken over by a syndicate lieutenant who was expanding his bookmaking and loansharking activities in the area. Predictably, this new creditor began to use the luncheonette as a front for his bookmaking and loansharking business, forcing the proprietors to handle bets. N.Y. COMMISSION, supra note 18, at 45-50.
cial concessions to his loanshark regarding the use or operation of company's facilities. Examples are numerous. A Louisiana man loaned money to restaurant and tavern owners, who in turn accepted cigarette machines, jukeboxes, and pinball machines from a syndicate supplier. The owner of a warehouse deeply in debt to a loanshark, allowed the shark to use his facility to store hijacked trucks and merchandise. A Philadelphia restaurant owner, in debt to a loanshark, explained why he bought a particular product: "If I bought another brand, my restaurant would be a parking lot tomorrow morning."

c. "Busting Out" a Legitimate Business. Syndicates will sometimes infiltrate a business intending to pirate the company's assets and force it into bankruptcy. Such schemes to defraud company creditors are known as "bust-outs" or "scams." Loansharking often provides the requisite toehold for initiating a "bust-out."

The procedure is well illustrated by the Murray Packing scandal. Murray Packing supplied meat, poultry, and eggs to New York area supermarkets. The company had purchased goods

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176 It has transferred to the legitimate field of business the same strong-arm practices which have proved so successful in the past. A manufacturer who will not use a syndicate-owned trucking firm finds his life in danger or his family threatened. A bar or restaurant operator who will not rent a syndicate-owned jukebox finds that his waiters go on strike. A grocery store owner who will not buy a syndicate-controlled line of imported food may be burned out. Furthermore, in its legitimate business enterprises, organized crime frequently demands a higher price for its goods and services than is generally obtainable on the open market, and provides a lower quality of products.

Subcommittee #5 Hearings, supra note 12, at 153 (statement of John N. Mitchell, United States Att'y. Gen.).

One restaurant owner who fell into arrears on his loanshark debt purchased, at the suggestion of the loanshark, his meat and liquor from new suppliers at 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 taken on as a lookout for the restaurant's newly established bookmaking operation. Small Business Hearings, supra note 4, at 48-49 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County).

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

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

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

180 Id. at 49 (statement of Michael H. Metzger, Asst. Dist. Atty., N.Y. County). "An estimated 250 such scam operations are pulled off each year, netting around $200,000 per job." 115 CONG. REC. 5874 (1969) (remarks of Sen. McClellan).

on credit above the level of its cash resources. Within a year of its incorporation, the business stood on the brink of bankruptcy. A salesman for Murray Packing, Joseph Pagano, promising a solution to the company’s financial problem, steered the company’s managers to an alleged lieutenant in New York’s Gambino family, a man named Castellana.

To “save” the faltering company, Murray’s principals took an $8,500 loan from Castellana. The one-percent weekly interest rate, although 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 managers acceded to an imposed settlement. Pagano became one-third owner and president of the company and received authority to write checks and transact company business. During January, February, and March of 1961, Murray Packing reestablished its credit by paying suppliers promptly. The company then drastically increased its meat and poultry credit purchases. These supplies were promptly transferred to Pride Wholesale Meat and Poultry Co., a concern owned by Castellana. The sales to Pride Wholesale, however, were below cost. Furthermore, as revenues entered the Murray Packing account, Pagano withdrew them—issuing personal notes to the company.

In 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 principals in the original business—were convicted of conspiracy to violate bankruptcy laws.

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

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182 Joseph Pagano was identified as a “soldier” in the Genovese family. See Organized Crime and Illicit Traffic in Narcotics: Hearings Before the Permanent Subcomm. on Investigations of the Senate Comm. on Gov’t Operations, 88th Cong., 1st Sess. 248 (1963) (as noted on Committee chart of Genovese family verified during testimony of John F. Stanley, Deputy Chief Inspector, Central Investigations Bureau, N.Y. Police Dep’t).

183 Id. at 294 (as noted on Committee chart of Gambino family verified during testimony of John F. Stanley, Deputy Chief Inspector, Central Investigations Bureau, N.Y. Police Dep’t).

184 United States v. Castellana, 349 F.2d 264 (2d Cir. 1965).
to bankrupt a company and defraud legitimate businesses of over one million dollars.\(^{185}\)

d. **Skimming Company Profits.** Organized crime figures will frequently permit a controlled business to operate and use sham transactions to "skim off" its income or assets. Commonly, such schemes presage a bust-out although some 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.\(^{186}\) Such payments provide the syndicate member with a steady flow of income and the business with tax deductions. In some cases, a controlled company instead of supplying cash may channel its products to the loanshark's designee for nonexistent or inadequate consideration.\(^{187}\)

A classic "skim off" involved the Progressive Drug Company.\(^{188}\) Pawnee Drug Company purchased Progressive, a legitimate family enterprise. 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

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\(^{185}\) 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, for example, loan-sharking supplied the means for disposing of "skimmed off" products.

Joseph and Vincent Falcone, known Mafia members, operated Falcone Dairy Products, a wholesale distributor of soft cheeses in Brooklyn. In 1967, the Falcons and Joseph Currieri opened a soft cheese factory in Alburg, Vermont. The Alburg factory purchased milk from Vermont farmers and shipped its products to Falcone Dairy. The farmers' cooperatives billed Alburg directly for milk, and Alburg billed Falcone for cheese. By 1973, Alburg owed $500,000 to the dairy cooperatives. Shortly after the farmers demanded payment, the Alburg plant burned and the corporation entered bankruptcy proceedings.

Alburg had made shipments to Falcone Dairy valued at approximately $1,600,000 per year. Most of these shipments had never been paid for, however. When the creditors demanded payment, Falcone asserted that 400,000 pounds of the purchased cheese had been rancid. Falcone claimed damages of an amount in excess of the purchase price due.

The scam succeeded because Falcone was able to dispose of the "rancid" cheese without showing a sale on its books. The loansharking operations of the syndicate facilitated this process. Illegal aliens, using loanshark funds, had established pizza parlors in New York and New Jersey. The loansharks collected their debt by selling the "rancid" cheese to the aliens at exorbitant prices. Kwitny, *Pizza Putsch: Vermont's Dairymen Won't Soon Forget the Mafia's Arrival,* Wall St. J., Mar. 3, 1977, at 1, col. 1.

\(^{186}\) 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 4, at 65 (statement of Louis C. Cottell, Chief, Central Investigation Bureau, N.Y. Police Dep't); see also note 173 supra.

\(^{187}\) See notes 181-84 and accompanying text supra.

\(^{188}\) The description of the Progressive Drug Company "skim-off" is taken from Grutzner, *supra* note 23, at 46.
labor contract from a reputable union to a local of another union. They 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 to maintain labor peace. The new management also required Progressive's vice president to authorize case disbursements for merchandise never delivered and services never rendered. Progressive "was milked dry for the benefit of underworld figures and other subsidiaries of Twentieth Century Industries"; suppliers who had sold Progressive merchandise on credit eventually absorbed 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?"

II

THE LAW OF LOANSHARKING

A growing body of state and federal law addresses the problem of loansharking. Recently enacted laws prohibit extortionate lending and collection practices. Other provisions seek to reach the criminal hierarchy that finances and profits from illegal credit transactions. In some states these fresh attempts to control the loanshark complement long-enforced criminal usury and extortion statutes. Where in force together, these provisions are well-adapted to the practical difficulties involved in prosecuting the wide variety of illicit lending activities.

A. Extortionate Credit Transaction Laws

I. Historical Development and Basic Principles

Extortionate credit transaction (ECT) laws aim directly at the modern loanshark. The ECT approach first surfaced in the
federal Consumer Credit Protection Act of 1968; since then, several states have enacted similar statutes. ECT statutes are not usury laws. Criminal usury statutes forbid loans accompanied by excessive interest, while ECT laws proscribe any loan consummated against a backdrop of violence. The two types of statutes thus separately condemn the two central objectionable characteristics of loanshark transactions. All ECT laws share one pivotal requirement: the presence of an extortionate “understanding” with regard to an extension of credit.

One commentator has called the federal ECT statute “curious,” and federal courts have encountered considerable difficulty in deciphering its meaning. State courts have had no chance to examine state ECT provisions closely. However, the federal and state ECT statutes are strikingly similar. This fact, coupled with the federal provision’s progenitor role, renders federal authorities highly relevant in deciphering the meaning of state ECT laws.

2. Elements of the Offense

Courts that have analyzed the federal ECT statute have identified three elements of the crime it defines: (1) making an extension of credit, (2) with the requisite extortionate understanding, while (3) acting intentionally and knowingly. Although the stat-

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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.

ute aims mainly at professional loansharks, courts have found its language and legislative history broad enough to bring all lenders within its sweep.\textsuperscript{198}

\textbf{a. Conduct.} All ECT laws established a conduct requirement of \textit{making 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 debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred."\textsuperscript{199}

Courts have read the words "any loan ... valid or invalid ... however arising," to cover atypical loans.\textsuperscript{200} For example, gambling debts are included,\textsuperscript{201} as are obligations arising from unauthorized use of credit cards\textsuperscript{202} or the misappropriation of partnership funds.\textsuperscript{203} In \textit{United States v. Bufalino},\textsuperscript{204} the Second Circuit held that an "extension of credit" arose\textsuperscript{205} when the "victim," a swindler, obtained $25,000 worth of diamonds "in exchange for a series of promises and a worthless check."\textsuperscript{206} In the court's opinion, "Congress took an exceedingly broad view of what it is 'to extend credit,'"\textsuperscript{207} so that even illicit transactions would come within the reach of the statute.

An even broader reading of the statute appears in \textit{United States v. Totaro},\textsuperscript{208} where the loan proceeds were never transferred:

There is no doubt that [the defendants] entered into an agreement to make the extortionate loan of $2500. Although the loan may have been invalid because the check was not paid, nevertheless \textit{the credit agreement was entered into}. \textit{We think that is all the statute requires,} and that when the agreement was made

\textsuperscript{200} E.g., United States v. Annerino, 495 F.2d 1159, 1166 (7th Cir. 1974).
\textsuperscript{201} E.g., United States v. Mase, 556 F.2d 671, 674 (2d Cir. 1977), cert. denied, 435 U.S. 916 (1978).
\textsuperscript{202} United States v. Annerino, 495 F.2d 1159, 1166 (7th Cir. 1974).
\textsuperscript{203} Id.
\textsuperscript{204} 576 F.2d 446 (2d Cir.), cert denied, 439 U.S. 928 (1978).
\textsuperscript{205} Id. at 452.
\textsuperscript{206} Id. at 448.
\textsuperscript{207} Id. at 452.
\textsuperscript{208} 550 F.2d 957 (4th Cir.), cert. denied, 431 U.S. 920 (1977).
the crime was complete so that the fact the check delivered to [the borrower] was bad would not serve to exonerate [the defendants].

b. The Creditor's Understanding. The ECT laws require proof that there was an "understanding of the creditor and debtor at the time [they entered into the loan] . . . 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." To determine whether this understanding was present, a court must examine the state of mind of both parties when they entered into the transaction.

The primary difficulty with the statute rests in this inquiry. Because the required understanding primarily involves the possibility of violence or physical harm to the defaulting debtor, proof of the creditor's manifestation of this element would typically consist of threats made to the alleged debtor. Congress did not use the term "threat," however, although most traditional extortion statutes specifically require proof of threats. By requiring only an understanding of possible harmful consequences, Congress attempted to spare prosecutors the potentially difficult task of proving that the defendant explicitly threatened the debtor. The Congressional Findings and Declaration of Purpose indicate that the statute is aimed at transactions which are characterized by the use of implicit or explicit threats of violence. Congress thus recognized that loansharks do not always openly threaten their victims, but often operate on the basis of implication and veiled suggestion.

Courts have also recognized that the understanding element requires proof of something less than full-blown threats. In United States v. Annoreno, for example, 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

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209 Id. at 959 (emphasis added).
212 See notes 377-81 and accompanying text infra.
214 460 F.2d 1303 (7th Cir.), cert. denied, 409 U.S. 852 (1972).
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." 215 The court went on to set out an objective standard of proof for the understanding requirement, holding that the prosecutor need only show circumstances which indicate that an atmosphere of threats surrounded the transaction:

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 predicated their fear that default or delinquency might result in harm to themselves or their families. 216

Special evidentiary provisions in the federal ECT statute further support this view of the understanding requirement. In making out a prima facie case of an extortionate transaction, the prosecutor can rely on specified kinds of circumstantial evidence, 217 none of which necessarily lead to the inference that open threats were used.

Courts have effectuated this congressional extension of the reach of anti-loansharking laws by defining understanding as a "meeting of the minds" between the two parties. The prosecutor is not required to show that the defendant and his victim expressly agreed that violent consequences would follow default; 218 the proof need only consist of evidence that the parties comprehended 219 or were aware 220 that violent collection tactics would be used.

c. The Debtor's Understanding. Proof that the debtor feared violent or criminal retaliation would tend to show the required understanding on his part. Congress, however, again deliberately chose not to draw on the extortion statutes and specifically re-

215 Id. at 1309.
216 Id. (footnote omitted).
217 18 U.S.C. §§ 892(b)-892(c) (1976). For a discussion of these provisions and their use in proving the understanding element, see notes 453-66 and accompanying text infra.
219 Id.
quire proof of fear on the victim's part.\textsuperscript{221} The standard of proof concerning the debtor's half of the transaction thus does not require proof of fear: "Where the threat of violence exists \textit{and is comprehended by the victim}, the extortionate nature of the transaction is present and punishable under this statute."\textsuperscript{222} The important element is thus not fear, but only an awareness that the transaction was backed by implicit threats of violence.\textsuperscript{223}

d. \textit{State of Mind}. Perhaps because the understanding element requires a subjective inquiry, 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."\textsuperscript{224} In \textit{United States v. Nakaladski},\textsuperscript{225} an ECT conspiracy case, the court fleshed out this standard: "[T]he government [must] prove only that [the] appellants had planned and intended that [the debtor] would understand the possibility that harmful consequences could [follow]."\textsuperscript{226} This broad standard is appropriate, since it includes those who do not actually intend to use force but do intend to convey that possibility to the borrower.\textsuperscript{227}

\textsuperscript{221} Some extortion statutes use the term "fear" as well as the term "threat." See, e.g., Hobbs Act, 18 U.S.C. § 1951(b)(2) (1976); CAL. PENAL CODE §§ 518, 519 (West 1970); IDAHO CODE §§ 18-2801, 18-2802 (1979); MISS. CODE ANN. § 97-3-77 (1972).

\textsuperscript{222} \textit{United States v. Annoreno}, 460 F.2d 1303, 1309 (7th Cir.) (emphasis added), cert. denied, 409 U.S. 852 (1972). The defendants in \textit{Annoreno} were convicted only of conspiracy to violate the ECT statute. \textit{Id.} at 1305. Therefore, the understanding of the victims was not strictly at issue, and the court's statement could be considered dictum. The court felt compelled to consider the nature of the debtor's understanding, however, since it required the government to prove "that the defendants planned and intended that those to whom they extended credit would understand the possible harmful consequences of default or delinquency." \textit{Id.} at 1309 n.7.

\textsuperscript{223} \textit{See United States v. Benedetto}, 558 F.2d 171, 178 (3d Cir. 1977).

The absence of a fear requirement eliminates a potential prosecutorial problem if its only witness is a government agent who posed as a borrower. The agent could fully understand that nonpayment could result in violence, but experience no fear because he knows the lender will be arrested. \textit{Cf. United States v. Quinn}, 514 F.2d 1250, 1267 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976) (prosecution under Hobbs Act, federal extortion statute, 18 U.S.C. § 1951 (1976)).

\textsuperscript{224} \textit{United States v. Benedetto}, 558 F.2d 171, 177 (3d Cir. 1977).

\textsuperscript{225} 481 F.2d 289 (5th Cir.), cert. denied, 414 U.S. 1064 (1973).

\textsuperscript{226} \textit{Id.} at 297.

\textsuperscript{227} The standard is arguably overbroad, however, since it would also take in the bluffer who plans and intends to create the required understanding, but has no intention of actually harming the borrower upon default. On these facts, the lender arguably has no "understanding" that illegal collection tactics "could result." See 18 U.S.C. § 891(f) (1976).

The phrase "understanding of the creditor and the debtor" (id.) should cover the bluffer, however, for three reasons. First, this construction is compatible with the statute's general purpose of eradicating loans consummated against a backdrop of violence. \textit{See note
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). Such a provision first appeared in Title II of the federal Consumer Credit Code of 1968:

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.

A few states have since passed similar statutes. While the ECT law focuses on circumstances surrounding the extension of credit, "it is the use of extortion in the course of loan collections which is . . . made unlawful by [the collection law]. . . ."

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 'loan sharks,' to seek ex-

212 and accompanying text supra. Whether or not the lender actually intends to use violence, veiled threats will be equally successful in instilling fear, the evil the statute was designed to eradicate. Second, the ECT statute deals only with the circumstances when the loan is made; a separate provision prohibits extortionate collection tactics. See notes 228-33 and accompanying text infra. Third, even phony threats will often harm the debtor by instilling mental anxiety when he defaults. Since the creditor expects this result, he "understands" that default "could result in the use of . . . other criminal means," i.e., the threats which the debtor recalls, to cause harm. See 18 U.S.C. § 891(6) (1976).

228 For an explanation of the various terms used in this Article to refer to the collection process, see note 237 infra.


232 See note 229 supra.

233 United States v. Biancofiori, 422 F.2d 584, 585 (7th Cir.), cert. denied, 398 U.S. 942 (1970). The two statutes cover distinct facets of the same problem. A lender, for example,
tralegal methods of enforcing their unconscionable agreements which this statute is designed to restrain."\(^\text{234}\)

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 to collect [the] same."\(^\text{235}\) Reading a state-of-mind requirement into the statute, courts have insisted upon *knowing* participation by the defendant.\(^\text{236}\) The statute applies not only to participants in organized crime, but to *anyone* using extortionate means to collect an extension\(^\text{237}\) of credit.\(^\text{238}\)

a. Conduct. The primary conduct prohibited by the statute is *collecting, attempting to collect, or punishing* for nonpayment.\(^\text{239}\) Few decisions have turned on the definitions of these terms; their meaning in the context of prosecutions under the collection law is not as precise as might be desired. The lender may be extortionate or may not intend to use force in collecting a debt, or he may not intend to suggest the possibility that force will be used. When the debtor defaults, however, the lender may become incensed and threaten violence if the debtor does not repay. On these facts, these would be no violation of the ECT law, but the lender could be convicted for using extortionate means to collect. See, e.g., United States v. Benedetto, 558 F.2d 171, 177 n.3, 178 (3d Cir. 1977). On the other hand, an extortionate understanding may accompany the loan agreement, but outside events, such as arrest or repayment, may preclude the use of extortionate collection techniques. On these facts, there would presumably be a violation of the ECT law, but no collection law violation.

The federal collection law, 18 U.S.C. § 894 (1976), has proven to be a valuable complement to the ECT law as a weapon against loansharking and organized crime. In fact, there are considerably more cases under the federal collection law than under the companion ECT statute.\(^\text{234}\) United States v. Natale, 526 F.2d 1160, 1165 (2d Cir. 1975), *cert. denied*, 425 U.S. 950 (1976).\(^\text{235}\) *Id.* at 1166.\(^\text{236}\) See, e.g., United States v. Benedetto, 558 F.2d 171, 178 (2d Cir. 1977).

\(\text{237}\) The phrase "to collect an extension of credit" is imprecise; "extension of credit" refers to the agreement to enter into the loan or other transaction, and the agreement itself is not collected. See note 199 and accompanying text supra. The statute itself, however, uses this imprecise language. 18 U.S.C. § 894(a). In addition, to refer to the collection of "debts" would be misleading, since the collection law also applies to transactions that are not debts in the traditional sense of the term. See notes 199-209 and accompanying text supra.

Throughout this Article, therefore, the phrases "collection of debts," "collection of credit," and "collection of an extension of credit" are variously used to refer to the collection process within the meaning of the collection laws.\(^\text{238}\) E.g., United States v. Annerino, 495 F.2d 1159, 1164-65 (7th Cir. 1974).\(^\text{239}\) 18 U.S.C. § 894(a) (1976). 18 U.S.C. § 891(3) contains this definition: "To collect an extension of credit means to induce in any way any person to make repayment thereof."
usually self-evident. In *United States v. Papia*,\(^{240}\) 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.\(^{241}\) The court found this evidence sufficient to support the charge of conspiracy to collect the debt and to punish the failure to repay the loan.\(^{242}\)

b. Attendant Circumstances. Two attendant circumstances are prerequisites to conviction under the collection law: (1) the existence of an extension of credit, and (2) the participation "in any way . . . in the use of any extortionate means . . . " to collect.\(^{243}\)

The extension-of-credit requirement is identical to that imposed by the ECT law;\(^{244}\) thus, the courts read the requirement broadly. In *United States v. Briola*,\(^ {245}\) for example, where the evidence showed that during a meeting with the victim, the defendants beat him and kneed him in the groin, the defendants did not contest the fact that they punished the victim.\(^{246}\) Instead, they contended that the beating was punishment for a theft rather than for nonrepayment of a loan.\(^{247}\) 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.\(^{248}\) 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 traditional type of loan."\(^{249}\) The loan itself need not have been extortionate at the outset.\(^ {250}\) In fact, the prosecutor need not even prove that the alleged debtor admitted his liability for the obligation.\(^{251}\)

\(^{240}\) 560 F.2d 827 (7th Cir. 1977).
\(^{241}\) Id. at 832-33.
\(^{242}\) Id. at 834.
\(^{244}\) In the federal law "to extend credit" is defined by 18 U.S.C. § 891(1) (1976), and the definition applies to both the ECT and collection provisions. See notes 195-209 and accompanying text supra.
\(^{245}\) 465 F.2d 1018 (10th Cir. 1972), cert. denied, 409 U.S. 1108 (1973).
\(^{246}\) Id. at 1020-21.
\(^{247}\) Id. at 1021.
\(^{248}\) Id. at 1020.
\(^{249}\) Id. at 1021.
\(^{250}\) See, e.g., id. (collection law "directed to the use of extortionate means . . . to collect . . . regardless of whether the loan . . . resulted from the assumption of responsibility as a result of force or threats"); United States v. Annerino, 495 F.2d 1159, 1165-66 (7th Cir. 1974); note 233 and accompanying text supra.
\(^{251}\) E.g., United States v. Nace, 561 F.2d 763, 770-71 (9th Cir. 1977).
Interpretation of 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." 252

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 using violence or other criminal means.

(i) Collection of an Extortionate Loan. According to the court in United States v. Nakaladski, 253 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 either by attempting to collect in any way or even by accepting payments. 254 According to this reasoning, it is not necessary to show use or threatened use of violence; collection of a loan known to be extortionate, by definition, constitutes an extortionate collection. 255 The borrower will recall the extortionate understanding that was present when the loan was made, and he will suffer the type of pressure that the collection law was intended to eradicate. 256

(ii) Implicit Threats. In United States v. Curcio, 257 the court struggled with the statutory language "implicit threat," which was under attack as unconstitutionally vague. 258 Declaring that Congress, in using this language, "simply incorporated well established federal decisional law of extortion into the Act," 259 the court concluded:

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. 260

254 Id. at 298.
255 Id.
256 See note 227 supra.
258 Id. at 356. The defendant claimed that the vagueness of this language rendered the provision void under the due process clause of the fifth amendment. Id.
259 Id.
260 Id. at 357 (citation omitted).
In recognition of the problems of proof that the language "implicit threat" presents, the statute provides for the introduction of evidence of the victim's knowledge of past extortionate collections by the defendant. When direct evidence of the actual belief of the debtor is not available and the prosecution meets certain other conditions, evidence of the defendant's reputation in any community of which the victim was a member is admissible. The court in United States v. Largent held that introduction of evidence under this provision is consistent with Federal Rule of Evidence 404. The court also stated, however, that to be admissible, the reputation evidence "must be substantially similar and near in time to the offense charged, must be in issue, and must have more probative value than prejudicial impact."

The minimum requirement for an implicit threat is that "the actor knows that his words or act ought reasonably to be taken as a threat." Proof of threats may come from testimony.

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262 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 the civil judicial process or that the annual rate of interest exceeds 45%.
263 See notes 454-55 and accompanying text supra.
265 Id. at 1043 (citations omitted). Federal Rule of Evidence 404 states:
   Evidence of prior conduct is not admissible to prove the character of a person or another crime, but rather is admissible to prove motive, opportunity, intent, preparation, plan, knowledge, identity or absence of mistake or accident.
266 Id. (citation omitted). Cf. United States v. Joines, 327 F. Supp. 253, 255-56 (D. Del. 1971) (court notes in dicta that Congress, in this provision, intended to broaden rules of evidence and by-pass some strict exclusionary rules); Pub. L. No. 90-321, § 201, 82 Stat. 146, 159 (1968) (congressional finding that "[a]mong the factors which have rendered past efforts at prosecution almost wholly ineffective has been the existence of exclusionary rules of evidence stricter than necessary for the protection of constitutional rights.").


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).

The DeStafano formulation requires that the defendant knew that he was making a threat, while the Curcio interpretation requires that he intended to instill fear. If a lender intends to place another in fear, however, surely he knows that his acts or statements are threats. If the "intent" standard is used, therefore, there is no need to instruct the jury concerning a "knowledge" requirement.
of the defendant's reputation for using violent collection tactics.\textsuperscript{268} As the court remarked in \textit{United States v. Spears},\textsuperscript{269} 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."\textsuperscript{270}

(iii) Explicit Threats. A court can find that a lender used explicit threats as a collection tactic even if the defendant actually intended no harm. In \textit{United States v. Sears},\textsuperscript{271} for example, the defendant approached the debtor and demanded repayment, saying "'[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.'"\textsuperscript{272} The defendant testified that he had intended his words to have a "'psychological' effect on [the debtor] which would induce him to repay the loan."\textsuperscript{273} He sought to escape conviction, however, by arguing that he never "owned a gun and ... [had] never intended to harm [the debtor]."\textsuperscript{274} The court upheld the trial judge's jury instruction that the issue was whether or not the defendant "intend[ed] to put [the debtor] in fear.... [or] use his language ... to force him to pay."\textsuperscript{275} The fact that he intended no harm was immaterial. "Fear must be the intended result of the defendant's act."\textsuperscript{276}

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.\textsuperscript{277} "[T]he silencing of a victim"\textsuperscript{278} by fear does not foreclose conviction.

(iv) Actual Use of Violence or Other Criminal Means. The collection statute includes in its definition of extortionate means the

\textsuperscript{268} See, e.g., \textit{United States v. Spears}, 568 F.2d 799, 801 (10th Cir.), \textit{cert. denied}, 439 U.S. 839 (1978) (testimony that defendants "'climbed on people,' frightening them about receiving their money"); \textit{United States v. Frazier}, 479 F.2d 983, 986 (2d Cir. 1973) (victims' testimony that they observed defendants administer beatings to other recalcitrant debtors).

\textsuperscript{269} 568 F.2d 799 (10th Cir.), \textit{cert. denied}, 439 U.S. 839 (1978).

\textsuperscript{270} Id. at 802.

\textsuperscript{271} 544 F.2d 585 (2d Cir. 1976).

\textsuperscript{272} Id. at 802.

\textsuperscript{273} Id. at 586.

\textsuperscript{274} Id. at 587.

\textsuperscript{275} Id.

\textsuperscript{276} Id.

\textsuperscript{277} Id. at 588.


\textsuperscript{278} Id. at 257.
"use . . . of violence." 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.

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 collection law differs from the ECT laws. At least one court has misread the statute and the decisions interpreting it to impose a fear result. The statute, in fact, neither mentions fear nor requires an inquiry into the victim's state of mind, except when evidence of the victim's knowledge of the defendant's past conduct is introduced to show that the defendant intended to threaten the victim. "[I]t is the threat of harm which is prohibited . . ., actual fear is not an element of the offense."  
d. State of Mind. The collection statute requires that the defendant have "knowingly participate[d] . . . in the use of any extortionate means." Courts have read this language as requiring an intent to "put [the victim] in fear" and not the actual intent to harm. The statute punishes only the knowing use of

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282 See notes 218-20 and accompanying text supra.
283 See United States v. Nace, 561 F.2d 763, 768 (9th Cir. 1977). The Nace 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).
284 See 18 U.S.C. § 894(b) (1976). See also note 438 and accompanying text infra.
288 See, e.g., United States v. Sears, 544 F.2d 585, 588 (2d Cir. 1976) ("[fear must be the intended result . . ."); United States v. Curcio, 310 F. Supp. 351, 357 (D. Conn. 1970) ("intent . . . to instill fear").

There seems to be at least semantic disagreement over the state-of-mind requirement imposed by § 894. While United States v. DeStefano, 429 F.2d 344, 347 (2d Cir. 1970), cert.
extortionate means\textsuperscript{289} and the only state-of-mind requirement in the usual case is the intent to instill fear. The knowing participation requirement, however, covers not only those who intend to induce fear, but also those who assist the other participants with knowledge of their designs.\textsuperscript{290}

C. Criminal Usury

1. Historical Development and Basic Principles

Despite the ancient heritage of usury proscriptions, criminal usury statutes lack common-law lineage.\textsuperscript{291} The earliest systematic legislative efforts to criminalize usurious lending in America were the small loan acts passed in the early twentieth century.\textsuperscript{292} Recently, however, states have supplemented or strengthened these statutes with specific criminal usury proscriptions. These laws responded to an obvious yet intransigent problem: “the creditor’s power over the necessitous to extort oppressive terms . . . .”\textsuperscript{293}

denied, 402 U.S. 972 (1971), seems to require no more than knowledge that acts will be reasonably read as threats, \textit{Curcio} specifically requires a specific intent to instill fear. See note 260 and accompanying text \textit{supra}. We see no practical distinction between these standards. If the provocateur knows that the listener will reasonably construe his actions as a threat, surely he intends to instill fear. We advise use of the “intent” formulation in framing instructions since “knowledge” of a “reasonable tendency” is a slippery concept, likely to confuse jurors. \textit{DeStefano} could be read as identifying a state-of-mind requirement in addition to the intent to instill fear, relating only to the conduct element of “threaten”—\textit{i.e.}, the defendant must know that he is threatening. But if a defendant intends to place another in fear, surely he knows that his acts are threats. Therefore, we see no need to instruct the jury on any separate state-of-mind requirement relating to this element of the crime. Indeed, the intent element renders the “reasonable tendency” conduct requirement virtually irrelevant as a practical matter because it is difficult to conceive of a situation in which one would intend to instill fear, undertake conduct to achieve that goal, but not engage in conduct with a tendency to instill fear. In light of this observation it seems that the “reasonable tendency” requirement serves no purpose save to complicate and lengthen jury instructions in these cases. These observations are not limited to § 894; they apply as well to traditional extortion statutes.

\textsuperscript{289} See note 267 and accompanying text \textit{supra}.

\textsuperscript{290} For a conspiracy prosecution, the jury need only find that “it was the intent of [the defendants] to use threats or actual violence . . . .” United States v. Nakaladski, 481 F.2d 289, 298 (5th Cir.), cert. denied, 414 U.S. 1064 (1973).

\textsuperscript{291} See Matlack Properties, Inc. v. Citizens & S. Nat’l Bank, 120 Fla. 77, 80, 162 So. 148, 150 (1935); Crisman v. Corbin, 169 Or. 332, 341, 128 P.2d 959, 962 (1942).

\textsuperscript{292} See \textit{supra} note 57, at 137; note 73 and accompanying text \textit{supra}.

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

2. Elements of the Offense

Although usury statutes vary and have caused confusion among courts, it is possible to generalize about the elements of the usury offense. The Florida Supreme Court summarized the typical elements 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; (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.

a. Conduct. Criminal usury statutes typically contain a two-fold conduct requirement: (1) making a loan and (2) charging, taking, agreeing to take, or receiving interest. Although at least one statute requires that a transaction meet a detailed definition of "extension of credit," most simply refer to a "loan or forbearance of any money or other property." Regardless of

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294 See, e.g., CAL. CIVIL CODE § 1916-3(b) (West Supp. 1979); FLA. STAT. ANN. § 687.071(3) (West Supp. 1979) (45% per annum interest); MASS. ANN. LAWS ch. 271, § 49(a) (Michie/Law. Co-op Supp. 1979); MICH. STAT. ANN. § 19.15(51) (1975); N.Y. PENAL LAW §§ 190.40 (second degree), 190.42 (first degree) (McKinney Supp. 1978-79).

295 See, e.g., CONN. GEN. STAT. §§ 37-4, 37-7 (1969); FLA. STAT. ANN. § 687.071(2) (West Supp. 1979) (25% per annum interest); GA. CODE ANN. §§ 57-117, 57-9901 (1977); HAW. REV. STAT. § 478-6 (1976); IOWA CODE § 535.6 (1979-80); MO. ANN. STAT. § 408.095 (Vernon 1979).

296 See, e.g., statutes cited in note 193 supra.

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


300 See FLA. STAT. ANN. § 687.071(1)(d) (West Supp. 1978).

the conduct they require, usury statutes do not usually reach sales transactions; if 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. The law is aware, however, of the many disguises usurious transactions may assume. As one court poetically stated, "[T]he concealment of the needle of usury in a haystack of subterfuge will not avail to prevent its pricking the body of the law into action." 303

By proscribing both "charging" or "agreeing to take" and "taking" or "receiving more than the legal rate of interest," 304 the typical usury statute reaches any usurious agreement whether or not the lender actually collects the interest or principal. As one court observed, "Clearly, the ordinary meaning of 'charge' [does not require] ... actual payment." 305 Acceleration clauses, however, are an exception to this rule; some states consider them usurious only if the lender actually receives the accelerated interest. 306 Although this interpretation may be just and, under

money, or forbearance to enforce the collection of any sum of money'); ILL. REV. STAT. ch. 38, § 39-1(a) (1975) ("a loan of money or other property or forbearance from the collection of such a loan"); MASS. ANN. LAWS ch. 271, § 49(a) (Michie/Law. Co-op Supp. 1979) ("a loan of money or other property").

See, e.g., Elder v. Doerr, 175 Neb. 483, 487-88, 122 N.W.2d 528, 532-33 (1963) (time sale not usurious, although difference between time price and cash price may exceed legal rate of interest), cert. dismissed, 377 U.S. 973 (1964); Levine v. Nolan Motors, Inc., 169 Misc. 1025, 1026, 8 N.Y.S.2d 311, 312-13 (Bronx County Sup. Ct. 1938) (credit sale where total price exceeded cash price by more than legal rate held nonusurious) (alternative holding).


See, e.g., COLO. REV. STAT. § 18-15-104(1) (1978) ("charges, takes, or receives"); CONN. GEN. STAT. § 37-4 (1969) ("charge, demand, accept or make any agreement to receive"); MASS. ANN. LAWS ch. 271, § 49(a) (Michie/Law. Co-op Supp. 1979) ("contracts for, charges, takes or recieves").


See, e.g., Armstrong v. Alliance Trust Co., 88 F.2d 449, 451-52 (5th Cir. 1937) (applying Mississippi law); Smith v. Western & S. Life Ins. Co., 87 F.2d 839, 841-42 (5th Cir. 1937) (applying Kansas law).

The Florida Supreme Court has fashioned a slightly different rule. Under its reasoning, an unexercised acceleration clause does not render the transaction usurious. But if the clause is exercised the loan becomes usurious even if the lender does not claim the entire amount of the unearned interest. If the amount of interest which the lender could have collected under the clause exceeds the legal rate, the mere exercise of the clause renders the transaction criminally usurious. Home Credit Co. v. Brown, 148 So. 2d 257, 260 (Fla. 1962).
some state formulations, comport with statutory language, in most cases the exception for acceleration clauses imposes an additional conduct requirement or disregards language sufficiently broad to cover such clauses.

b. Attendant Circumstances. The critical attendant circumstance under usury statutes is the designated interest ceiling. Prohibited interest levels vary greatly, ranging from six percent in Tennessee and twelve percent in Arizona to fifty percent in New Jersey. Some statutes exempt those authorized or permitted by law to charge what otherwise would be usurious interest rates.

c. Result. The typical usury statute requires no result. If the original agreement is usurious, repayment is unnecessary for conviction of the lender.

d. State of Mind. Because usury is "largely a matter of intent," its proof generally requires a determination of the lender's state of mind. In some states, the lender must intentionally charge interest which he knows is in excess of the legal rate. Florida courts will presume that a lender is acting in good faith, but will allow this presumption to be rebutted by evidence that the lender knew the rate of interest he charged was illegal. The

307 See, e.g., S.D. COMPIL. LAWS ANN. § 54-3-9 (1967) (requiring receipt as element of criminal usury).
308 See, e.g., HAW. REV. STAT. § 478-6 (1976) (anyone "who, by any method or device whatsoever, receives or arranges for the receipt of interest, increase, or profit at a greater rate than one per cent a month ... shall be guilty of usury") (emphasis added).
313 See notes 305-06 and accompanying text supra.
lender then must come forward with evidence of his good faith in order to defend against the charge of usury.\footnote{317} New Jersey courts do not investigate the lender's state of mind, thereby placing even less of a burden on the state. In \textit{State v. Tillem},\footnote{318} 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 loan sharking 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.\footnote{319}

This approach appears reasonable in light of New Jersey's high ceiling for interest rates (fifty percent)\footnote{320} and may have made sense in the particular fact situation facing the court. A strict-liability approach, however, will occasionally condemn "good faith" transactions between innocent parties, and thereby work unfair results.\footnote{321}

\section*{D. Other Loansharking Laws}

Several other statutory provisions are available to fight loansharking, although few have yet surfaced in reported decisions.

\section*{I. Laws Prohibiting Financing Extortionate Extensions of Credit}

Title II of the federal Consumer Credit Protection Act of 1968\footnote{322} contains a provision prohibiting the financing of extortionate extensions of credit (hereinafter, financing laws). Most states that have enacted provisions modeled on the federal ECT statute have also adopted financing laws.\footnote{323} A few states have

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\item \footnote{319} \textit{Id. at} 426, 317 A.2d at 741.
\item \footnote{320} \textit{Id. at} 423, 317 A.2d at 741.
\item \footnote{321} \textit{See} note 311 and accompanying text \textit{supra}.
\item \footnote{322} \textit{See}, e.g., Dixon v. Sharp, 276 So. 2d 817 (Fla. 1973) (borrower set interest rate on own initiative and rejected lender's advice to obtain legal counsel).
\item \footnote{323} 18 U.S.C. § 899 (1976).
\item \footnote{325} \textit{See}, e.g., \textit{ARIZ. REV. STAT. ANN.} § 13-2303 (1978); \textit{COLO. REV. STAT.} § 18-15-105 (1973).
\end{itemize}
\end{footnotesize}
enacted laws prohibiting both the financing of criminal usury and the financing of extortionate credit transactions.\textsuperscript{324} Most state financing provisions are similar to the federal statute, which reads:

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.\textsuperscript{325}

The goal of the financing laws is ambitious: "to make possible the prosecution of the upper levels of the criminal hierarchy."\textsuperscript{326} The legislators recognized the "immense practical difficulties which attend [this] effort"\textsuperscript{327} but, nonetheless, hoped that the law would be "a worthwhile weapon to add to the Government's arsenal."\textsuperscript{328} The legislative history highlights the potentially troublesome state-of-mind element of the crime:

To come within the prohibition of [the financing law], 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.\textsuperscript{329}

Proof of this element will surely prove difficult, especially in light of the high degree of insulation in the upper levels of the criminal hierarchy.

\textsuperscript{327} Id.
\textsuperscript{328} Id. at 30, reprinted in [1968] U.S. Code Cong. & Ad. News 2028.
\textsuperscript{329} Id. at 30, reprinted in [1968] U.S. Code Cong. & Ad. News at 2028 (emphasis in original).
2. Laws Prohibiting Receipt of Loansharking Proceeds

Pennsylvania alone prohibits the receipt of proceeds of extortionate extensions of credit, proceeds of collections of extensions of credit by extortionate means, and proceeds of criminal usury. Like financing provisions, this "receiving law" aims at the higher echelons of organized crime. The total absence of reported cases on the provision, however, suggests the ambitiousness of this task.

3. Laws Proscribing the Possession of Records of Loansharking Transactions

A few states have enacted laws prohibiting the possession of records of loans violating either the usury laws, the ECT laws, or both (hereinafter, possession laws). Florida's possession law is typical:

Books of account or other documents recording [usurious] extensions of credit 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, or conspire so to do, shall be guilty of a misdemeanor of the first degree.


Two other types of statutes are potentially useful in loan-sharking prosecutions: small loan laws and general racketeering laws. Most states have enacted small loan laws making it a misdemeanor either to engage in the small loan business without first obtaining a license or to charge more than a certain interest rate. At least one case involves the use of a small loan law in a

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331 Id. § 4806.8.
332 See text accompanying note 326 supra.
335 See note 737 infra.
loansharking prosecution.\textsuperscript{336} Especially in the many states that have no statutes aimed at extortionate or usurious credit transactions,\textsuperscript{337} the small loan laws could be more widely used in the prosecution of loansharks.

Another law which relates to loansharking activities is the federal Racketeer Influenced and Corrupt Organizations (RICO) statute.\textsuperscript{338} Although Congress designed RICO to control all facets of organized crime,\textsuperscript{339} Congress recognized that "organized crime derives a major portion of its power through money obtained from such illegal endeavors as ... loansharking."\textsuperscript{340} Some states have passed RICO laws patterned after this statute.\textsuperscript{341}

The federal RICO statute prohibits the use and investment of income derived "from a pattern of racketeering activity or through collection of an unlawful debt."\textsuperscript{342} It defines "racketeering activity" to include any act in violation of the ECT, financing, or collection laws.\textsuperscript{343} "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."\textsuperscript{344}

E. Extortion

1. Historical Development

At common law, the crime of extortion focused on official misbehavior, rather than private wrongdoing. "[A]ny officer's unlawful 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"\textsuperscript{345} constituted the common law misdemeanor of extortion.\textsuperscript{346} Common law courts extended the official-oriented
misdemeanor of extortion to fill loopholes in the law of larceny. Thus the term "extortion" today applies to private citizens as well as public officers and denotes a form of aggravated theft.

Robbery, the oldest form of aggravated theft, originally was limited to larceny by violence or threat of immediate violence to the victim.\textsuperscript{347} Robbery eventually encompassed two additional threats that could be used to force victims to surrender their property. First, some English cases held that the offense embraced a threat to destroy the victim’s home.\textsuperscript{348} Bishop thought that this was rational, since "one without habitation is exposed to the inclement elements; so that to deprive a man of his house is equivalent to inflicting personal injury upon him."\textsuperscript{349} Second, in 1776, the court in \textit{Rex v. Jones}\textsuperscript{350} held that threats to accuse a man of sodomy were sufficient to sustain a conviction for robbery.\textsuperscript{351} The fact that extortion embraced such threatened allegations confounded Bishop, who commented that the rule was an "excrecence on the law."\textsuperscript{352}

Paralleling these developments in the common law of robbery, several statutes passed during the reigns of George I and George II expanded the offense of extortion by punishing attempts to obtain money by sending letters threatening accusation of crimes.\textsuperscript{353} A later provision\textsuperscript{354} was held to apply to threats to expose a clergyman’s sexual activities to the church hierarchy and in the newspapers.\textsuperscript{355} These “blackmail” statutes did not, however, encompass verbal threats.\textsuperscript{356}

This curious mixture of threats to injure person or property, to accuse of a crime or to expose a shameful act, forms the core of modern extortion law. Modern statutes also proscribe threats to expose any secret tending to lower a person’s esteem in the com-

\textsuperscript{349} Id. at 649.
\textsuperscript{350} 1 Leach 139, 168 Eng. Rep. 171 (1776).
\textsuperscript{351} Id. at 142, 168 Eng. Rep. at 173; see 3 J. Stephen, \textit{History of the Criminal Law of England} 149 (1883).
\textsuperscript{352} 2 J. Bishop, \textit{supra} note 348, at 649.
\textsuperscript{353} See, e.g., 3 J. Stephen, \textit{supra} note 351, at 149-50 (listing statutes).
\textsuperscript{355} Rex v. Miard, 1 Cox Cr. Cas. 22 (1844); see 2 F. Wharton, \textit{supra} note 354, § 2006, at 2321.
\textsuperscript{356} 3 J. Stephen, \textit{supra} note 351, at 149.
munity or to impair his business reputation. In addition, threats of personal injury are not limited to the person of the victim, and some novel suggestions of harm have been recognized as extortionate. To paraphrase Stephen, the whole subject has been elaborated in a way shown by experience to be necessary.

2. Elements of the Offense

a. Conduct and Result. Extortion statutes fall into two major categories. A bare majority of jurisdictions require the appropriation of the victim’s property by the defendant. The minority proscribe the mere making of a threat with the intent to appropriate. Some of the majority also require that the defendant instill a fear that compels or induces delivery of property by the victim. A focus on fear can either expand or contract the scope of punishable conduct. It may expand it to embrace most conduct that in fact induces fear. Alternatively, it may contract the ambit of punishable behavior by “protecting” otherwise extortionate threats that fail to inspire fear. The latter

357 See, e.g., CAL. PENAL CODE § 519(4) (West 1970) (“any secret affecting him or them”); MO. ANN. STAT. § 570.010(4)(d), (e) (Vernon Supp. 1979) (“expose . . . to hatred, contempt or ridicule; or . . . harm the credit or business repute.”

358 See, e.g., NEB. REV. STAT. §§ 28-513(b), 28-513(f) (Supp. 1978) (expose to hatred; take action as public official; bring about strike or boycott; testify or refuse to testify); N.Y. PENAL LAW § 155.05(2)(e) (ii), (iii) (McKinney 1975) (“[c]ause damage to property; or . . . [e]ngage in other conduct constituting a crime”).


360 3 J. Stephen, supra note 351, at 150.


362 See, e.g., IOWA CODE ANN. § 711.4 (West Special Pamphlet 1978); LA. REV. STAT. ANN. § 14.66 (West 1974). See also Appendix B infra.

363 See, e.g., CONN. GEN. STAT. § 53a-119(5) (1979) (“by means of instilling . . . a fear”); DEL. CODE ANN. tit. 11, § 846 (1974) (“by means of instilling . . . a fear”); MISS. CODE ANN. § 97-3-77 (1973) (“through fear of some injury threatened to be inflicted . . . which fear shall have been produced by the threats of the person so receiving or taking such property”); N.Y. PENAL LAW § 155.05(2) (e) (McKinney 1975) (“by means of instilling . . . a fear”).


365 See, e.g., People v. Rollek, 280 A.D. 437, 439, 114 N.Y.S.2d 85, 86 (4th Dep’t 1952), aff’d, 304 N.Y. 905, 110 N.E.2d 734 (1953). Where the victim’s state of mind is an element
result excludes threats that fail to instill fear only because the victim is uncommonly steely-nerved or is cooperating with the authorities. In jurisdictions requiring fear, such transactions may, as a matter of law, constitute attempted extortion at most.\(^3\)\(^6\)\(^6\)

In jurisdictions proscribing threats accompanied only by the intent to appropriate, the victim's state of mind is immaterial.\(^3\)\(^6\)\(^7\) In addition, it may be that in such jurisdictions, "[t]he jury will not inquire into the 'probable force and power' of the threat . . . even though the threat is not of the type which will produce terror."\(^3\)\(^6\)\(^8\) This reasoning should also apply where appropriation is required but fear is not, at least when the defendant's threats result in delivery of the property.\(^3\)\(^7\)\(^0\)

Almost every statute enumerates discrete harms that must be threatened to give rise to the offense of extortion.\(^3\)\(^1\) Threats to injure person or property, to accuse of a crime, and to expose a secret injuring another's reputation are universally proscribed.\(^3\)\(^2\) Most jurisdictions go beyond these common law staples and approximate Model Penal Code § 223.4, which also prohibits threats to:

(d) take or withhold action as an official, or cause an official to take or withhold action; or
(e) 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
(f) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or

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 438 infra.\(^3\)\(^6\)\(^6\)

See id.; United States v. Quinn, 514 F.2d 1250, 1266-67 (5th Cir. 1975) (dictum), cert. denied, 424 U.S. 955 (1976).\(^3\)\(^6\) See, e.g., People v. Percin, 330 Mich. 94, 47 N.W.2d 29 (1951).\(^3\)\(^6\)\(^8\) Note, supra note 347, at 88. Under the decided cases, however, this approach seems to ignore the definition of "threat." See note 381 and accompanying text infra.\(^3\)\(^6\)\(^9\)

See, e.g., ALA. CODE § 13A-8-13 (1975); NEB. REV. STAT. § 28-513 (Supp. 1978).\(^3\)\(^7\)\(^0\) 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, for without the threat delivery would not have occurred.\(^3\)\(^7\)\(^1\) See, e.g., ARIZ. REV. STAT. ANN. § 13-1804 (1978); CONN. GEN. STAT. § 53a-119(5) (1979); DEL. CODE tit. 11, § 846 (1974). Exceptions include: ARK. STAT. ANN. §§ 41-2202-2203 (1977); COLO. REV. STAT. § 18-4-401 (1978); ME. REV. STAT. tit. 17A, § 355 (1978); N.C. GEN. STAT. § 14-118.4 (Supp. 1977).\(^3\)\(^7\)\(^2\) See Appendix B infra.
(g) inflict any other harm which would not benefit the ac-
tor.\textsuperscript{373}

The practice of enumerating specific harms springs from the be-
lief that a "law which included all threats made for the purpose of
obtaining property would embrace a large portion of accepted
economic bargaining."\textsuperscript{374} On the other hand, residual provisions
such as the Model Code's "any other harm" prohibition\textsuperscript{375} reflect
the futility of attempting to anticipate all condemnable forms of
threats.

The Model Penal Code and most extortion provisions ap-
proximating it recognize an affirmative defense based on threats
to accuse, to expose, or to take or withhold official action. The
defendant can raise this defense if he was honestly seeking the
property either as restitution or indemnification for the harm that
was the subject of his threatened accusation, exposition, or official
action, or as compensation for property or lawful services.\textsuperscript{376}

The threat is the core of any extortionate transaction. Proving
that the defendant threatened one of the enumerated harms
is frequently difficult, and determining whether the defendant's
words or acts were likely to intimidate the victim requires close
scrutiny of all relevant circumstances.\textsuperscript{377} Courts have shown a
willingness to search for implicit threats in apparently innocent
circumstances.\textsuperscript{378} For example, a Michigan court grappled with
the distinction between an "intelligible" and "unintelligible" threat
while reviewing the extortion conviction of an individual who,
during an assault trial involving a friend, told a female witness in
the assault trial that "[s]omebody needs to beat your butt; you
ain't going to stay in this courthouse forever . . . ."\textsuperscript{379} The
court affirmed the conviction.\textsuperscript{380} Under the federal statute,
threats may be inferred if the defendant's conduct would have induced fear in a reasonable person.  

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

Some jurisdictions in which threatening without appropriation satisfies the statute recognize that such threatening may be effectuated either orally or in writing. Several of the jurisdictions that include fear as an element of extortion limit violations to its "wrongful" use. In United States v. Enmons, random acts of violence punctuated an otherwise bona-fide labor dispute. In holding that "wrongful," as used in the federal Hobbs Act, modified the entire acquisitive scheme and not solely the use of fear, the Supreme Court limited the statute's reach to instances where the defendant had no lawful claim to the property obtained. "[T]he use of force to achieve legitimate collective-bargaining demands" is therefore not a federal offense.

381 See, e.g., United States v. Quinn, 514 F.2d 1250, 1266-67 (5th Cir. 1975), cert. denied, 424 U.S. 955 (1976). The same result took a different form in United States v. Rastelli, 551 F.2d 902, 905 (2d Cir.) (victim's fear must be both actual and reasonable), cert. denied, 434 U.S. 831 (1977).

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


389 Id. at 399-400.

390 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.
c. State of Mind. Extortion involves an intent to deprive another of his property. Precise statutory formulations vary. The broadest are found in laws punishing mere threats, and include the intent to compel another to act against his will.\textsuperscript{391} Some jurisdictions specify that the threat must be made “maliciously.”\textsuperscript{392} Others require that property be obtained “knowingly.”\textsuperscript{393} The state of mind requirement rarely necessitates a special inquiry since felonious intent is ordinarily inferred from the threat itself.\textsuperscript{394}

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.\textsuperscript{395}

3. Other Statutory Provisions

The basic extortion provisions may not exhaust a jurisdiction’s treatment of the illicit use of threats. In jurisdictions where extortion entails actual appropriation, unavailing threats may constitute blackmail\textsuperscript{396} or criminal coercion.\textsuperscript{397} Threatening with the intent to compel behavior, even if it is not extortion, may be punished as coercion\textsuperscript{398} or intimidation.\textsuperscript{399} Mere threatening, without any specific intent, is a crime in some jurisdictions; the


\textsuperscript{393} See, e.g., COLO. REV. STAT. § 18-4-401 (1978); ILL. REV. STAT. ch. 38, § 16-1 (1975); IND. CODE ANN. § 35-43-4-2 (Burns 1979).

\textsuperscript{394} See, e.g., United States v. Duhon, 565 F.2d 345, 351 (5th Cir.), cert. denied, 435 U.S. 952 (1978).


\textsuperscript{397} See, e.g., KY. REV. STAT. ANN. § 509.080 (Baldwin 1975).

\textsuperscript{398} 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).

\textsuperscript{399} See, e.g., MONT. CODE ANN. § 45-5-203 (1978).
offense is variously denominated as menacing,\textsuperscript{400} criminal threatening,\textsuperscript{401} or terroristic threatening.\textsuperscript{402} Conduct less severe than threatening may constitute harassment.\textsuperscript{403} Finally, an assortment of provisions punishes particular forms of intimidation; examples include procuring prostitutes by threats,\textsuperscript{404} sending threatening letters\textsuperscript{405} and telephoning threats.\textsuperscript{406}

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 alleged criminal transactions for the jury. 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.'"\textsuperscript{407} The court found this evidence, corroborated by another witness, sufficient for conviction.\textsuperscript{408}

Many jurisdictions require an objective showing that the defendant's conduct was threatening.\textsuperscript{409} 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."\textsuperscript{410} By establishing the degree of harm threatened, the direct evidence may demonstrate that the threat would "move" the "firm and prudent person."

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\textsuperscript{400} See, e.g., Ohio Rev. Code Ann. §§ 2903.21, 2903.22 (Page 1975).
\textsuperscript{403} See, e.g., N.Y. Penal Law § 240.25 (McKinney 1967).
\textsuperscript{404} See Miss. Code Ann. § 97-29-51 (1972).
\textsuperscript{408} Id.
The victim also provides the best evidence of his own fear when fear is an element of the crime. His state of mind testimony is obviously critical to the question of his actual fear, and his description of the threat is probative, although not necessarily determinative, on the issue of the reasonableness of his fear.

Similarly, in establishing an extortionate "understanding"—a modified version of "threat" and "fear"—the victim provides the best evidentiary source. The extortionate credit transaction laws apply the term "understanding" to the creditor (defendant) as well as the debtor (victim). As in proving the standard extortionate threat, the victim will often provide crucial testimony from which the jury may infer the existence of the parties' "understanding."

Where the prosecution is unable to prove these elements through direct evidence, it 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 uses implicit rather than explicit threats to induce
fear. Moreover, loanshark victims may be unable or unwilling to testify. The very fear which must be proved often silences key witnesses and threatens to sabotage the prosecution. In either situation, proof of criminal conduct requires heavy reliance on circumstantial 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.

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

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

\[417 \text{ "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).}

\[418 \text{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." Conference Report, supra note 194, at 29. See United States v. Fatico, 441 F. Supp. 1285, 1288 (E.D.N.Y 1977) ("We know, from cases we have tried, that fear of reprisal shuts off sources of vital evidence. Terror is particularly acute when cruel mobs ... are threatened [by prosecution].")}.

\[419 \text{People v. Thompson, 97 N.Y. 313, 318 (1884).}

\[420 \text{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[ping] 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. Therefore, courts have often viewed it unfavorably.⁴２¹ Cases of loansharking and extortion, however, reveal great judicial latitude in admitting character evidence.

C. Character Evidence

The Supreme Court in *Michelson v. United States* ⁴²² 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 prejudice 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.⁴²³

Courts admit character evidence, however, if it is "substantially relevant for some other purpose than to show a probability that [the defendant] committed the crime on trial because he is a man of criminal character." ⁴²⁴ If character evidence passes the

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⁴²¹ *McCormick's Handbook of the Law of Evidence* § 188, at 445 (2d ed. E. Cleary 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."

⁴²² 335 U.S. 469 (1948).

⁴²³ Id. at 475-76 (footnotes omitted). See also *Fed. R. Evid. 403*. ⁴²⁴ *McCormick*, supra note 421, § 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 character evidence can come in at all ...." ⁴²³ Id. § 186, at 443. See also *United States v. Park*, 421 U.S. 658, 677-78 (1975); *State v. Belisle*, 79 N.J. 444, 445, 111 A. 316, 317 (1920).
relevance test, the trial court must then balance probative value against prejudicial effect in determining admissibility.\(^4\) 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.\(^4\)

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 States v. Carbo*,\(^4\) a Ninth Circuit decision interpreting the Hobbs Act.\(^4\) In *Carbo*, a group of defendants tried to obtain managerial control over a welterweight boxer through extortionate demands on his manager.\(^4\) 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.\(^4\)

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,\(^4\) 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 inter-
vened with [the victims] knowing that his presence would instill fear in them and intending to manipulate this fear . . . .

. . . . 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. 432

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." 433 Admissibility is reasonable because if reputation evidence is not admissible the prosecution is precluded from establishing a material 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. 434

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. 435 While there appears to be ample eviden-

432 Id. at 740-41.
433 Id. at 741. The court held that this was a proper case for application of what has been termed the multiple admissibility doctrine:

When an evidentiary fact is offered for one purpose, and becomes admissible by satisfying all the rules applicable to it in that capacity, it is not inadmissible because it does not satisfy the rules applicable to it in some other capacity, and because the jury might improperly consider it in the latter capacity. This doctrine, although involving certain risks; is indispensable as a practical rule.

Id. at 741-42 (quoting 1 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 13, at 300 (3d ed. 1940) [hereinafter cited as WIGMORE]).

434 Id.
435 See quotation accompanying note 399 supra. The lower court also seems to have allowed the jury to infer the defendant's intent from reputation evidence. The jury instruction read:
tiary precedent for using prior acts evidence for this purpose, supra note 421, § 190(5), at 450. The law's emphasis on prior bad acts evidence, however, may not apply in the loansharking and extortion context, where special considerations suggest a close linkage between reputation and intent. See note 438 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.

438 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 is hardly self-evident and warrants closer scrutiny.
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.

Reputation evidence is often used to help establish the victim's state of mind—as proof of his fear and the reasonableness thereof. 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 need not show, however, a specific reputation for violence in connection with extortionate schemes.

b. Prior-Acts Evidence. The Second Circuit in United States v. Palmiotti also faced the peculiar evidentiary problems posed by the extortion case. In Palmiotti, the business agent of the Granite Cutters Union had demanded a payoff from a construction firm in return for overlooking union regulations requiring more workers on the job. 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

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440 An analogy can also be drawn to homicide cases in which the defendant pleads self-defense. Courts commonly admit evidence of the deceased's reputation for violence or dangerousness to show that the defendant reasonably believed that deadly force was necessary for his own protection. See State v. Miranda, 24 CRIM. L. REP. (BNA) 2008 (Conn. Sept. 12, 1979); 2 Wigmore, supra note 433, § 246, at 44; Annot., 1 A.L.R.3d 571 (1965). In a loansharking case, the government may similarly attempt to prove the reasonable tendency of all the circumstances to instill fear. In situations where conduct is equivocal, character emerges as a key factor. The analogy is useful, however, only inasmuch as it demonstrates relevancy. Prejudice to the defendant need not be considered in the homicide cases because it is not evidence of the defendant's reputation, but of the deceased's, that is introduced.


442 254 F.2d 491 (2d Cir. 1958).

443 Id. at 493-94.
what appellant said to him, it was certainly within their pro-
vince to infer that appellant intended [to commit extortion].

The court then ruled on the admissibility of the victim’s tes-
timony 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,” pointing out that the trial judge had in-
structed the jury that it “must not be considered by you as any
proof of the acts charged in this indictment.” Subsequent
cases have followed Palmiotti in admitting prior-acts evidence to
show fear and its reasonableness.

The prior acts offered as evidence need not be identical to
the acts feared. In Callanan v. United States, the Eighth Circuit
allowed the victim to testify that he knew the defendant was re-
sponsible for an assault on one of his employees; 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 equip-
ment. As similarity diminishes, however, so does relevancy,

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444 Id. at 495.
445 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 subsequent similar acts properly admitted to show defendant’s state of mind).
See also note 437 supra.
446 254 F.2d at 497.
448 See, e.g., Callanan v. United States, 223 F.2d 171, 177-78 (8th Cir.), cert. denied, 350

In Palmiotti, the prior bad act involved a shakedown nearly identical to the crime
charged in the indictment. The same defendant threatened the same witness. Obviously,
both parties knew of the prior act. More complex fact patterns may arise, however. If, for
example, the prosecution witness knew of a prior act of intimidation directed by the de-
fendant at a third party, that fact should be relevant to prove the witness’ fear and its
reasonableness. Whether the court should admit evidence of this knowledge to show the
defendant’s intent to instill fear is a more difficult question. When the defendant knows
that the alleged victim is aware of his prior extortive acts, intent is readily read into
equivocal conduct in the same manner as in cases in which the defendant capitalizes on his
vicious reputation. But if the prosecution cannot show that the defendant believed that the
victim knew of his previous bad acts, the conclusion that the defendant would have taken
precautions to avoid instilling fear if that were not his intent is less easily inferred.
449 Id.
450 Id. at 178.
451 Id. Courts are, however, more likely to admit prior acts evidence when of the same
type as the acts feared and not too remote in time. See, e.g., United States v. Quinn, 514
and courts therefore examine the degree of similarity in initially assessing relevancy and in striking the balance between probative value and prejudice.\textsuperscript{452}

2. **Statutory Authority for the Introduction of Character Evidence**

Legislatures as well as courts have recognized the reasonableness and importance of using character evidence to prove extortionate activity.\textsuperscript{453} The ECT laws,\textsuperscript{454} for instance, contain detailed provisions for the admissibility of reputation and prior-acts evidence.\textsuperscript{455}

The critical element of the ECT offense is the "understanding" that violence "could result" if repayment is not timely.\textsuperscript{456} The law provides two methods of 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"\textsuperscript{457} to collect or punish nonpayment.\textsuperscript{458} Second, if direct evidence of this sort is unavail-

\textsuperscript{452} See United States v. Beechum, 582 F.2d 898 (5th Cir. 1978).
\textsuperscript{453} Conference Report, supra note 194, at 29, quoted in note 418 supra.
\textsuperscript{454} See note 413 supra.
\textsuperscript{455} See, e.g., 18 U.S.C. §§ 892(b)-(c), 894(b)-(c) (1976).
\textsuperscript{457} 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."
\textsuperscript{458} 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 nonexclusive 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
   (A) in the jurisdiction within which the debtor, if a natural person, resides 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.
(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
able (as when the victim is dead or too frightened to testify) and certain other prerequisites are met,\textsuperscript{459} the court may "allow evidence to be introduced tending to show the [creditor's] reputation as to collection practices" to prove the "understanding" element.\textsuperscript{460} Neither method changes the elements of the crime; instead they help to illuminate the often subtle and complex criminal backdrop which the creditor exploits and to guide the court in its decision as to which inferences to allow.\textsuperscript{461}

\textsuperscript{459} Under the federal ECT law, the prosecution 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). 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. 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.

\textsuperscript{461} The ECT law language could be read as restricting the use of character evidence to certain limited situations where direct evidence of the actual belief of the debtor as to the creditor's collection practices is not available. See 18 U.S.C. § 892(c) (1976). Nonetheless, 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
These provisions withstood constitutional challenge in *United States v. Bowdach*, where the defendant "contend[ed] that the introduction of reputation evidence [was] so prejudicial that it de-priv[e]d him of Due Process of law as guaranteed by the Fifth Amendment." 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 reputa-
tion evidence under certain circumstances, due to the reluctance of loansharking victims to testify; otherwise, it might be virtually impossible to demonstrate the victim's state of mind toward the transaction.

. . . . [W]here such evidence is admitted [only to show the victim's state of mind], the Constitution is satisfied.

In a similar constitutional challenge to the evidentiary provi-
sions of an ECT companion provision, another federal court spoke even more broadly:

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 ques-
tion merely represent a codification of these principles.

By linking the ECT evidentiary provisions to the *Carbo* hold-
ing, the court moved toward an important goal: the liberal em-
ployment of character evidence in all prosecutions involving threats, fear, or an extortionate understanding.

evidence admitted despite direct testimony of debtor's actual belief as to creditor's collection practices), *cert. denied*, 409 U.S. 986 (1972). This approach appears unobjectionable, assuming the evidence is otherwise admissible under the rules of evidence. See note 425 and accompanying text supra.


463 *Id.* at 226.

464 *Id.* at 226-27 (footnotes omitted).


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

A. The Duty to Report

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," 467 has long embodied the call to "accuse every offender, and to proclaim every offense." 468 At common law, if an 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." 469 Although modern jurisdictions criminally punish only the failure to report treason, 470 courts still recognize the moral obligation of citizens to advise authorities of criminal wrongdoing. 471 The legal duty of every citizen to testify when called upon to do so complements this moral duty. The Supreme Court has endorsed Lord Chancellor Hardwicke's "pithy phrase" that "[t]he public has a right to every man's evidence." 472 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 his family. 473

Notwithstanding these lofty ideals, violence, threats of violence, 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 retaliation, potential informants and witnesses may refuse to volunteer information or otherwise cooperate in law enforcement efforts. Intervening intimidation may silence citizens

467 1 J. Bishop, supra note 348, ¶ 717, at 396.
469 1 J. Bishop, supra note 348, ¶ 720, at 397.
473 Id.
who initially supply information, or result in would-be prosecution witnesses "turning" in favor of the defendant at trial.474

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 loan-sharking and extortion, magnify this effect.475

Pressures upon informants and witnesses are hardly chimerical. Coupled with actual threats communicated in specific instances is the aura of fear born of past mobster reprisals for cooperation with law enforcement agents. Horror stories are numerous. Informants and witnesses have been discovered in rivers wearing "concrete boots," 476 while the bodies of others have

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474 The victims of organized criminal activity usually do not testify either because the crime is consensual, as I suggested above, or because they fear for their lives.

I have had to face this problem directly during my years as a United States Attorney in Maryland. Victims did not testify then, they did not testify when my predecessor held office, and they do not testify today, for those reasons. The addict will not turn in his pusher, because he relies on that criminal for a "fix." The victim of extortion, already forced by fear to pay, will not then risk his life.

Insiders are kept quiet by an ideology of silence, underwritten by a completely realistic fear that death comes to those who talk—often not mere death, but death by torture.

Photographs of some of those grisly crimes have been shown to loan shark victims to secure repayment of their debts. Can people such as these victims really be expected to step forward to testify?

Unimplicated witnesses have been, and are now, regularly bribed, threatened, or murdered. Scores of cases have been lost because key witnesses turned up in rivers in concrete boots. Victims have been crushed—James Bond like—along with their automobiles by hydraulic machines in syndicate-owned junkyards.

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475 "This also explained why almost all the charges ever brought against him, even in the beginning, were dismissed. No witnesses. Once people got to know that careless talk was liable to bring Joe Gallo around to remonstrate and maybe make his point with an ice pick, witnesses in Brooklyn became as scarce as woodpeckers." JOEY, supra note 91, at 34.

476 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 Att'y Gen. Nicholas deB. Katzenbach) [hereinafter cited as Invasions of Privacy Hearings]. See also SMALL BUSINESS REPORT, supra note 120, at 67:

Mr. Doe testified in graphic detail of the method of collection used by his creditors: "Around September of 1965, I went to his home and told him this thing should be paid up now. He said, 'What do you mean, paid up? You have rocks in your head. You will be paying this thing for the rest of your life. And
been deposited in automobile junkyards to be crushed by hydraulic compactors.\textsuperscript{477} After hanging one suspect informant from a butcher's hook, mobsters tortured him, and left him to die three days later.\textsuperscript{478}

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.\textsuperscript{479} 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 what you gotta do. That will serve notice to every fucking rat stool pigeon what's gonna happen when and if he finks.\textsuperscript{480}

Former 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."\textsuperscript{481}

The law has responded to these harsh realities through a cluster of interrelated rules. 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 deserving citizens while supporting effective law enforcement.

\textsuperscript{477} N.Y. Times, Jan. 21, 1967, at 64, col. 2.
\textsuperscript{480} Intercepted conversations between Michael Scandifia and Petey "Pumps" Ferrara, Scandifia and Larry Pistone, March 1963, Brooklyn, N.Y. (on file with Cornell Institute on Organized Crime).
\textsuperscript{481} Invasions of Privacy Hearings, supra note 476, at 1158.
B. The Duty to Protect

A humane society can neither capitulate to its criminal element 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 born 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.

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, additional 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, the initial and leading case on the duty to protect, the plaintiff's intestate 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, 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. Police officers asked the plaintiff to identify four men who had 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, the plaintiff, a regular, paid informant for the Alcohol Tax Unit of the Internal Revenue Service, was scheduled to testify before a grand jury investigating an illicit whiskey operation. When Swanner learned of a threat on his life, 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 damage action against the government for failing to discharge its duty to protect. Many other reported decisions recognize the existence of such a duty to protect witnesses and informants in dicta.

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. Courts, however, have carved out exceptions to this rule when the defendant stands in a "special relationship" to the foreseeable victim of harmful conduct. The causes of action 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. 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.

488 Before a citizen may sue any governmental unit, he must determine if the government has waived its defense of sovereign immunity and exposed itself to liability for the tortious acts of its employees. The United States is amenable to most such suits by virtue of the Federal Torts Claims Act, 28 U.S.C. §§ 2671-80 (1976). The states have consented to suit in varying degrees. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 131, 975 (4th ed. 1971).
489 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 or prosecution of criminals. 5 N.Y.2d at 80, 154 N.E.2d at 537, 180 N.Y.S.2d at 269. 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
The duty to protect matures when it “reasonably appears” that an individual's cooperation with authorities places him in danger.\textsuperscript{490} The endangered person need not formally request protection;\textsuperscript{491} it suffices that the government is aware of facts warranting a reasonable inference of danger.\textsuperscript{492} 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.\textsuperscript{493} 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.\textsuperscript{494}

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, authorities may invite potentially staggering liability by dismissing a witness's fears, even where there is no clear indication of danger. Confirming fears out of cautiousness, however, 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 "reasonable" care to protect the person or persons endangered,\textsuperscript{495} 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.

490 Schuster v. City of New York, 5 N.Y.2d at 81, 154 N.E.2d at 537, 180 N.Y.S.2d at 269.


492 Id.

493 71 Ill. App. 2d at 380, 219 N.E.2d at 150.

494 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 502 infra.

495 Schuster v. City of New York, 5 N.Y.2d at 80, 154 N.E.2d at 537, 180 N.Y.S.2d at 269; Swanner v. United States, 309 F. Supp. at 1187.
including members of the informant's or witness's family.\footnote{Swanner v. United States, 309 F. Supp. at 1187.} In determining the reasonableness of precautions taken, courts should look 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.\footnote{Comment, Municipality Liable for Negligent Failure to Protect Informer: The Schuster Case, 59 Colum. L. Rev. 487, 503 (1959).}

4. Practical Considerations

The decision in Schuster immediately engendered predictions of dire financial consequences; skeptics predicted frequent and substantial court awards\footnote{See Schuster v. City of New York, 5 N.Y.2d at 80, 154 N.E.2d at 537, 180 N.Y.S.2d at 269 (noting such predictions). See also Massengill v. Yuma County, 104 Ariz. 518, 523, 456 P.2d 376, 381 (1969).} and burdensome outlays in providing protection.\footnote{Schuster v. City of New York, 5 N.Y.2d at 94, 154 N.E.2d at 545, 180 N.Y.S.2d at 280 (dissenting opinion, Conway, C.J.).} For various reasons, these consequences have not materialized. First, the law does not mandate protection until it reasonably appears that the informant or witness is in danger. This requirement normally obviates 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.

The effectiveness of witness relocation programs constitutes a final, and perhaps the most significant, reason for the generally moderate cost of protection.\footnote{See generally F. Graham, The Alias Program (1977).} 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 program relocates approximately five hundred persons annually.\footnote{Speech by Gerald Shur, Cornell Institute on Organized Crime, Summer 1976 (recording on file with Cornell Institute on Organized Crime).} In 1976 the program's director asserted that to his knowledge, no one in the program had ever been killed because of his or her cooperation with government authorities.\footnote{See id. at 48.}
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, the finder of fact will be viewing the government's actions with 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 that the leader of the whiskey ring was in Tennessee, at the site of the still. Authorities had no apparent reason to believe that any ring members were in the Montgomery area. Moreover, Swanner learned of the threat solely through hearsay.

The distorting effects of hindsight also appeared in a recent New York case in which a former boyfriend threatened and subsequently killed his lover and her husband. The appellate division reversed the trial court's dismissal of the wrongful death complaint, even though the police warned the victims of the threat, advised them to take precautions, and maintained a patrol in the vicinity of the victims' home.

C. Nondisclosure of Witness Identities

Modern commentators have advocated a system of liberal criminal discovery, including disclosure of prosecution witnesses, as a wise alternative to a sporting theory of justice. Timely identification of witnesses facilitates defense planning and pretrial investigation. Most importantly, it increases the defendant's ability

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503 Zibbon v. Town of Cheektowaga, 51 A.D.2d 448, 382 N.Y.S.2d 152 (4th Dep't 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. Although 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 nonnegligent 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) (concurring opinion, McNally, J.).

504 American Bar Associations standards recommend broad disclosure in criminal cases "to provide adequate information for informed pleas, expedite trials, minimize surprise, afford opportunity for effective cross-examination, and meet the requirements of due process." ABA STANDARDS, DISCOVERY AND PROCEDURE BEFORE TRIAL § 1.2 (Approved Draft, 1970). See also 1 C. Wright, FEDERAL PRACTICE AND PROCEDURE: CRIMINAL § 252, at 493 (1969) ("There is vast literature on the subject, and it is almost entirely favorable to broad criminal discovery.").
to prepare for cross-examination. Thus, it is maintained, disclosure goes far toward ensuring revelation of the truth at trial.\textsuperscript{505}

While this general thesis has much to recommend it, it is of limited validity 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 \textit{Brady v. Maryland},\textsuperscript{506} the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment."\textsuperscript{507} Although \textit{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.\textsuperscript{508}

The \textit{Brady}-based argument for witness disclosure rests on the practical effects of nondisclosure: absent knowledge of his accus-
ers' 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. Moreover, absent pretrial disclosure, prosecution witnesses will frequently surprise defense counsel, making it more difficult to challenge the prosecution's case. Similarly, without disclosure, the defense will lack the opportunity prior to trial to refresh the witness's memory, raise questions regarding the accuracy of his account, and thereby influence his direct testimony. Finally, nondisclosure precludes meeting with the witness while the events are freshest in his mind; a faltering memory might be averted by prompt prodding. Citing these factors, defense counsel have argued that nondisclosure violates the "fair trial" right recognized in Brady.

Despite this argument, the Supreme Court distinguished Brady from the typical witness-disclosure case in Weatherford v. Bursey. 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 absent in this context.

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 deprived him of due process. 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 prep-

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509 Cf. A. Amsterdam, Trial Manual for the Defense of Criminal Cases § 270, at 1-283 (3d ed. 1976) ("as any experienced trial lawyer knows, uninformed cross-examination is worse than no cross-examination at all").

510 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., Introduction to ABA Standards, Discovery and Procedure Before Trial (1969); cf. Fed. R. Civ. P. 26(b) (endorsing broad discovery in civil proceedings).


513 429 U.S. at 549.
aration,” at least when he “den[i]es up through the day before his appearance at trial that he will testify against the defendant,” and then “testif[i]es with devastating effect.” 514

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 ....' ... 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. 515

2. Judicial Discretion to Compel Disclosure

a. Sources of Discretion. Notwithstanding Supreme Court rejection of a constitutional mandate, courts recognize a general discretion to compel disclosure of witness identities even in the ab-

514 528 F.2d 483, 487 (4th Cir. 1975).
515 429 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 the defendant always will receive the opportunity to face and cross-examine the witness at trial, he may nonetheless argue that pretrial nondisclosure so seriously hinders effective cross-examination that it renders the confrontation clause a hollow guarantee. See note 509 supra.

Apparently no reported decision addresses the sixth amendment claim; but 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 claim. 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. Although 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), it 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 suggests that a right of confrontation claim would meet a similarly negative response, since those considerations necessarily underlie the “empty right” argument based on the sixth amendment.

This conclusion finds further support in the Supreme Court’s broad language in Weatherford: “There is no general constitutional right to discovery in a criminal case, and Brady did not create one ....” 429 U.S at 559. See also notes 661-64 and accompanying text infra (confrontation right normally not violated even in case of declarant absence where proffered statement falls within hearsay exception).
sence of an authorizing statute.\textsuperscript{516} Courts differ as to the source of this discretion. Some courts have cited the “inherent power” of courts.\textsuperscript{517} Others have analogized to Federal Rule of Criminal Procedure 16, which specifically allows criminal discovery in other situations.\textsuperscript{518} The most sensible source of judicial 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.\textsuperscript{519}


\textsuperscript{517} 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 government’s refusal to comply with pretrial order to identify witnesses).

\textsuperscript{518} See generally note 520 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 involved in 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 rule 16(a)(l)(C):

\begin{quote}
Upon request of the defendant the government shall permit the defendant to inspect and copy or photograph books, papers, documents \ldots 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 the trial \ldots \textsuperscript{(Emphasis added).}
\end{quote}

After noting the mandatory character of the provision, the court pointed to rule 16(d)(l), 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. Larson, 555 F.2d 673, 676 (8th Cir. 1977) (under rule 16, “[i]t 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) (“the discretion employed by the district court \ldots need [not] be limited to a defense showing of materiality and reasonableness”); United States v. Hearst, 412 F. Supp. 863, 867 (N.D. Cal. 1975) (“[Richter’s] continued validity is suspect.”).

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.” Nor does the rule specify when protective orders should issue, although 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.

\textsuperscript{519} See McCray v. Illinois, 386 U.S. 300, 309 (1967) (dictum) (Roviaro balancing test regarding disclosure of informant identities rests on courts’ supervisory powers); United
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.

States v. Richter, 488 F.2d 170, 173-74 (9th Cir. 1973) (district court empowered to effectuate “speedy and orderly administration of justice”).

An issue closely related to witness disclosure concerns whether an indictment alleging extortion or other loanshark-related crimes 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). Problems arise in at least two situations.

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. Because the prosecution's proof will not focus on the victim or include his testimony, specific identification of the alleged criminal act by time, place, and language used 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, 205-06 (S.D.N.Y. 1973) (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 conspiracy was charged and not substantive crime of extortion was crucial), aff'd, 492 F.2d 443 (2d Cir.), cert. denied, 417 U.S. 944 (1974).

Second, 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 the victim's identity uncertain. Such a situation might occur, for example, when a loanshark 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 525-26 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. Because of the prosecution's interest in protecting the would-be witness, the defendant may 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 unacceptable 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 by requiring disclosure only a short time before trial. See notes 544-46 and accompanying text infra.

Fifth, double jeopardy concerns may be minimized by careful delineation of facts in the indictment and liberal construction of the initial indictment in the event of a second prosecution.

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 541-43 and accompanying text infra.
On one side of the balance lies the defendant's interest in preparing his defense, an interest that arguably increases with the severity of possible punishment and the complexity of the underlying factual situation. Considerations of judicial convenience and expediency, as well as problems in effectively conducting voir dire, also support disclosure.

Against these benefits, however, courts must weigh the possible harms of pretrial identification. Intimidation or injury of

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 deal with the disclosure issue if identification is requested in a bill of particulars.

Eighth, existing authority supports this result. In 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). An arguably contrary case, United States v. Agone, 302 F. Supp. 1258, 1260 (S.D.N.Y. 1969), is 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. See also United States v. Simmons, 96 U.S. 360 (1878); Lauer v. United States, 320 F.2d 187 (7th Cir. 1963).

18 U.S.C. § 3432 (1976), for example, provides for mandatory disclosure of witnesses in capital cases. See note 544 supra. Courts might analogize to the statute in reasoning that the greater the severity of the possible sentence, the greater the need for disclosure.

See United States v. Jackson, 508 F.2d 1001, 1007 (7th Cir. 1975) (suggesting problem of juror who discovers relationship with witness after trial begins).


521 United States v. Tomasetta, 429 F.2d 978 (1st Cir. 1970) (mere failure to name victim "might not have" warranted dismissal of indictment). An arguably contrary case, United States v. Agone, 302 F. Supp. 1258, 1260 (S.D.N.Y. 1969), is 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. See also United States v. Simmons, 96 U.S. 360 (1878); Lauer v. United States, 320 F.2d 187 (7th Cir. 1963).


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Concern for the safety of the witness is especially strong where the witness is also an informant. In United States v. Pennick, 500 F.2d 184, 186 (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."
witnesses and subornation of perjury are recurrent dangers, especially in organized crime prosecutions. 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.

In *People v. Lopez*, the court delayed disclosure, citing the witnesses' actual fear inspired by knowledge of the defendant's past conduct; 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." Harassment of others associated with the case also militates against disclosure. In *United States v. Cannone*, the Second Circuit held that the district court erred in sustaining without meaningful explanation the defense's motion for pretrial discovery of witness names. The appellate court noted the indictment of several of the defendants for beating a grand jury witness as well as "the absence of specific evidence of the need for disclosure."

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—a source independent of the prosecutor—indicates probable cause to believe the defendant has engaged in violence. This independent source bolsters the prosecutor's assessment of the potential danger of reprisal for witness cooperation.

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527 United States v. Cannone, 528 F.2d 296, 301 (2d Cir. 1975); United States v. Percevault, 490 F.2d 126, 131 (2d Cir. 1974).
529 See United States v. Anderson, 481 F.2d 685, 693 (4th Cir. 1973) (defendants were powerfully placed officials in small county where witnesses lived).
531 *Id.* at 246, 384 P.2d at 29, 32 Cal. Rptr. at 437.
532 *Id.*
534 528 F.2d 296 (2d Cir. 1975).
535 *Id.* at 302.
536 *Id.* at 302 n.6.
537 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, 890 (1968) (character background of defendant and his counsel proper considerations in deciding whether to require disclosure of witness list to defendant).
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 protection. Although courts have yet to tie this doctrine to nondisclosure of witness identities, the duty to protect and witness nondisclosure interact in three important ways. First, nondisclosure is itself an effective means of providing protection; the defendant cannot injure a witness he cannot identify. Second, nondisclosure advances the important policies underlying the duty to protect: encouragement of cooperation, reciprocation for citizen service, and prevention of injury.

Finally, witness nondisclosure responds to 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. By refusing to order disclosure of witness names, courts can blunt this criticism. Nondisclosure eliminates the need for costly physical protection during the crucial pre-testimony period. 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 who 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. Several courts have focused on the defense's failure to seek a continuance in upholding convictions against wrongful nondisclosure attacks. Mid-trial continuances protect the defendant's right to

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, 1392 (5th Cir. 1974) ("Rebuttal witnesses are a recognized exception to all witness disclosure requirements."); Breedlove v. State, 295 So. 2d 654, 655 (Fla. Dist. Ct. App. 1975). But see People v. Manley, 19 Ill. App. 3d 365, 371, 311 N.E.2d 593, 598 (1974) (prosecutor must disclose rebuttal witness once he forms intent to call that witness).

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) ("[T]he 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 generally notes 468-503 and accompanying text supra; see also Comment, note 497 supra.

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.

confrontation without infringing upon his right to a speedy trial.\footnote{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. The defendant's resources may be drained and his associations curtailed; and he may be subjected to public obloquy which creates anxiety in his family, friends and the defendant himself. H. R. REP. No. 1508, 93rd Cong., 2d Sess. 15, reprinted in [1974] U.S. CODE CONG. & AD. NEWS 7401, 7408. These problems are almost entirely inapplicable to mid-trial continuances designed to facilitate the defendant's preparation for cross-examination. Concern with the defendant's inability to prepare evaporates; the very purpose of the continuance is to facilitate preparation. By restricting the duration of the mid-trial continuance, courts can avert undue prolongation of anxiety and incarceration, while minimizing inconvenience to the court and jury. But see United States v. Cannone, 528 F.2d 296, 301 (2d Cir. 1975) (rejecting continuances as full solution for harm done by nondisclosure); Howe v. Alaska, 589 P.2d 421, 424 (Alas. 1979) (continuance "an awkward and disruptive substitute for pre-trial discovery"). In arguing for nondisclosure, prosecutors might suggest a continuance to protect the defendant. On the other hand, prosecutors might fear that a continuance would 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 actual sequence of events, and infer, from coercion of the witness, commission of the crime charged.} The prosecutor willing to accept a continuance in return for witness nondisclosure\footnote{In arguing for nondisclosure, prosecutors might suggest a continuance to protect the defendant. On the other hand, prosecutors might fear that a continuance would 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 actual sequence of events, and infer, from coercion of the witness, commission of the crime charged.} 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 examination. The defense attorney usually 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. Counsel need not speculate; he can prepare for cross-examination with perfect knowledge of the precise points drawn out on direct. Thus, where the court grants a mid-trial continuance, the refusal of the 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 with the disclosure issue by statute or rule. 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.\textsuperscript{544} The rationale for limiting such provisions to capital offenses\textsuperscript{545} is not surprising—where capital punishment may be imposed, the defendant's need for access to witness identities outweighs the potential dangers accompanying disclosure.\textsuperscript{546}

A second type of statute provides for the exchange of witness lists between prosecution and defense.\textsuperscript{547} Such provisions in effect amount to conditional disclosure rules. In Wisconsin, for example, a defendant's discovery of prosecution witnesses is conditioned upon his tender to the prosecutor of a list of prospective defense witnesses.\textsuperscript{548}

\textsuperscript{544} For example, 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 venire-man and witness.


A distinctive feature of some provisions is that the prosecutor must disclose witness 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, at 260 (1974); Uniform Rules of Criminal Procedure 421(b)(3)(i) (1974). Invariably, these provisions leave the time of disclosure to the discretion of the trial judge.

\textsuperscript{545} United States v. Chase, 372 F.2d 453, 466 (4th Cir.) (disclosure required in only capital cases), cert. denied, 387 U.S. 907 (1967).

\textsuperscript{546} The federal statute does not provide for the issuance of protective orders allowing the criminal defendant to obtain information that may be necessary to his defense. The statute mandates disclosure with "no strings" attached.

\textsuperscript{547} Wis. Stat. Ann. § 971.23(3) (a) (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.

\textsuperscript{548} 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 witnesses."). But in Washington, the courts have required defendants to disclose within a
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. In short, application of protective order provisions entails the same balancing process employed in the absence of statutory guidelines.

f. Relation of Informant-Disclosure Balancing. With the growing sophistication of criminal activities and methods of avoiding apprehension, law enforcement agencies have grown increasingly dependent on informants to combat crime. As with witnesses, assorted policies favor nondisclosure of informant identities to a criminal defendant, and courts have recognized a limited prosecutorial privilege to refuse disclosure to encourage informants to assist the government.

The United States Supreme Court justified this approach in *Roviaro v. United States*:

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.

In short, nondisclosure keeps the flow of information regarding criminal activity open. Disclosure of an informant's identity may jeopardize the physical safety of both the informant and his family. The involvement of organized crime members amplifies

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*reasonable time* despite Wash. Rev. Code Ann. § 10.37.030 (1961), which provides that the defendant shall disclose witnesses within five days of receipt of the prosecutor's witness list. See State v. Adams, 144 Wash. 699, 257 P. 387 (1927); State v. Sickles, 144 Wash. 236, 257 P. 385 (1927).

549 See Wis. Stat. Ann § 971.23(6) (West 1971); cf. Fla. R. Crim. P. 3.220(h) (West 1975) (allowing issuance of protection order "upon a showing of cause"); N.J. Cr. R. 3:13-3(d) (showing of "good cause" required).

550 See notes 504-49 and accompanying text infra.


553 Id. at 59.
the danger of death or bodily harm. The court suggested the magnitude of this problem in *Harrington v. State*:554

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 in all instances.555

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 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 government must reveal the informant's identity.556

In *Rovario*, the Supreme Court outlined 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 informant's testimony, and other relevant factors.557

555 *Id.* at 497.
557 353 U.S. at 62. The circumstances that justified disclosure in *Rovario* included: (1) the defendant's opportunity to cross-examine the agents could not 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
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.\textsuperscript{558} In the final analysis, resolution of the disclosure issue rests within the discretion of the trial court. Only a clear abuse of discretion will result in reversal.\textsuperscript{559} Yet the courts have also identified various factors informing this discretion. These include: whether the informant participated in the criminal transaction,\textsuperscript{560} whether the informant witnessed the criminal


560 See, e.g., United States v. Martinez, 487 F.2d 973 (10th Cir. 1973) (where the informer introduced undercover agent to accused's co-defendant and was present when sale was consummated, court properly disclosed informer's identity); 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); Poutomene v. United States, 221 F.2d 582, 583-84 (5th Cir. 1955) (where sale of heroin was made to government informer, court erred in denying defendant's request for disclosure where the informant did not participate in the criminal transaction, and actively participated in the unlawful transaction); State v. Roundtree, 118 N.J. Super. 22, 30-32, 285 A.2d 564, 569 (App. Div. 1971) (disclosure required where, in the presence of an undercover agent, gave defendant $10 with which to purchase narcotics); People v. Simpson, 47 A.D.2d 665, 665, 364 N.Y.S.2d 198, 199-200 (2d Dep't 1975) (where informant accompanied police officer to defendant's apartment to purchase large quantities of marijuana, court erred in failing to order disclosure). See also *Encinas-Sierras v. United States*, 401 F.2d 228, 231 (9th Cir. 1968) (disclosure not required where informant was not present and took no part in the arrangement for illegal import of heroin); 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.").

In *State v. Robinson*, 89 N.M. 199, 549 P.2d 277 (1976), the New Mexico Supreme Court retreated from a per se approach in active participant cases. The court concluded:

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.
whether the identity of the crime's perpetrator is in issue,
and whether the defendant has claimed entrapment, and

Id. at 201, 549 P.2d at 279.

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. The court continued by distinguishing Roviaro:

In Roviaro, the Government's informer was the sole participant, other than the accused, in the transaction charged. The informant was the only witness in a position to amplify or contradict the testimony of the Government witnesses. In the case before us [the agent ... was the dominant moving party in the transactions, not the informant.

Id. The teaching of Robinson comports with Roviaro. An overeagerness to give determinative effect to the informant's active participation ignores the balancing approach mandated by Roviaro. Following Robinson, courts should consider all relevant factors in passing on the disclosure issue.


Generally, the prosecution need not disclose the identity of an informer who merely observed a criminal act. In Doe v. State, 262 So. 2d 11 (Fla. Dist. Ct. App. 1972), for example, the court ruled that disclosure of the informant's identity was not required where the informant witnessed the sale of heroin to an undercover agent but did nothing in advance to prepare for the sale. Id. at 15. See Commonwealth v. Swenson, 368 Mass. 268, 331 N.E.2d 893, 898-900 (1975) (no error in failure of trial judge to require disclosure of informant's identity where informant 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). 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.

See People v. Durazo, 52 Cal. 2d 354, 356, 340 P.2d 594, 596 (1959) (disclosure warranted where informant could possibly contradict government witness's identification of defendant); People v. Williams, 51 Cal. 2d 355, 359, 333 P.2d 19, 21 (1959) (disclosure required when identity material to defense); 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); Ricketts v. State, 305 So. 2d 296 (Fla. Dist. Ct. App. 1974) (disclosure mandated because nonparticipant informant only witness who could possibly contradict prosecution's evidence); Monseratte v. State, 232 So. 2d 444, 445 (Fla. Dist. Ct. App. 1970) (disclosure necessary to determine if appellant sold heroin to unnamed defendant); People v. Goggins, 34 N.Y.2d 163, 172-73, 313 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); 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 for short time and that agent spoke to several persons, including seller, at time of transaction).

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. Eddings, 478 F.2d 67 (6th Cir. 1973) (disclosure properly withheld where the defendant freely admitted purchasing non-tax-paid whiskey with the intent to subsequently sell it); 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
whether the informant "set the stage" for the crime. 564

Although the basic principle of balancing applied to informant disclosure cases clearly applies by analogy to witness disclosure, the policies implicated in the two situations markedly diverge. The defendant typically seeks informant disclosure in his search for exculpatory witnesses, while he seeks witness disclosure 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 witness disclosure normally involves only the case at hand. Two prosecutorial concerns, however, apply in both situations—danger of injury or death resulting from disclosure and the resulting detrimental effect on cooperation with law enforcement authorities. 565

564 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. Most courts deny disclosure despite these circumstances. See United States v. Russ, 362 F.2d 843 (2d Cir. 1966) (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). Some courts, however, have considered the "set up" as a factor favoring disclosure. 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). There, the Fifth Circuit stated:

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 this 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 aim of every trial, compelled its disclosure.

Courts should note these differences and similarities, so as to avoid applying inapposite principles. The defense’s interest in calling an informant who 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. A witness, by definition, will appear at trial, and 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 when the prosecution does not intend to transform the informant into a witness.

V

PROOF PROBLEMS POSED BY WITNESS FEAR—EVIDENTIAL
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, a frightened witness may refuse to testify, claim failure of memory, or spuriously invoke his fifth amendment rights. In other cases, a prospective witness, after initially providing information implicating the defendant, may completely reverse his story either at or prior to trial. The law does not look lightly upon these derelictions of duty. Subpoena authority, complemented by the contempt power, enables the prosecutor to insist that fearful witnesses testify, while sanctions for perjury increase the chance that they will testify truthfully.

Contempt citations and perjury indictments, however, are no panacea. Where a witness’s fear is substantial, he may continue in his reticence or fabrication notwithstanding the possibility of legal reprisals. When such sanctions are imposed on the victim-witness, they result in punishing the wrong party; the wrath of the state falls on the manipulated contemnor or perjurer, while the primary defendant goes free. These limitations of perjury and

566 “Attorney General Nicholas deB. Katzenbach testified in 1965 that, even after the cases had been developed, it was necessary to forego prosecution hundreds of times because key witnesses would not testify for fear of being murdered.” Measures Relating to Organized Crime: Hearings Before the Subcomm. on Criminal Law and Procedures of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 508 (1969) (statement of Sen. McClellan).
contempt, however, need not prove fatal to the prosecution's case. Many cases will present opportunities for the employment of other effective prosecutorial tools sufficient to bring a fear-inspiring defendant to justice.

Effective cross-examination, introduction of prior inconsistent statements, and use of extrinsic evidence to refresh recollection are among the available options. To use these tools, however, the prosecutor must first be able to put the recalcitrant witness on the stand. At least where a claim of self-incrimination is asserted, the prosecutor generally will be unable to do this. The law of evidence compensates for this problem, however; recognizing the increased need for evidence, 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, the only legitimate reason is to avoid subjecting himself to criminal penalties. The constitutional privilege cannot be invoked to protect another person or to avert reprisals. Courts, however, often hesitate to

567 While the major concern of this section is the frightened witness, the doctrines discussed are equally applicable to a witness who invokes the privilege against self-incrimination for reasons other than fear. Witnesses in the cited cases, therefore, include accomplices, codefendants, and victims. Similarly, while this section focuses on a witness who refuses to testify on fifth amendment grounds, policies relevant in the fifth amendment context usually apply to refusals to testify based on other reasons. We do not mean to oversimplify the issue. For example, the chain of inference created when a co-conspirator tacitly acknowledges guilt by pleading the fifth differs from the inferential sequence produced by an alleged victim openly refusing to take the stand. In both cases, however, the likely result is the same—prejudice to the defendant based on technically inadmissible "proof."

568 Hale v. Henkel, 201 U.S. 43, 66-67 (1905); Brown v. Walker, 161 U.S. 591, 597 (1895). See also In re Master Key, 507 F.2d 292, 293 (9th Cir. 1974) (possibility, not likelihood, of criminal prosecution required).

569 See State v. Abbott, 275 Or. 611, 616-17, 552 P.2d 238, 241 (1976); State v. Classen, 39 Or. App. 683, 694-95, 571 P.2d 427, 533 (1977), rev'd on other grounds, 285 Or. 221, 590 P.2d 1198 (1979). In Rogers v. United States, 340 U.S. 367 (1951), the Supreme Court held that as to "each question to which a claim of privilege is directed, the court must determine whether the answer to that particular question would subject the witness to a 'real danger' of further crimination." Id. at 374.

Various considerations impinge on a witness's ability to invoke the fifth amendment. For example, if a witness pleads guilty to a related charge, the privilege is not available as to questions concerning that crime. See, e.g., Namer v. United States, 373 U.S. 179, 182 (1963); Commonwealth v. Martin, 362 N.E.2d 507, 510-11 (Mass. 1977); State v. Kendrick, 538 P.2d 313, 314 (Utah 1975). The privilege may be invoked, however, as long as a
inquire into the prospective witness's motives or fail to require the witness to "justify his fear of incrimination." Even if the court decides that the invocation of the privilege is improper, the law normally prohibits the prosecution from putting on the stand any known recalcitrant witness.

1. Goals in Calling the Recalcitrant Witness

For several reasons, the prosecution may wish to call a witness 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 call the recalcitrant witness to avert the inference that the witness's testimony was damaging to his case, or to establish the witness's unavailability and bring special hearsay rules into play. Finally, the prosecutor may wish to call the recalcitrant witness to raise the improper inference from his silence that the defendant is guilty of the crime charged.


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 (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. One court has held that an instruction should be given where the prosecution uses the witness's absence against the defendant. See United States v. Maloney, 292 F.2d 535, 538 (2d Cir. 1969). Another placed discretion for an instruction's 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). Still others find an instruction insufficient to counter the prejudicial effect of calling such a witness. See, e.g., United States v. King, 461 F.2d 53, 57 n.4 (8th Cir. 1979).

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. As stated in People v. Brown, 26 N.Y.2d 88, 257 N.E.2d 16, 308 N.Y.S.2d 825 (1970):

Whether 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
2. The Prohibition Against Calling The Recalcitrant Witness

Courts generally look with disfavor on any attempt by the prosecutor 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.

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. See also Barber v. Page, 390 U.S. 719 (1968). Although the Brown 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," (26 N.Y.2d at 94, 257 N.E.2d at 19, 308 N.Y.S.2d at 829 (emphasis added)), the decision never specifically ruled on whether a simple declaration by the prosecutor or the witness's attorney suffices to establish unavailability. In 1976, 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.2d 808, 808, 380 N.Y.S.2d 267, 269 (2d Dep't 1976).

Holding an in camera hearing to determine the witness's unavailability probably would be a better procedure. This method establishes unavailability as effectively as calling the recalcitrant witness at trial, yet avoids the problems of prejudicing the defendant.

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 rule 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 ....

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 codefendant rather than the state seeks to utilize it.

State v. Smith, 74 Wash. 2d 744, 758-59, 446 P.2d 571, 581 (1968) (emphasis in original), vacated on other grounds, 408 U.S. 934 (1972). Accord, Bowles v. United States, 439 F.2d 536 (D.C. Cir. 1970), cert. denied, 401 U.S. 995 (1971); Commonwealth v. Greene, 445 Pa. 228, 285 A.2d 865 (1971). In a strong dissent, Justice Roberts in Commonwealth v. Greene stated, "This argument achieves an empty symmetry without significance." Id. at 233, 285 A.2d at 868. Chief Judge Bazelon, dissenting in Bowles v. United States, suggested that there was a lesser potential for abuse when such a witness was called by the defendant because of 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." 439 F.2d at 545 n.13.

Courts have adopted various approaches to determine whether reversible error resulted from the prosecution's calling a recalcitrant witness. The Supreme Court in Namet v. United States, 373 U.S. 179 (1963), suggested two tests, each relating directly to one of these justifications: the "conscious and flagrant attempt" test (id. at 186), concerned with deterring prosecutorial misconduct; and the "critical weight" test (id. at 187), focused di-
a. Prejudicial Effect. Whenever a witness invokes 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."\(^576\) Since the exercise by the witness of his fifth amendment rights is not evidence and therefore has no probative weight, any inferences drawn from it are improper.\(^577\) Furthermore, due to the "high courtroom drama"\(^578\) surrounding this kind of confrontation, a witness's assertion of his privilege against self-incrimination may "have a disproportionate impact on [the jury's] deliberations."\(^579\) 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

rectly on 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." \(\text{Id. at 186 (emphasis added)}\). 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 had a weak case and called the witness for the express purpose of raising the inference of the defendant's guilt probably made a "conscious and flagrant attempt" within the meaning of Namet.

The Namet court further stated that a defendant's sixth amendment right of confrontation was 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." \(\text{Id. at 187 (emphasis added).}\) In contrast to the subjective test established for prosecutor misconduct, the test for sixth amendment violations is objective, focusing on the amount of evidence the prosecution offered to the jury. It appears that when applying this standard, the court would look not to the prosecutor's intentions, but to the sufficiency of the evidence without the adverse inferences drawn from the witness's recalcitrance.

Although 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 type of error that may result from the use of a recalcitrant witness.

\(^{576}\) United States v. Maloney, 262 F.2d 535, 537 (2d Cir. 1959).

\(^{577}\) \text{Id.}\n

\(^{579}\) \text{Id.}\n
In DeGualdo v. People, 147 Colo. 426, 432, 364 P.2d 374, 378 (1961), the court went further and took judicial notice "that in the public mind an odium surrounds the claim of constitutional privilege by a witness in refusing to testify." \text{See also} 8 Wigmore, supra note 433, § 2272, at 426 ("[T]he layman's natural first suggestion would probably be that the resort to privilege in each instance is a clear confession of crime").
extortion victim expressly refuses to testify, the jury might attribute this reluctance to his fear of the defendant and conclude that a criminal threat did exist.

b. Protecting the Confrontation Right. In *Pointer v. Texas*, the Supreme Court emphasized the fundamental character of a defendant's right to confrontation:

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.

Since a recalcitrant witness's invocation of the fifth amendment is not considered testimony, the defendant has no right of cross-examination. By calling such a witness, therefore, the prosecution may effectively advance its case without allowing the defendant to rebut adverse inferences, undermine the witness's credibility, or elicit favorable testimony.

c. Deterrence of Prosecutorial Misconduct. In *United States v. Maloney*, 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." Some courts combine this notice concept with their concern for "fair play," and conclude that placing a known recalcitrant witness on the stand constitutes prosecutorial misconduct. The American Bar Association's Project on Standards for Criminal Justice concurs:

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.
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.

While the basic formula for reviewing convictions involving prosecutorial misconduct—the “conscious and flagrant attempt” test—focuses on the prosecutor’s motives for calling the witness, some courts have simply asked whether the prosecutor knew of the witness’s intention to “take the fifth.” There is a split of authority concerning 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. Some go further and place an affirmative duty upon the prosecutor to ascertain the witness’s intentions. One jurisdiction applies a negligence standard, basing the decisions on whether the prosecutor should have known that the witness would remain silent.

 Courts also disagree about the effect of prosecutorial misconduct. Some jurisdictions, stressing deterrence, hold that misconduct without more constitutes reversible error. Others maintain that misconduct alone does not suffice for reversal. In the latter jurisdictions, courts couple inquiries into the prosecutor’s good faith with an evaluation of the prejudicial effect of his conduct.

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Code of Professional Responsibility is apparently to 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 (1971).

588 See note 575 supra.


590 See, e.g., Burkley v. United States, 373 A.2d 878, 880 (D.C. 1977) (no misconduct where prosecutor did not know which questions witness would refuse to answer).


594 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, 541-42 (3d Cir. 1969) (prosecutor’s misconduct compounded by judge’s instructions emphasizing witness’s refusal to testify); Burkley v. United States, 373 A.2d 878, 882 (D.C. Ct. App. 1977) (prosecutorial misconduct, if committed at all, was harmless error); Mathis v. State, 469 S.W.2d 796, 804 (Tex. Crim. App. 1970) (calling witness without knowing what he would testify to constitutes harmless error).

595 See, e.g., DeGesualdo v. People, 147 Colo. 426, 430, 364 P.2d 374, 377 (1961) (good faith sufficient to overcome possible prejudice). Those courts that focus on the prejudicial
As an added deterrent measure, a defendant's failure to request a curative instruction concerning the evidentiary value of a witness's silence has been held not to constitute a waiver of a charge of prosecutorial misconduct. In such a case, the defendant receives "the benefit of the doubt as to whether or not the error could have been cured by an instruction." \footnote{Commonwealth v. DuVal, 453 Pa. 205, 217-18, 307 A.2d 229, 234-35 (1973) (good faith of prosecutor irrelevant to determination of prejudicial effect of testimony).}

These 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." \textit{Id.} at 513. \textit{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 of guilt was not "so overwhelming that the error could be deemed harmless beyond a reasonable doubt.").

Whatever standard of review is employed, all courts look essentially to four basic factors in determining if the error caused by calling the witness was sufficient to justify reversal. These are: (1) the type and number of questions asked, (2) the type of inference obtained from the witness's silence, (3) the amount of unprivileged testimony the witness gave, and (4) the sufficiency of the other evidence presented. \textit{See, e.g.}, Moynahan v. Manson, 419 F. Supp. 1139, 1149 (D. Conn. 1976), aff'd, 559 F.2d 1204 (2d Cir. 1977), cert. denied, 434 U.S. 939 (1978).

\footnote{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 integras, 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. \textit{Id.} at 538. Judge Hand's argument by analogy to the codefendant confession rule has been undermined by the Supreme Court's decision in Bruton v. United States, 391 U.S. 123 (1968). Moreover, a majority of cases have rejected the \textit{Maloney} view and held the curative instruction insufficient. \textit{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. Oregon, 435 U.S. 333 (1978), upheld the court's right to give a cautionary instruction regarding prosecutorial comments on the defendant's failure to testify on his own behalf, even over the defendant's objection. The Court held that "the giving of such an instruction . . . does not violate the privilege against compulsory self-incrimination guaranteed by the Fifth and Fourteenth Amendments." \textit{Id.} at 340-41 (footnote omitted).
3. The Recalcitrant Immunized Witness

If a witness initially refuses to testify and a subsequent grant of immunity results in the witness’s renewed willingness to speak, acceptance of his testimony is not error. Once the “initial silence [is] broken, 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.”  

Some witnesses, however, express an intention to remain silent even after a grant of immunity. Court decisions vary as to whether these witnesses may be called to testify. Many jurisdictions refuse to allow the prosecution to call even the immunized witness who expresses an intention not to talk. As the court stated in Commonwealth v. DuVal:  

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.  

Nevertheless, one recent decision, recognizing that these witnesses have “no privilege not to testify,” held that “it [was] proper for the jury to hear [the witness] assert a nonprivileged refusal to testify, whatever might be the inferences to be drawn from that refusal.”  

B. Admissibility of Out-of-Court Statements

When a fearful witness has made a statement implicating the defendant but later claims the self-incrimination right or otherwise refuses to testify, the prosecutor will normally seek to introduce the prior statement at trial. In such situations the hearsay rule and confrontation clause become the prosecutor’s principal obstacles. Exceptions riddle the hearsay rule, however, ensuring that statements that are especially trustworthy and especially

601 Id.
needed can be admitted. 602 And the Supreme Court has repeatedly recognized that actual confrontation at trial is not always necessary to satisfy the confrontation clause. Liberal hearsay exceptions designed to admit earlier statements made by an unavailable declarant are particularly useful in cases complicated by witness fear.

1. Exceptions to the Hearsay Rule Not Requiring Unavailability

Sometimes the prosecutor need not demonstrate the witness's unavailability to introduce hearsay evidence; rather, an exception under which the availability of the defendant is immaterial will provide a vehicle for introducing hearsay statements. 603 The prior statement, for example, may appear in an admissible business record 604 or constitute an admissible present sense impression 605 or excited utterance. 606 In a recent case 607 the Sixth Circuit admitted as a "recorded recollection" 608 a statement based on comments the witness made to the Secret Service shortly after an illegal check-cashing incident. At trial the witness apparently remembered the relevant events, but feigned forgetfulness to avoid implicating the defendant. The court admitted the hearsay on the grounds that the witness's "in-court testimony would be incomplete because of his insufficient recollection." 609 By refusing to look beyond the witness's allegation of memory failure to inquire whether the witness's memory had actually lapsed, the court averted a difficult subjective inquiry and avoided the anomalous result of having to exclude evidence because a witness falsely testified that his memory had faltered precisely to avoid presentation of the evidence. 610

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602 See McCormick, supra note 421, at 670.
603 See, e.g., Fed. R. Evid. 803.
604 See Fed. R. Evid. 803(6); McCormick, supra note 421, § 311, at 728-29 (unavailability requirement for business records "has for all practical purposes been abandoned").
605 See Fed. R. Evid. 803(1).
606 See Fed. R. Evid. 803(2); see generally McCormick, supra note 421, §§ 288-98.
608 Fed. R. Evid. 803(5).
610 Prior statements reduced to writing may also be used to refresh the witness's recollection. See Fed. R. Evid. 612; note 674, infra. Such use does not run afoul of the hearsay rule because the statement is not offered as evidence. Although the general rule allows all recorded statements, subject to the court's discretion, to be used to refresh recollection (see Annot., 82 A.L.R.2d 473, 597-602 (1962)), some courts have declined to follow the rule when the prior statement was not made at the time the event occurred, or while the event was still fresh in the witness's mind. See McCormick, supra note 421, § 9, at 16.
2. Unavailability-Based Hearsay Exceptions

Although hearsay exceptions not dependent on the declarant's unavailability sometimes come into play in cases involving fearful witnesses, utilization of unavailability-based exceptions is more important and more common. This is not surprising; the usual purpose and common effect of instilling fear is to render the potential witness, for all practical purposes, unavailable. In order to invoke unavailability-based hearsay exceptions, however, the government must make a good-faith effort to present the witness at trial.

Exceptions founded on declarant unavailability reflect the need to admit otherwise unobtainable evidence. Therefore, the court's inquiry logically should focus on whether the declarant's testimony, rather than his body, can be produced at trial. In federal courts and most state courts, a declarant is considered unavailable if he pleads the fifth amendment invokes some other privilege, or flees beyond the reach of process. A few states still condition admission of out-of-court statements upon physical unavailability, such as death, absence, or incapacity. Even in these jurisdictions, however, the traditional category of "mental incapacity" may encompass refusals to testify because of witness fear.

611 See generally Fed. Evid. 804.
612 Witnesses who are slain before trial also become "unavailable" for purposes of hearsay exceptions. See United States v. West, 574 F.2d 1131 (4th Cir. 1978).
614 Mason v. United States, 408 F.2d 903, 906 (10th Cir. 1969), cert. denied, 400 U.S. 993 (1971).
615 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 likelihood that declarant would have refused to testify on fifth amendment grounds).
616 Fed. R. Evid. 804(a)(1). See also Weinstein, supra note 460, § 804(a)(01), at 804-37 (exemption on grounds of privilege requires ruling of judge).
617 See 29 Rutgers L. Rev. 133 (1975).
618 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).
619 See People v. Rojas, 15 Cal. 3d 540, 551-52, 542 P.2d 229, 236, 125 Cal. Rptr. 357, 364 (1975) (fear is "mental infirmity" and witness who refuses to testify because of threats made against him is unavailable under Cal. Evid. Code § 240(a)(3)); McCormick, supra note 421, at 140.
In the fearful witness situation, the declarant will often claim a failure of memory or simply refuse to testify.\(^\text{620}\) Under the better rule, failure of memory constitutes unavailability,\(^\text{621}\) a notion comporting with the common-law concept of competence.\(^\text{622}\) Similarly, persistent refusal to testify in the face of court orders serves to establish unavailability in most jurisdictions.\(^\text{623}\) Again, common-law competency principles, as well as sound policy, support this view of unavailability.\(^\text{624}\)

a. Former Testimony. While most courts classify testimony given at a prior proceeding as hearsay even where the defendant actually cross-examined the witness,\(^\text{625}\) they admit many such statements under the "former testimony" exception when the declarant is unavailable.\(^\text{626}\) If the prior testimony was given under oath and the defendant had an adequate opportunity and incentive to cross-examine the witness, the statement is generally admissible irrespective of the character of the earlier proceeding.\(^\text{627}\) Courts sometimes require identity of parties and issues before applying the former testimony exception, but this is "merely a means of fulfilling the policy of securing an adequate opportunity of cross-examination by the party against whom testimony is now offered or by someone in like interest."\(^\text{628}\) The need to show an opportunity to cross-examine, however, bars admission of grand jury statements under the former testimony exception.\(^\text{629}\)

\(^\text{620}\) See People v. Rojas, 15 Cal. 3d 540, 542 P.2d 229, 125 Cal. Rptr. 357 (1975).

\(^\text{621}\) See Green v. California, 399 U.S. 149, 168 n.17 (1970); McCormick, supra note 421, § 253, at 611-12.

\(^\text{622}\) To be competent to testify, a witness must have perceived the relevant events and be able to recall and communicate concerning them at trial. See McCormick, supra note 421, § 62, at 140 ("witness's capacity to observe, remember, and recount"). Failure of memory thus renders the witness incompetent as to matters outside his recollection.

\(^\text{623}\) See United States v. Carlson, 547 F.2d 1346, 1354 (8th Cir. 1976) (refusal to testify despite grant of use immunity and a six-month contempt citation rendered witness unavailable), cert. denied, 431 U.S. 914 (1977); United States v. Garner, 574 F.2d 1141 (4th Cir.) (holding unavailable a witness who, granted use immunity and threatened with contempt, equivocated concerning willingness to answer), cert. denied, 439 U.S. 936 (1978); Fed. R. Evid. 804(a)(2).

\(^\text{624}\) A failure to testify can be viewed as a failure of the communication component of competence. See note 622 supra.

\(^\text{625}\) Weinstein, supra note 460, ¶ 804(b)(1)(01), at 804-49.

\(^\text{626}\) Fed. R. Evid. 804(b)(1).


\(^\text{628}\) McCormick, supra note 421, § 257, at 620.

\(^\text{629}\) The presence of certain guarantees of trustworthiness, however, may make grand jury testimony admissible under catch-all exceptions to the hearsay rule, such as Fed. R.
b. Statements Against Interest. The hearsay exception for statements against interest rests on the common-sense proposition that self-interest counsels against the making of statements subjecting oneself to criminal liability or pecuniary loss. Therefore such statements are vested with special reliability, on the assumption the declarant would not so jeopardize himself unless the statement was true. Statements against interest inculpating another, however, entail a danger of unreliability, because they may be made by a codefendant seeking immunity or wishing to plead guilty to a lesser crime. Courts have therefore taken special care to separate statements against interest from statements against others.


See e.g., Fed. R. Evid. 804(b)(3); McCormick, supra note 421, §§ 276-80.

Weinstein, supra note 460, § 804(b)(3)(01), at 804-77.


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 permeate the entire statement. As Wigmore states:

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 433, § 1465, at 339 (emphasis in original). 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 cocriminals 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.
Although some states admit only statements against the declarant's pecuniary interest, most jurisdictions follow the better rule in admitting declarations against penal interest as well.634 Since

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this exception requires that the statement subject the declarant to criminal liability, it is inapplicable where the declarant has already been convicted or has received immunity.\footnote{United States v. Gonzalez, 559 F.2d 1271, 1273 (5th Cir. 1977).}

c. The "Catch-All" Exception. Under the federal rules, a statement inadmissible under the forgoing enumerated exceptions may still be admissible under a "catch-all" exception. This alternative is of extreme importance in securing admission of many types of statements, especially prior grand jury testimony.\footnote{See notes 669-70 and accompanying text infra.} The catch-all exception is circumscribed, however; a statement falls within its sweep only if it satisfies five requirements.\footnote{FED. R. EvID. 804(b)(5) (applicable where declarant is unavailable). But see S. Rep. No. 93-1277, 93d Cong., 2d Sess. 20, 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 accomplished by legislative action."). Although a general residual provision phrased in the same terms as the unavailability-based catch-all appears in FED. R. EvID. 803(24), reported cases applying the residual exception have generally involved only an unavailable declarant. For cases satisfying the reliability requirement, see United States v. Rogers, 549 F.2d 491, 501 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977); United States v. Leslie, 542 F.2d 285, 291 (5th Cir. 1976); United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977); United States v. Insana, 423 F.2d 1165, 1170 (2d Cir.), cert. denied, 400 U.S. 841 (1970); Crawford v. State, 282 Md. 210, 222, 383 A.2d 1097, 1103-04 (1978). \textit{But see} United States v. Iaconetti, 540 F.2d 574, 578 (2d Cir. 1976), cert. denied, 429 U.S. 1041 (1977); United States v. Insana, 423 F.2d 1165, 1170 (2d Cir.), cert. denied, 400 U.S. 841 (1970); Crawford v. State, 282 Md. 210, 222, 383 A.2d 1097, 1103-04 (1978). But see United States v. Oates, 560 F.2d 45, 81 (2d Cir. 1977); United States v. Fiore, 443 F.2d 112 (2d Cir. 1971), cert. denied, 410 U.S. 984 (1973).} 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 prosecution for perjury; (2) the witness testified to matters of first-hand knowledge; and (3) the witness never retracted or indi-
cated reservations about his testimony. In another fearful-witness case, 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) the threat of prosecution for perjury did not guarantee reliability because the prosecutor threatened to call the witness before successive grand juries where he would face an unlimited number of contempt charges if he remained silent; and (5) the witness did not support his testimony with any detailed facts concerning the defendant. Furthermore, unlike Carlson, the defendant never directly threatened the witness. These cases point up the fact-bound character of catch-all exception determinations, as well as the care with which courts explore indications of reliability.

Second, the government must offer the statement as evidence of a material fact. This requirement wisely ensures that courts do not apply the catch-all exception to "trivial or collateral matters." In practice, however, it would seem that this requirement does little more than restate the basic rule of relevance. For example, the government satisfied this requirement in Carlson by offering the declarant's statement to show "intent, knowledge, a common plan or scheme and the absence of mistake or accident."
Third, the statement must be the most probative evidence reasonably available on the point for which the government seeks support.\textsuperscript{650} The meaning of this requirement remains unclear; one court found it satisfied by a showing that the testimony in question is necessary to the government's case.\textsuperscript{651}

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.\textsuperscript{652} Notice allows the defendant to prepare an objection to the statement's admission; but again this requirement has been watered down.\textsuperscript{653} Finally, admission of the statement must comport with the purposes of the rules and the interests of justice.\textsuperscript{654} This sweeping requirement merely restates rule 102,\textsuperscript{655} and should rarely bar admission if the other four tests are met.

Only the Federal Rules and a small number of state statutes or rules provide for admission of hearsay statements under a catch-all provision.\textsuperscript{656} There is, however, also common-law authority recognizing such a residual exception.\textsuperscript{657}

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 confronta-

\textsuperscript{650} \textit{Fed. R. Evid.} 803(24)(B), 804(b)(5)(B).

\textsuperscript{651} United States v. Carlson, 547 F.2d at 1355.

\textsuperscript{652} \textit{Fed. R. Evid.} 803(24), 804(b)(5).

\textsuperscript{653} \textit{H. Conf. Rep. No. 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 need for out-of-court statement did not arise until after start of trial the court admitted the evidence, noting both impracticability of giving notice before trial and defendant's failure to request 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, 73 n.30 (2d Cir. 1977) ("[t]here is absolutely no doubt that Congress intended that the requirement of advance notice be rigidly enforced").

\textsuperscript{654} \textit{Fed. R. Evid.} 803(24)(C), 804(b)(5)(C).

\textsuperscript{655} "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." \textit{Fed. R. Evid.} 102.


\textsuperscript{657} \textit{See Dallas County v. Commercial Union Assurance Co., 286 F.2d 388, 396-97 (5th Cir. 1961).}
tion clause requirements, as well as subconstitutional evidentiary principles governing the scope of the hearsay rule. The constitutional requirements are easily met in the case of an available witness since, by definition, an available witness can be called and cross-examined at trial.

Although a more serious confrontation problem arises when the court invokes an unavailability-based exception to admit hearsay evidence, admission of such statements when made by a declarant afraid to testify at trial will often survive sixth amendment challenge. The confrontation clause does not necessarily require actual confrontation. Even in the absence of the ability to cross-examine, the right of confrontation may be satisfied if the proffered statement bears equivalent guarantees of trustworthiness. Because all hearsay exceptions are based on peculiar indices of trustworthiness that accompany certain forms of utterances, application of a hearsay exception to admit statements of a declarant unavailable for confrontation rarely violates the confrontation clause.

In California v. Green the Supreme Court mandated an examination of circumstantial "indicia of 'reliability'" in applying the confrontation clause to admission of out-of-court state-

658 "In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him." U.S. Const. amend. VI.
659 The Supreme Court recognizes that the two requirements overlap, but has consistently refused to find them coterminous. Dutton v. Evans, 400 U.S. 74, 86 (1970); California v. Green, 399 U.S. 149, 155-56 (1970) (confrontation clause may be violated by admission of testimony that meets all evidentiary requirements); see also United States v. Yates, 524 F.2d 1282, 1285-86 (D.C. Cir. 1975).
664 United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965) ("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). There has been a recent flurry of scholarly efforts to treat the interface of hearsay exceptions and the confrontation clause. The long list of articles and comments is collected in the most recent contribution addressing the topic: Western, The Future of Confrontation, 77 Mich. L. Rev. 1185 (1979). An article with greater emphasis on the problems identified in this Article is Graham, The Confrontation Clause, the Hearsay Rule, and the Forgetful Witness, 50 Texas L. Rev. 151 (1978). See also Younger, Confrontation and Hearsay: A Look Backward, A Peek Forward, 1 Hofstra L. Rev. 32 (1975).
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 during the preliminary examination, confrontation clause requirements were met. The Court noted, however, that even in the case of an unavailable witness and no opportunity to cross-examine, hearsay may satisfy the constitutional requirements provided it is marked by sufficient "indicia of 'reliability'"—an observation borne out in *Dutton v. Evans*.

Grand jury testimony has been held constitutionally admissible under the test of *Green*; since the grand jury witness testifies under oath and is subject to prosecution for perjury, "indicia of reliability" are invariably present.

b. *Waiver of the Confrontation Right.* The confrontation right, a personal privilege intended for the benefit of the accused, may be waived. Waiver can occur in numerous ways: by voluntary and express relinquishment; by stipulation to the admission of evidence; or by a guilty plea. Waiver may also arise out of the

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666 Id. at 161-62. For cases satisfying the reliability requirement see note 640, supra. See also United States v. Fiore, 443 F.2d 112, 115 (2d Cir. 1971) (oath is required for admission of all testimonial statements); United States v. Allen, 409 F.2d 611, 619-14 (10th Cir. 1969) ("demeanor evidence is not an essential ingredient of the confrontation privilege"); Crawford v. State, 282 Md. 210, 383 A.2d 1097 (1978) (cross-examination at preliminary hearing, though not as extensive as it would have been at trial, was adequate for purposes of confrontation clause where witness was unavailable at trial). But see Ohio v. Roberts, 55 Ohio St.2d 191, 378 N.E.2d 492 (1978) (requiring actual cross-examination to render preliminary examination testimony admissible), cert. granted, 441 U.S. 904 (1979). There are limitations on the defendant's right to cross-examine adverse witnesses. Chambers v. Mississippi, 410 U.S. 284, 295 (1973) ("The 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").

667 399 U.S. at 161-62.

668 400 U.S. 74 (1971).

669 On use of hearsay exceptions to introduce grand jury testimony, see note 629 and accompanying text supra.


671 United States v. Carlson, 547 F.2d at 1357.

672 Brookhart v. Janis, 384 U.S. 1, 4 (1966). As a general rule, a waiver is only valid if there is "an intentional relinquishment or abandonment of a known right or privilege" by the accused. Johnson v. Zerbst, 304 U.S. 458, 464 (1938).


defendant's misconduct, such as intimidation of the declarant.\textsuperscript{675} The court need not expressly advise a defendant of his confrontation right prior to waiver; the issue in every case is whether he forfeited that right personally.\textsuperscript{676} A waiver made by defendant's lawyer, for example, will constitute a forfeiture of the confrontation right if the defendant acquiesces.\textsuperscript{677}

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 made a prior statement implicating the defendant, the prosecutor may attempt to use that statement at trial to refresh the witness's recollection,\textsuperscript{678} to impeach him with his inconsistent remarks,\textsuperscript{679} or as substantive evidence admissible under the hearsay exceptions already discussed.\textsuperscript{680}

\textsuperscript{675} 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"); cf. Taylor v. United States, 414 U.S. 17, 19-20 (1973) (waiver resulted when defendant voluntarily absented himself from trial); Illinois v. Allen, 397 U.S. 337, 342-43 (1970) (waiver resulted from removal of defendant from courtroom due to disruptive conduct); Snyder v. Massachusetts, 291 U.S. 97, 106 (1934) (right of confrontation may be waived by defendant's misconduct).

\textsuperscript{676} United States v. Carlson, 547 F.2d at 1358 n.11.

\textsuperscript{677} Brookhart v. Janis, 384 U.S. 1, 7-8 (1966).

\textsuperscript{678} 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 to the 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.

\textit{Accord,} Bullard v. Pearsall, 53 N.Y. 230, 231 (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 (4th 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 before the jury under the guise of refreshing the witness's memory. \textit{See} People v. Welch, 16 A.D.2d 554, 229 N.Y.S.2d 909 (4th Dep't 1962).

\textsuperscript{679} See notes 715-27 and accompanying text infra.

\textsuperscript{680} See notes 604-57 and accompanying text supra.
These strategies, however, pose substantial difficulties. The general rules of challenging credibility, as well as special restrictions on impeaching one's "own" witness, limit the ability to use prior statements to impeach. Similarly, in most jurisdictions the hearsay rule presents an imposing barrier to the prosecutor seeking to introduce a prior inconsistent statement 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, applies not only to attack by inconsistent statements, but to all modes of impeachment. Where the witness turns at trial, the rule threatens to preclude impeachment, permitting the witness's devastating testimony to go unchallenged. If the witness turns prior to trial, the rule may bar the prosecutor from using the witness or his previous statement at all.

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 prescribed oath. Part juror and part witness, these "oath-helpers" testified only as to the veracity of the party calling them, rather than to the facts of the case. Since the calling party had complete freedom of choice in his selection of witnesses, he could not dispute the testimony of those he called. As the modern concept of trial by jury emerged, however, the role of the witness dramatically changed. No longer called 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. Resulting limitations on parties' freedom to select witnesses, combined with the complexity of modern courtroom procedure, raised questions as to whether the no-impeachment rule impeded just decisions. In response to increasing 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.

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682 McCormick, supra note 421, § 38.
687 See notes 713-14 and accompanying text infra.
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.  

The vouching theory, an antiquated justification, overlooks the lack of free choice in modern-day witness selection; except when choosing character witnesses and experts, modern-day parties, for all practical purposes, have witnesses foisted upon them. The reasoning of the coercion theory is also questionable. It assumes a significant likelihood that witnesses can be forced to lie, and overlooks more direct and effective means of inducing desired perjury. Moreover, the rules of evidence narrow the types of “coercive impeachment.” The defense can impugn only the witness’s veracity, and general evidentiary principles aimed at avoiding prejudice further circumscribe available tactics.

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. This pincer movement aimed at the prosecutor frustrates a reasoned search for truth, but 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 one basic exception, McCORMICK, supra note 421, § 38, at 75; WIGMORE, supra note 433, §§ 898-99; Ladd, supra note 686, at 76. See MCCORMICK, supra note 421, § 38, at 76; Ladd, supra note 686, at 77. See MCCORMICK, supra note 421, § 41, at 76. See id., § 38, at 75. See Note, supra note 681, at 1019. See generally MCCORMICK, supra note 421, § 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). In New Jersey, one may generally impeach his own witness, but not by use of prior inconsistent statements except in the case of surprise. N.J. STAT.
ported either by statute or decision. Courts have generally recognized two components to this exception. First, the party seeking to impeach must show that he is surprised by his witness's testimony. This requirement will disarm the prosecutor who discovers before trial that his witness has spun. Second, the party must demonstrate that the witness's testimony is "positively harmful to his cause."

The formulation of the "harmfulness" or "prejudice" requirement varies from state to state. As a general rule, however, the testimony must affirmatively injure the calling party's case. A witness's forgetfulness or mere denial normally will not justify impeachment. California, however, has liberally applied the prejudice concept. In *People v. LeBeau*, a prosecution rebuttal witness denied making an out-of-court statement that contradicted the defendant's testimony; the trial court then permitted the prosecutor to impeach by extrinsic evidence the witness's prior statement. 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. Distinguishing a case involving similarly "neutral" tes-

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694 See *McCormick, supra* note 421, § 38.
695 See *Young v. United States*, 97 F.2d 200 (5th Cir. 1938) (prior statement erroneously admitted where prosecutor expected witness to disavow it).
696 *McCormick, supra* note 421, § 38, at 77. Prior to 1975, federal evidence law provided that a pretrial statement could not be admitted for purposes of impeachment unless the prosecution could show that it was both surprised and affirmatively damaged by the witness's in-court testimony. See, e.g., *United States v. Allsup*, 485 F.2d 287, 290-91 (8th Cir. 1973); *United States v. Scarbrough*, 470 F.2d 166, 168 (9th Cir. 1972).
697 See, e.g., *Travelers Ins. Co. v. Hermann*, 154 Md. 171, 180, 140 A. 64, 67 (1927) (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"); *Malone v. Gardner*, 362 Mo. 569, 588, 242 S.W.2d 516, 523 (1951) ("unfavorable" and "material"); *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 the witness]").
698 See *Commonwealth v. Strunk*, 293 S.W.2d 629, 630 (Ky. 1956) (requiring that "witness testify[ing] positively" as to "fact prejudicial to the party, or to a fact clearly favorable to the adverse party"); Note, *supra* note 681, at 1004; *see also People v. Newson*, 37 Cal. 2d 34, 41-42, 230 P.2d 618, 622-23 (1951).
700 *Id.* at 149, 245 P.2d at 303.
timony in which impeachment evidence was excluded, the court stated: "[I]t is necessary to determine on the facts of each case whether the testimony of the witness sought to be impeached has actually damaged the party calling him." 701 Applying this open-ended standard liberally, the court found that the impression created by the witness's denial—that the prosecutor had harassed the defendant with questions lacking factual support—damaged the prosecution's case. How far LeBeau's "harassment" logic extends is unclear, but arguably the prejudicial appearance of spurious harassment arises whenever the prosecution's questioning points toward the defendant's guilt, yet fails to elicit evidentiary support.

A second standard exception to the no-impeachment rule applies to the "compelled witness." Jurisdictions that require the prosecutor to call all known important witnesses normally permit the prosecutor to impeach them. 702 This exception is of limited importance because in federal court, 703 as in most state jurisdictions, 704 there is no rule requiring the prosecution to produce all known eye-witnesses to a crime. Prosecutors in these jurisdictions, 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. 705 In loansharking cases, the victim should qualify as such a witness.

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701 Id. (emphasis added).
702 McCormick, supra note 421, § 38, at 77; Ladd, supra note 686, at 1014-15.
703 United States v. Bryant, 461 F.2d 912, 916 n.1 (6th Cir. 1972).
704 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, 453, 345 A.2d 605, 606 (1975); Commonwealth v. Gray, 441 Pa. 91, 95, 271 A.2d 486, 490 (1970).
705 See, e.g., Fine v. Moomjian, 114 Conn. 226, 231-32, 158 A. 241, 244 (1932); Atwood v. Hayes, 139 Okla. 95, 99-100, 281 P. 259, 263 (1929).
Of course, if the defense calls the turncoat, the prosecution is free to challenge his credibility.\textsuperscript{706} Fearing introduction of prior statements, however, defendants will normally hesitate to call such witnesses. In some jurisdictions the prosecutor may solve this problem by requesting the court to call the turncoat witness to the stand.\textsuperscript{707} Once the witness is called by the judge, either party may impeach.\textsuperscript{708}

There are varying rules regarding when a court may or must exercise its authority to call witnesses; it is clear, however, that the decision rests primarily within the trial court's discretion.\textsuperscript{709} The judge should exercise this power in order to produce a satisfactory record, to render a reasonable decision on matters of fact, or to discover the real issues in the case.\textsuperscript{710} In a number of cases, courts have supported judicial witness-calling by citing the refusal of either party to vouch for a witness who seemingly possessed

\textsuperscript{706} An interesting and difficult question arises as to the prosecutor's ability to impeach when a witness is first called by the prosecutor and then by the defendant. See generally McCormick, supra note 421, § 38, at 78-79 (outlining four different resolutions of problem).

\textsuperscript{707} See, e.g., Morris v. State, 100 Fla. 850, 859-60, 130 So. 582, 586-87 (1930); see generally Note, The Trial Judge's Use of His Power to Call Witnesses-An Aid to Adversary Presentation, 51 Nw. L. Rev. 761, 769-70 (1957); see also Note, supra note 681, at 1015.

\textsuperscript{708} 3A Wigmore, supra note 433, § 392, at 703.

\textsuperscript{709} See Hall v. State, 136 Fla. 644, 678-79, 187 So. 392, 406-07 (1939) (state attorney asked court to call witness, jury was sent out while pros and cons of request argued, and court granted the state's motion); Fla. Stat. Ann. § 90.615 (Supp. 1978) (court in its discretion can call witnesses to be cross-examined by both parties). Pennsylvania cases also have recognized the court's power to call witnesses and emphasized the judge's broad discretion. Commonwealth v. Crews, 429 Pa. 16, 21-23, 239 A.2d 350, 353-54 (1967); Commonwealth v. DePasquali, 424 Pa. 500, 504, 230 A.2d 449, 450 (1967); Commonwealth v. Burns, 409 Pa. 619, 635-37, 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 authority of the trial judge to call witnesses. State v. Andreano, 117 N.J. Super. 498, 502, 285 A.2d 229, 231 (A.D. 1971).


\textsuperscript{710} Note, supra note 707, at 774. The Federal Rules of Evidence provide that a court "may [call witnesses] on its own motion or at the suggestion of a party." Fed. R. Evid. 614(a). While neither the rule nor the accompanying Advisory Committee Note suggests what standards should be applied when a party requests judicial calling of a witness, common-law principles provide useful guidance. Under federal common law, "a judge [could], in the exercise of a 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). Only if calling the witness was an abuse of discretion resulting in prejudice to the defendant would a conviction be reversed. Smith v. United States, 331 F.2d 265, 273 (8th Cir. 1964).
important information. 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, under these circumstances, call the witness to the stand.

d. Rejecting the Traditional Rule—The Modern Trend and the Federal Rule. Departing from the traditional rule, several jurisdictions now permit impeachment without regard to which party called the witness. This liberalization wisely protects the prosecutor obliged by the circumstances of the case to call a witness where there is uncertainty as to what the witness will say. 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.

2. Use of Prior Inconsistent Statements to Impeach the Turncoat Witness

The prosecutor who is able to establish an exception to the no-impeachment rule, or who is 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, reputation for untruthfulness, and certain types of prior convictions. In addition, the components of competency—such

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712 See Hall v. State, 136 Fla. 644, 678-79, 187 So. 392, 406-07 (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 421, § 8, at 13-14 (footnote omitted).
713 See, e.g., FED. R. EVID. 607; 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 1974) (except that party producing witness may not impeach character); N.J. STAT. ANN. § 2A:84A, Rule 20 (West 1976) (except that surprise is required for impeachment by prior inconsistent statement); N.Y. CRIM. PROC. LAW § 60.35 (McKinney 1971).
714 See notes 723-27 and accompanying text infra.
715 McCormick, supra note 421, § 33, at 66, § 43, at 86.
LOANSHARKING

as perception and memory—may be challenged to discredit the witness. The most effective method of impeachment, however, involves introduction of prior inconsistent statements. Invariably, the turncoat witness has 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. 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.” The federal courts, in evaluating “inconsistency,” apply a reasonableness test. Introduction of the prior utterance is permitted if, upon comparing the two statements in their entirety, a reasonable man would find that their effect is to produce inconsistent beliefs:

The contradiction need not be “in plain terms. [Inconsistency exists] if the preferred 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.”

For example, if a witness before the grand jury explained in detail 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 al-

716 Id.
717 Id. § 38, at 75.
718 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 as to the types of utterances that 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).
719 United States v. Rogers, 549 F.2d 490, 496 (8th Cir. 1976), cert. denied, 431 U.S. 918 (1977). See 3 WEINSTEIN, supra note 460, ¶ 607(06), at 607-23. Thus the concept of “inconsistency” departs markedly from the concept of prejudice as applied to the surprise exception to the no-impeachment rule. See text accompanying notes 696-701 supra. But see Langan v. Pianowski, 307 Mass. 149, 151, 29 N.E. 2d 700, 701 (1940) (failure to remember does not constitute inconsistency).
720 United States v. Barrett, 539 F.2d 244, 254 (1st Cir. 1976) (quoting Commonwealth v. West, 312 Mass. 438, 440, 45 N.E.2d 260, 262 (1942)); see generally 4 WEINSTEIN, supra note 460, ¶ 801(d) (1) (A) [01], at 801-76 to 76.1; see also United States v. Coppola, 479 F.2d 1153, 1158 (10th Cir. 1973).
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 because juries, in spite of cautionary instructions, may consider the statements probative of the defendant's guilt. Consequently, courts may refuse to allow the prosecution to place otherwise inadmissible evidence before the jury under the guise of impeachment. The Federal Rules of Evidence, for example, while no longer requiring a showing of surprise and affirmative damage as prerequisites to impeachment of the turncoat witness, subject all evidence to a "probative value versus unfair prejudice" analysis, an exercise assigned to the discretion of the trial court.

The concern with possible prejudice and misleading of the jury is particularly well-founded where the prosecutor knows that the witness intends to repudiate his earlier statement. Aware that the witness will not provide helpful evidence, the prosecutor would normally not call such a witness at all. The defense will

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721 In United States v. DeSisto, 329 F.2d 929, 933 (2d Cir.), cert. denied, 377 U.S. 979 (1964), the court refuted the notion that jurors could perform the mental gymnastics necessary to separate the impeachment function of prior inconsistent statements from their use as substantive evidence.

722 Both the length and detail of the prior statement bear on the issue of undue prejudice. While the precise amount of the prior statement ordinarily 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 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).

724 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.


726 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 188. 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. at 191.
argue in such situations that 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 by the jury as substantive evidence.\textsuperscript{727}

Courts, however, should not overlook other factors that counterbalance this argument: the uncertainties of testimony, the potential honesty-producing effect of placing the witness under oath, and the need of both the defense and the prosecution to discredit 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 are inadmissible to prove the truth of their content.\textsuperscript{728} The logic of the hearsay rule, however, seems inappropriate in this context. In most instances in which the hearsay rule applies, opposing counsel has no opportunity to cross-examine the maker of the proffered hearsay statement. Therefore the hearsay rule serves to protect the opposing party by barring admission of the statement as substantive evidence. In the turncoat witness context, however, the witness is the original speaker and is thus available for cross-examination.\textsuperscript{729} Furthermore, given the effect of the passage of time upon human memory, the prior statement is often likely to be more accurate than testimony at trial.\textsuperscript{730}


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). The instruction must 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 apply only 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. Fimental, 363 N.E.2d 1343, 1348 (Mass. App. Ct. 1977)).

\textsuperscript{728} McCormick, supra note 421, § 251, at 601.

\textsuperscript{729} 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 basing decision on what they see and hear in court).

\textsuperscript{730} McCormick, supra note 421, § 251, at 602.
Admission of prior inconsistent statements as substantive evidence would help combat the fearful witness problem. Such a rule should reduce the frequency of threats made to prospective witnesses since defendants would have little to gain from forcing a witness to change his story. Furthermore, prosecutors would not be forced to engage in subterfuge in order 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 present and subject to cross examination."

Despite the Model Code's wholesale abandonment of the orthodox rule and similar moves in several states, most jurisdictions still refuse to allow the introduction of prior inconsistent statements as substantive evidence. The Federal Rules of Evidence, the handiwork of both reformers and traditionalists, strike a compromise between these extremes. Defining some prior inconsistent statements as nonhearsay, Federal Rule 801(d) (1) provides for their admission as substantive evidence, when

[the 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 admissible under this provision. Any prior signed statement which the witness affirms as truthful may also be admitted as substantive evidence.

---

732 Model Code of Evidence rule 503(b) (1942). The same position is taken in Uniform Rule of Evidence 63(1) (1953).
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.737 The chart also does not include statutes proscribing racketeering738 or engaging in organized crime.739

The statutes in the chart have been separated into elements to facilitate structural comparison. With only one exception, these analyses incorporate no case law.

Footnotes for Appendix A begin on page 275.
<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTES</th>
<th>CONDUCT</th>
<th>ATTENDANT CIRCUMSTANCES</th>
<th>State of Mind As To:</th>
</tr>
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<tr>
<td>Ala.</td>
<td>No relevant statutes</td>
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<td>Alaska</td>
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<td>Ariz.</td>
<td>Extortionate Credit Transactions</td>
<td>making extension of credit&lt;sup&gt;740&lt;/sup&gt;</td>
<td>understanding that creditor could enforce loan by violence&lt;sup&gt;741&lt;/sup&gt;</td>
<td>felony</td>
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<tr>
<td></td>
<td>ARIZ. REV. STAT. ANN. § 13-2302 (1978)</td>
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<tr>
<td></td>
<td>Criminal Usury</td>
<td>engaging</td>
<td>business of making loans at a higher rate of interest than authorized by law&lt;sup&gt;743&lt;/sup&gt;</td>
<td>felony</td>
</tr>
<tr>
<td></td>
<td>ARIZ. REV. STAT. ANN. § 13-2208 (1978)</td>
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<td></td>
</tr>
<tr>
<td></td>
<td>Financing Extortionate Credit Transactions</td>
<td>advancing</td>
<td>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</td>
<td>felony</td>
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<tr>
<td></td>
<td>ARIZ. REV. STAT. ANN. § 13-2303 (1978)</td>
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<tr>
<td></td>
<td>Financing Criminal Usury</td>
<td>providing</td>
<td>directly or indirectly financing for the business of making loans at excessive rate of interest&lt;sup&gt;744&lt;/sup&gt;</td>
<td>felony</td>
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<tr>
<td></td>
<td>ARIZ. REV. STAT. ANN. § 13-2208 (1978)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Collection of Extension of Credit by Extortionate Means</td>
<td>participates or conspires</td>
<td>use of extortionate means&lt;sup&gt;746&lt;/sup&gt; to collect or attempt to collect any extension of credit or to punish non-repayment</td>
<td>felony</td>
</tr>
<tr>
<td></td>
<td>ARIZ. REV. STAT. ANN. § 13-2304 (1978)</td>
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<td></td>
<td></td>
</tr>
<tr>
<td>Ark.</td>
<td>No relevant statutes</td>
<td>makes, negotiates and charges, contracts for, or receives</td>
<td>for self or another loan of money, credit, goods, or things in action directly or indirectly with interest or charge in excess of lawful rate</td>
<td>willfully</td>
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<tr>
<td>Cal.</td>
<td><strong>Criminal Usury</strong>&lt;br&gt;CAL. CIV. CODE&lt;br&gt;§ 1916-3(b)&lt;br&gt;(West Supp. 1978)</td>
<td>makes, negotiates and charges, contracts for, or receives</td>
<td>for self or another loan of money, credit, goods, or things in action directly or indirectly with interest or charge in excess of lawful rate</td>
<td>willfully</td>
</tr>
<tr>
<td>Colo.</td>
<td><strong>Extortionate Credit Transactions</strong>&lt;br&gt;COLO. REV. STAT.&lt;br&gt;§ 18-15-102 (1973)</td>
<td>makes extension of credit&lt;sup&gt;747&lt;/sup&gt;</td>
<td>understanding of creditor and debtor that delay in repayment will result in extortionate means of collections&lt;sup&gt;748&lt;/sup&gt;</td>
<td>knowingly</td>
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<tr>
<td></td>
<td><strong>Criminal Usury</strong>&lt;br&gt;COLO. REV. STAT.&lt;br&gt;§ 18-15-104 (1973)</td>
<td>charges, takes, receives</td>
<td>money, property as loan finance charge exceeding 45% per annum</td>
<td>knowingly</td>
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<tr>
<td></td>
<td><strong>Financing Extortionate Credit Transactions</strong>&lt;br&gt;COLO. REV. STAT.&lt;br&gt;§ 18-15-105 (1973)</td>
<td>advances</td>
<td>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</td>
<td>knowingly</td>
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<td><strong>Financing Criminal Usury</strong>&lt;br&gt;COLO. REV. STAT.&lt;br&gt;§ 18-15-106 (1973)</td>
<td>advances</td>
<td>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</td>
<td>knowingly</td>
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<td>STATE</td>
<td>STATUTES</td>
<td>CONDUCT</td>
<td>ATTENDANT CIRCUMSTANCES</td>
<td>State of Mind As To:</td>
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<td></td>
<td>Collection of Extensions of Credit by Extortionate Means</td>
<td>participate or conspire</td>
<td>use of extortionate means to collect or attempt to collect any extension of credit or to punish non-repayment</td>
<td>knowingly</td>
</tr>
<tr>
<td></td>
<td>COLO. REV. STAT. § 18-15-107 (1973)</td>
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<tr>
<td></td>
<td>Possession or Concealment of Records of Criminal Usury</td>
<td>possesses, conceals</td>
<td>any writing, paper, instrument, or article used to record criminally usurious transaction</td>
<td></td>
</tr>
<tr>
<td></td>
<td>COLO. REV. STAT. § 18-15-108 (1973)</td>
<td></td>
<td>contents have been used, or are being used to conduct a criminally usurious transaction</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>or possesses, conceals</td>
<td>any writing, paper, instrument, or article used to record criminally usurious transactions</td>
<td></td>
</tr>
<tr>
<td>Conn.</td>
<td>Extortionate Credit Transactions</td>
<td>makes or conspires to make extension of credit</td>
<td>understanding that creditor could enforce loan by violence</td>
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<td></td>
<td>CONN. GEN. STAT. § 58-390 (1979)</td>
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<td>Criminal Usury</td>
<td>charge, demand accept, agree to receive</td>
<td>interest at a rate greater than 12% per annum</td>
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<td>Financing Extortionate Extensions of Credit</td>
<td>advances</td>
<td>money or property to any persons with reasonable grounds to believe that the person intends to use the money or property to make extortionate extensions of credit</td>
<td>willfully</td>
<td>reasonable grounds</td>
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<tr>
<td>Collection of Extentions of Credit by Extortionate Means</td>
<td>participates or conspires</td>
<td>use of extortionate means to collect or attempt to collect any extension of credit or to punish non-repayment</td>
<td>knowingly</td>
<td>knowingly</td>
</tr>
<tr>
<td>Del.</td>
<td>No relevant statutes</td>
<td></td>
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<tr>
<td>Fla.</td>
<td>Extortionate Credit Transactions</td>
<td>make or conspire to make extension of credit</td>
<td>understanding of creditor and debtor that delay in repayment could result in extortionate means of collection</td>
<td>knowingly and willingly</td>
</tr>
<tr>
<td>Fla.</td>
<td>Criminal Usury</td>
<td>charge, take, receive</td>
<td>interest exceeding 25% but less than 45% per annum</td>
<td>willfully and knowingly</td>
</tr>
<tr>
<td>Fla.</td>
<td>Possession of Records</td>
<td>possess or maintain or conspire to do so</td>
<td>books of account or other documents recording extensions of credit in violation of the extortionate credit transaction statute or the felonious criminal usury statute</td>
<td>knowingly and willfully</td>
</tr>
<tr>
<td>STATE</td>
<td>STATUTES</td>
<td>CONDUCT</td>
<td>ATTENDANT CIRCUMSTANCES</td>
<td>State of Mind As To: ATTENDANT CIRCUMSTANCES</td>
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</tbody>
</table>
| Ga.   | Criminal Usury,  
§ 57-117 (1977) | reserve, charge, take | directly or indirectly at rate of interest for any loan or forbearance greater than 5% per month | directly or indirectly at rate of interest for any loan or forbearance greater than 5% per month | misdemeanor 755 |
| Hawaii | Criminal Usury,  
§ 478-6 (1976) | receives, or receives or arranges to receive | directly or indirectly interest, discount or consideration on a loan or forbearance at a rate greater than 1% per month | intentionally, knowingly, or recklessly 756, intentionally, knowingly, or recklessly 756 | misdemeanor |
| Idaho | No relevant statutes | makes and resorts | express or implied loan or forbearance with intent of receiving more in repayment whether by interest or increase in principle loaned than authorized by law 757, on default of borrower to intimidation, threats, or any violent or criminal act to enforce collection or as a means of contribution | knowingly corrupt intent, knowingly corrupt intent | felony |
| Ill.  | Racketeering Transactions,  
ch. 38, §§ 39A-1, 39A-2 (1975) | makes and resorts | express or implied loan or forbearance with intent of receiving more in repayment whether by interest or increase in principle loaned than authorized by law 757, on default of borrower to intimidation, threats, or any violent or criminal act to enforce collection or as a means of contribution | knowingly corrupt intent, knowingly corrupt intent | felony |
<table>
<thead>
<tr>
<th>State</th>
<th>Relevant Statutes</th>
<th>Maximum Interest Rate</th>
<th>Severity</th>
</tr>
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<tbody>
<tr>
<td>Ind.</td>
<td>No relevant statutes</td>
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</tr>
<tr>
<td>Iowa</td>
<td><strong>Criminal Usury</strong>&lt;br&gt;Iowa Code § 535.6 (1977)&lt;br&gt;take, receive or agree to take, receive</td>
<td>directly or indirectly by means of commission or brokerage charges or otherwise, for the forbearance or use of money in the amount of more than five hundred dollars interest greater than 2% per month</td>
<td>serious misdemeanor</td>
</tr>
<tr>
<td>Kan.</td>
<td>No relevant statutes</td>
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<tr>
<td>Ky.</td>
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<td></td>
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<tr>
<td>La.</td>
<td>No relevant statutes</td>
<td></td>
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<tr>
<td>Me.</td>
<td>No relevant statutes</td>
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<tr>
<td>STATE</td>
<td>STATUTES</td>
<td>CONDUCT</td>
<td>ATTENDANT CIRCUMSTANCES</td>
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<tr>
<td>Md.</td>
<td>No relevant statutes</td>
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</table>
| Mass.  | Criminal Usury  
MASS. ANN. LAWS  
ch. 271, § 49(a)  
(Michie/Law. Co-op Supp. 1979) | contracts for, charges, takes, receives | directly or indirectly in exchange for either a loan of money or other property interest and expenses 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. 1979) | 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 |
| Mich.  | 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 |
<table>
<thead>
<tr>
<th>State</th>
<th>Relevant Statutes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Minn.</td>
<td>No relevant statutes</td>
</tr>
<tr>
<td>Miss.</td>
<td>No relevant statutes</td>
</tr>
<tr>
<td>Mo.</td>
<td>Criminal Usury&lt;br&gt;Mo. ANN. STAT.&lt;br&gt;§ 408.095 (Vernon Supp. 1978) take or receive or agree to take or receive directly or indirectly by means or commissions or brokerage charges or otherwise, interest greater than 2% per month purposely, knowingly, or recklessly</td>
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<td>Mont.</td>
<td>No relevant statutes</td>
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<td>Neb.</td>
<td>No relevant statutes</td>
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<td>Nev.</td>
<td>No relevant statutes</td>
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<tr>
<td>N.H.</td>
<td>No relevant statutes</td>
</tr>
<tr>
<td>N.J.</td>
<td>Wrongful Credit Practices and Related Offenses&lt;br&gt;N.J. STAT. ANN.&lt;br&gt;§ 2C:21-19 (West 1979) (a) Criminal Usury loans, or agrees to loan or takes, or agrees to take, or receives directly or indirectly, money or other property at a rate exceeding legal maximum rate or property as interest on loan or on forbearance of any interest in excess of maximum legal rate</td>
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<td>STATE</td>
<td>STATUTES</td>
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<td></td>
<td>(b) Business of Criminal Usury</td>
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<td>(c) Possession of Usurious Loans Records</td>
</tr>
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<td>(d) Unlawful Collection Practices</td>
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<td>(e) Making a False Statement of Credit Terms</td>
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<td>or fails to make or makes false, inaccurate, or incomplete statement of other credit terms</td>
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<td>(f) Debt Adjusters</td>
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<td>and</td>
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<td>State</td>
<td>Law</td>
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<td>N.M.</td>
<td>Criminal Usury</td>
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<tr>
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<td>N.M. Stat. Ann. §§ 56-8-9(A), 56-8-14 (1978)</td>
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<td>Excessive Commission for Procuring Loan</td>
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<td>N.Y.</td>
<td>Criminal Usury in the second degree</td>
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<td>N.Y. Penal Law § 190.40 (McKinney Supp. 1978)</td>
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<td>Criminal Usury in the first degree</td>
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<td>N.Y. Penal Law § 190.42 (McKinney Supp. 1978)</td>
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<tr>
<td>Possession of Record of Criminal Usury N.Y. Penal Law § 190.45 (McKinney 1975)</td>
<td>possesses</td>
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<td>N.C.</td>
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<td>N.D.</td>
<td>Criminal Usury N.D. Cent. Code § 47-14-11 (1978)</td>
</tr>
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<td>Engaging in or Financing Criminal Usury Business N.D. Cent. Code § 12.1-31-02(1) (1976)</td>
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<td>Ohio</td>
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<td>Okla.</td>
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<tr>
<td>Or.</td>
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<td>Pa.</td>
<td>Extortionate Credit Transactions 18 Pa. Cons. Stat. Ann. app. § 4806.2 (Purdon 1973)</td>
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<tr>
<td>Criminal Usury</td>
<td>engages or conspires to engage in criminal usury, charging interest at a rate exceeding 36% per annum(^\text{1}) intentionally, knowingly, or recklessly(^\text{2}) felony</td>
</tr>
</tbody>
</table>

| Financing Extortionate Credit Transactions | advances or conspires to advance money or property to a person with reasonable grounds to believe that the recipient intends to use the advance to make an extortionate extension of credit wilfully reasonable grounds felony |

| Financing Criminal Usury | advances or conspires to advance money or property to a person with reasonable grounds to believe that the recipient intends to use the advance to engage in criminal usury wilfully reasonable grounds felony |

| Collection of Extensions of Credit by Extortionate Means | participates or conspires to participate use of extortionate means to collect or attempt to collect any extension of credit or punish non-repayment knowingly felony |
| 18 Pa. Cons. Stat. ANN. app. § 4806.6 (Purdon 1973) |  |

<p>| Receiving Proceeds of Extortionate Credit Transactions or Collection of Extensions of Credit by Extortionate Means | 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 |
| 18 Pa. Cons. Stat. ANN. app. § 4806.7 (Purdon 1973) |  |</p>
<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTES</th>
<th>CONDUCT</th>
<th>ATTENDANT CIRCUMSTANCES</th>
<th>State of Mind As To: CONDUCT</th>
<th>ATTENDANT CIRCUMSTANCES</th>
<th>PENALTIES</th>
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<td></td>
<td>Receiving Proceeds of Criminal Usury 18 PA. CONS. STAT. ANN. app. § 4806.8 (Purdon 1973)</td>
<td>receives or conspires to receive</td>
<td>the proceeds of criminal usury</td>
<td>knowingly</td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td></td>
<td>Possession of Records of Criminal Usury 18 PA. CONS. STAT. ANN. app. § 4806.9 (Purdon 1973)</td>
<td>maintains, causes to be maintained, conspires to maintain, or possesses</td>
<td>any writing, paper, book, instrument or article used to record criminally usurious transactions</td>
<td>intentionally, knowingly, or recklessly</td>
<td>knows or has reasonable grounds to know that contents record criminally usurious transaction</td>
<td>felony</td>
</tr>
<tr>
<td>Rhode Island</td>
<td>Criminal Usury R.I. GEN. LAWS §§ 6-26-2, 6-26-3 (1969 &amp; Supp. 1979)</td>
<td>reserve, charge, take</td>
<td>directly or indirectly interest and expenses the aggregate of which exceeds 21% simple interest per annum</td>
<td>willfully and knowingly</td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td></td>
<td>Possession of Records of Criminal Usury R.I. GEN. LAWS § 6-26-9 (Supp. 1979)</td>
<td>possesses</td>
<td>any document, record, paper, instrument or other writing which records or evidences a usurious debt</td>
<td></td>
<td>knowledge of the contents</td>
<td>misdemeanor</td>
</tr>
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<td></td>
<td>Assault and Battery in the Collection of a Loan R.I. GEN. LAWS § 11-5-6 (Supp. 1979)</td>
<td>commits an assault and battery</td>
<td>purpose of collecting any loan</td>
<td></td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>South Carolina</td>
<td>Criminal Usury S.C. CODE</td>
<td>charging, collecting</td>
<td>usurious rate of interest</td>
<td>knowingly, intentionally</td>
<td></td>
<td>misdemeanor</td>
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<tr>
<td>Jurisdiction</td>
<td>Description</td>
<td>Relevant Laws/Statutes</td>
<td>Elements</td>
<td>Degree</td>
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<tr>
<td>S.D.</td>
<td>Criminal Usury</td>
<td>S.D. Compiled Laws Ann. § 54-3-9 (1967)</td>
<td>receives directly or indirectly interest, discount, or consideration greater than allowed by law</td>
<td>misdemeanor</td>
<td></td>
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<td>Tenn.</td>
<td>Criminal Usury</td>
<td>Tenn. Code Ann. §§ 39-4601, 39-4602 (1975)</td>
<td>receive compensation for the use of money at a rate greater than 6% per annum unless provided for by law</td>
<td>misdemeanor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tex.</td>
<td>Criminal Usury</td>
<td>Tex. Rev. Civ. Stat. Ann. art. 5069-1.06(2) (Vernon 1971)</td>
<td>contracts for, charges, or receives interest in excess of double the interest allowed by law</td>
<td>intentionally, knowingly, or recklessly</td>
<td>misdemeanor</td>
<td></td>
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<tr>
<td>Utah</td>
<td>Criminal Usury</td>
<td>Utah Code Ann. § 76-6-520 (1978)</td>
<td>engages in or provides financing for the business of making loans, directly or indirectly, at greater interest than authorized by law</td>
<td>knowingly</td>
<td>felony</td>
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<tr>
<td>Va.</td>
<td>No relevant statutes</td>
<td></td>
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<tr>
<td>Wash.</td>
<td>No relevant statutes</td>
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<td>W. Va.</td>
<td>No relevant statutes</td>
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<tr>
<td>Wis.</td>
<td>Extortionate Credit Transactions</td>
<td>Wis. Stat. Ann. § 943-28(2) (West Supp. 1979)</td>
<td>makes, conspires to make extension of credit understanding of creditor and debtor that delay in repayment will result in extortionate means of collection</td>
<td>felony</td>
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<tr>
<td>STATE</td>
<td>STATUTES</td>
<td>CONDUCT</td>
<td>ATTENDANT CIRCUMSTANCES</td>
<td>State of Mind As To:</td>
<td>PENALTIES</td>
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<tr>
<td>Criminal Usury</td>
<td>Wis. Stat. Ann. §§ 138.05, 138.06 (West 1974)</td>
<td>contract for,</td>
<td>directly or indirectly money, goods, or things in action at a rate greater than the</td>
<td></td>
<td>misdemeanor</td>
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<td></td>
<td></td>
<td>take, receive</td>
<td>maximum rate, except as authorized by other statutes</td>
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<tr>
<td>Financing Extortionate Credit Transactions</td>
<td>Wis. Stat. Ann. § 943.28(3) (West Supp. 1979)</td>
<td>advances</td>
<td>money or property, in any way</td>
<td>purpose of making</td>
<td>felony</td>
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<td>extortionate</td>
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<td>extensions of credit</td>
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<tr>
<td>Collections of</td>
<td>Wis. Stat. Ann. § 943.28(4) (West Supp. 1979)</td>
<td>participates</td>
<td>use of extortionate means collect or attempt to collect any extension of credit or to</td>
<td>knowingly</td>
<td>felony</td>
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<tr>
<td>Extensions of Credit</td>
<td></td>
<td></td>
<td>punish non-repayment</td>
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<td>by Extortionate Means</td>
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<td>Wyo.</td>
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<td>D.C.</td>
<td>No Relevant statutes</td>
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</table>
Criminal penalties for violation of these provisions are set forth in the following statutes:

Small loans statutes:
- ALA. CODE § 5-18-24 (1975);
- ALASKA STAT. § 06.20.320 (Supp. 1979);
- ARIZ. REV. STAT. ANN. § 6-133 (1978);
- CAL. FIN. CODE § 24651 (West 1968);
- DEL. CODE ANN. tit. 5, §§ 2110, 2112 (1974), § 2111 (Supp. 1977);
- FLA. STAT. ANN. § 516.19 (West Supp. 1978);
- GA. CODE ANN. § 25-9903 (1976);
- HAWAII REV. STAT. § 409-31 (1976);
- ILL. REV. STAT. ch. 74, § 37 (Supp. 1979);
- IOWA CODE § 536.19 (1977);
- KY. REV. STAT. § 288.991 (1970);
- MD. ANN. CODE art. 58A, § 14 (Supp. 1978) & MD. COM. LAW CODE ANN. § 12-816 (Supp. 1978);
- MASS. ANN LAWS ch. 140, § 110 (Michie/Law. Co-op. 1979);
- 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 (Verno 1968);
- MONT. REV CODES ANN. § 32-5-406 (1978);
- NEB. REV. STAT. § 45-128 (Supp. 1978);
- 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. § 58-7-8, 56-8-14 (1978);
- 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. 1979);
- PA. STAT. ANN. tit. 7, § 6218 (Purdon Supp. 1977);
- R.I. GEN. LAWS § 19-25-36 (1968);
- S.C. CODE § 34-29-250 (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 (1967).

Statutes modeled after Uniform Consumer Credit Code: COLO. REV. STAT. §§ 5-5-301, 5-5-302 (1973);
- IDAHO CODE §§ 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. ANN. §§ 16-a-5-301, 16-a-5-302 (1975);
- LA. REV. STAT. ANN. § 9:3553 (West Supp. 1979);
- ME. REV. STAT. ULT. 9-A, § 5.301 (Supp. 1979);
- OKLA. STAT. ANN. ULT. 14-A, §§ 5-301, 5-302 (West 1972);
- S.C. CODE §§ 37-5-301, 37-5-302 (1977);
- UTAH CODE ANN. §§ 70B-5-301, 70B-5-302 (Supp. 1979);
- WIS. STAT. ANN. § 425.401 (West 1974);

See, e.g., FLA. STAT. ANN. §§ 943.46 to 943.463 (West Supp. 1978);

See, e.g., OHIO REV. CODE ANN. § 2923.04 (Page 1975).

The prosecutor can 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. ARIZ. REV. STAT. ANN. § 13-2301(B) (1978).

ARIZ. REV. STAT. ANN. § 13-2301(3) (1978) defines extortionate extension of credit as "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."

ARIZ. REV. STAT. ANN. §§ 13-202 (rule of construction that no culpable mental state required unless statute expressly provides), 13-2302 (no mental state requirement) (1978).

ARIZ. REV. STAT. ANN. § 44-102 (Supp. 1979) (12% per annum).

See note 743 supra.

ARIZ. REV. STAT. ANN. § 13-2301(4) (1978) 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."

CAL. CONST. art 15, § 1 (10% per annum).

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.
§ 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.

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 ...."


See note 748 supra.

Conn. Gen. Stat. § 53-390(b) (1979) 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.


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.


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.

Interest and expenses 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.


N.J. Stat. Ann. § 51:1-1 (West Supp. 1979) (6% per annum, although can be increased to 9.5% per annum by regulation).


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.

N.D. Cent. Code § 47-14-09 (1979) sets this as 3% per annum higher than the maximum rate of interest payable on time deposits maturing in 30 months, but that in any event the maximum rate shall not be less than 7% and that the interest will not be compounded.


N.D. Cent. Code § 12.1-31-02 (2) (1976) established 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, if he knew any of the following: (1) it is an offense to charge, take, or receive interest or 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.

18 Pa. Cons. Stat. Ann. app. § 4806.1(f) defines "extortionate extension of credit" as an extension in which both the creditor and debtor understand that delay or failure of repayment may result in extortionate methods of collection. The prosecutor may 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 (a) the creditor had used or attempted to use extortionate means to collect loans or punish a failure to pay or (b) that the creditor had a reputation for so doing; and (3) the outstanding credit extensions, including unpaid interest, exceeded $100. Id. § 4806.2(b).

769 18 PA. CONS. STAT. ANN. app. § 4806.1(f) (Purdon 1973). “Extortionate extension of credit” is defined as any means which involves the use, or an express or implied threat of use, of violence or other criminal means. Id. § 4806.1(g).

770 18 PA. CONS. STAT. ANN. § 302(c) (Purdon 1973).

771 18 PA. CONS. STAT. ANN. § 4806.1(h) (Purdon 1973).

772 18 PA. CONS. STAT. ANN. § 302(c) (Purdon 1973).

773 Possession of usury records is presumptive evidence of possession with knowledge of the contents. R.I. GEN. LAWS § 6-26-10 (Supp. 1979).

774 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).

775 S.D. COMP. LAWS ANN. § 54-3-7 (Supp. 1977) (10% simple interest per annum).

776 TEX. REV. CIV. STAT. ANN. art. 5069-1.02 (Vernon 1971) (10% per annum).

777 TEX. PENAL CODE ANN. tit. 2, § 6.02(c) (Vernon 1974).

778 UTAH CODE ANN. § 70B-3-201 (Supp. 1979) (18% per annum).

779 VT. STAT. ANN. tit. 9, § 41(a) (Supp. 1979).

780 WIS. STAT. ANN. § 943.28(1)(c) (West Supp. 1979), defines “extortionate means” as any means “which involves the use, or an explicit or implicit threat of use, of violence or other criminal means . . . .”

781 WIS. STAT. ANN. § 138.05(1)(a) (West 1974) (12% per annum computed on declining principal balance).
APPENDIX B
EXTORTION STATUTES OF THE STATES

Footnotes for Appendix B begin on page 288

<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTES</th>
<th>CONDUCT</th>
<th>ATTENDANT CIRCUMSTANCES</th>
<th>CONDUCT</th>
<th>ATTENDANT CIRCUMSTANCES</th>
<th>PENALTIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ala.</td>
<td>ALA. CODE §§ 13A-8-13 to -15 (1975)</td>
<td>obtains control by threat to injure, confine, accuse, expose, etc.</td>
<td>property of another</td>
<td>knowingly with intent to deprive owner permanently</td>
<td>knowledge</td>
<td>felony</td>
</tr>
<tr>
<td>Alaska</td>
<td>ALASKA STAT. § 11.41.520 (1978)</td>
<td>obtains by threat to injure, accuse, expose, cause official action, etc.</td>
<td>property of another</td>
<td></td>
<td>knowledge</td>
<td>felony</td>
</tr>
<tr>
<td>Ariz.</td>
<td>ARIZ. REV. STAT. ANN. § 13-1804 (1978)</td>
<td>obtains or seeks to obtain by threat to injure, accuse, expose, etc.</td>
<td>property</td>
<td>knowingly</td>
<td>knowledge</td>
<td>felony</td>
</tr>
<tr>
<td>Ark.</td>
<td>ARK. STAT. ANN. §§ 41-2202, 2203 (1977) (Theft by)</td>
<td>obtains by threat</td>
<td>property of another</td>
<td>knowingly and with purpose of depriving owner of property</td>
<td>knowledge</td>
<td>felony</td>
</tr>
<tr>
<td>Cal.</td>
<td>CAL. PENAL CODE §§ 518, 519 (West 1970)</td>
<td>obtains by wrongful use of force or fear induced by threat to injure, accuse,</td>
<td>property from another with induced consent</td>
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<td></td>
<td>felony</td>
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<td>State</td>
<td>Statute</td>
<td>Description</td>
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<td>Colo.</td>
<td><a href="http://www.colorado.gov/pacific/pub/18-3-207">Colo. Rev. Stat. § 18-3-207 (1973)</a> (Criminal Extortion)</td>
<td>threatens to confine, restrain, or cause economic or bodily harm without legal authority intent to induce another to act against his will felony</td>
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<tr>
<td>Colo.</td>
<td><a href="http://www.colorado.gov/pacific/pub/18-4-401">Colo. Rev. Stat. § 18-4-401 (1973)</a> (Theft)</td>
<td>obtains, exercises control by threat anything of value knowingingly and with intent to permanently deprive other knowledge felony (if value exceeds $200)/ misdemeanour</td>
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</tr>
<tr>
<td>Del.</td>
<td><a href="http://www.delaware.gov/pacific/pub/11-846">Del. Code tit. 11 § 846 (1975)</a></td>
<td>Compels or induces delivery by fear of injury, accusation, exposure, etc. and causes such delivery and fear property of another intent to deprive another of property felony</td>
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<tr>
<td>Fla.</td>
<td><a href="http://www.floridastatutes.com/pacific/pub/836-05">Fla. Stat. Ann. § 836.05 (West 1976)</a></td>
<td>threatens to injure, accuse, expose verbally or in writing maliciously intent to extort money or pecuniary advantage or to coerce behavior felony</td>
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<td>STATE</td>
<td>STATUTES</td>
<td>CONDUCT</td>
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<td>ATTENDANT CIRCUMSTANCES</td>
<td>PENALTIES</td>
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<td>Fla. Stat. Ann. § 812.021(1)(e) (West Supp. 1978)</td>
<td>obtains by threat to accuse, expose</td>
<td>property of another</td>
<td>intent to deprive or defraud true owner</td>
<td></td>
<td></td>
<td>felony (if value exceeds $100)/ misdemeanor</td>
</tr>
<tr>
<td>Ga. Code Ann. § 26-1804 (1978) (Theft by)</td>
<td>obtains by threat to injure, expose, etc.</td>
<td>property of another unlawfully</td>
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<td></td>
<td>felony</td>
</tr>
<tr>
<td>Hawaii Hawaii Rev. Stat. § 708-830(3) (1976) (Theft by)</td>
<td>obtains by threat to injure, expose, etc.</td>
<td>property of another</td>
<td>intent to deprive another permanently</td>
<td>knowledge</td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>Idaho Idaho Code §§ 18-2801, 18-2802 (1979)</td>
<td>obtains by use of force or fear induced by threat to injure, accuse, expose, etc.</td>
<td>property from another wrongfully</td>
<td></td>
<td></td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>Ill. Ill. Ann. Stat. ch. 38, § 16-1 (Smith-Hurd 1977) (Theft)</td>
<td>obtains control by threat or deception</td>
<td>property of another</td>
<td>knowingly and with intent to deprive owner of property</td>
<td>knowledge</td>
<td></td>
<td>felony (if value exceeds $150 or second offense)/ misdemeanor</td>
</tr>
<tr>
<td>Ind. Ind. Code Ann. §§ 35-43-4-1, 35-43-4-2 (Burns Supp. 1977) (Theft by)</td>
<td>exerts control (e.g., obtains) by expressing an intention to damage property</td>
<td>property of another</td>
<td>knowingly or intentionally with intent to appropriate</td>
<td></td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>State</td>
<td>Statute</td>
<td>Description</td>
<td>Intent</td>
<td>Penalty</td>
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<td>Iowa</td>
<td>IOWA CODE ANN. § 711.4 (West Special Pamphlet 1978)</td>
<td>threatens to injure, commit any public offense, accuse, expose, etc.</td>
<td>intent to obtain thing of value for self or another</td>
<td>felony</td>
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<td></td>
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<tr>
<td>Kan.</td>
<td>KAN. STAT. ANN. § 21-3701(c) (Supp. 2A 1978) (Theft by)</td>
<td>obtains control by threat</td>
<td>intent to deprive</td>
<td>felony (if value exceeds $100)/ misdemeanor</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Ky.</td>
<td>KY. REV. STAT. ANN. § 514.080 (Baldwin 1975)</td>
<td>obtains by threat to injure, accuse, expose, etc.</td>
<td>intentionally</td>
<td>felony (if value exceeds $100)/ misdemeanor</td>
<td></td>
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<tr>
<td>La.</td>
<td>LA. REV. STAT. ANN. § 14.66 (West 1974)</td>
<td>communicates a threat to injure, accuse, expose, etc.</td>
<td>intent to obtain thing of value</td>
<td>felony</td>
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</tr>
<tr>
<td>Me.</td>
<td>ME. REV. STAT. tit. 17-A, § 355 (Supp. 1978) (Theft)</td>
<td>obtains by threat to injure or harm in any way</td>
<td>intend to deprive another of property</td>
<td>knowledge felony</td>
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<tr>
<td>Md.</td>
<td>MD. ANN. CODE art. 27 §§ 561-563 1976 &amp; Supp. 1978 (threats and threatening letters)</td>
<td>threatens to injure, accuse or accuse falsely</td>
<td>knowingly and with intent to extort money or other valuable thing</td>
<td>felony</td>
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<tr>
<td>Mass.</td>
<td>MASS. ANN. LAWS ch. 265, § 25 (Michie/Law. Co-op 1968)</td>
<td>threatens to injure person or property, or accuse verbally or in writing</td>
<td>maliciously intent to extort money or other pecuniary advantage</td>
<td>felony</td>
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<td>Mich.</td>
<td>Mich. Comp. Laws Ann. § 750.213 (1968)</td>
<td>threatens to injure, accuse, etc.</td>
<td>orally or in writing</td>
<td>maliciously intent to extort money or other pecuniary advantage or compel behavior</td>
<td>felony</td>
<td></td>
</tr>
<tr>
<td>Minn.</td>
<td>Minn. Stat. Ann. § 609.27 (West 1964 &amp; Supp. 1978)</td>
<td>threatens to injure, accuse, expose, etc. and causes another to act against his will</td>
<td>orally or in writing</td>
<td></td>
<td>felony</td>
<td></td>
</tr>
<tr>
<td>Miss.</td>
<td>Miss. Code Ann. § 97-5-77 (1972) (Robbery)</td>
<td>takes through fear induced by threat to injure person, family or property</td>
<td>property of another, in presence of, or from person</td>
<td>feloniously</td>
<td>felony</td>
<td></td>
</tr>
<tr>
<td>Mo.</td>
<td>Mo. Ann. Stat. § 570.030 (Vernon Special Pamphlet 1978) (Stealing)</td>
<td>appropriates by coercion (e.g., threat to injure, accuse expose, etc.)</td>
<td>property or services of another</td>
<td>purpose to deprive</td>
<td>felony (if value exceeds $150)/ misdemeanor</td>
<td></td>
</tr>
<tr>
<td>Mont.</td>
<td>Mont. Code Ann. § 45-6-301(2) (1978) (Theft by)</td>
<td>obtains control by threat to injure, accuse, expose, etc.</td>
<td>property of another</td>
<td>purposely or knowingly with purpose to deprive</td>
<td>felony (if value exceeds $150)/ misdemeanor</td>
<td></td>
</tr>
<tr>
<td>State</td>
<td>Code</td>
<td>Description</td>
<td>Intent</td>
<td>Punishment</td>
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<tr>
<td>Neb.</td>
<td>Neb. Rev. Stat. § 28-513 (Supp. 1976)</td>
<td>obtains by threatening to injure, accuse, expose, etc.</td>
<td>another of property</td>
<td>intent to deprive owner</td>
<td>felony (if value exceeds $300) misdemeanor&lt;sup&gt;810&lt;/sup&gt;</td>
<td></td>
</tr>
<tr>
<td>Nev.</td>
<td>Nev. Rev. Stat. § 205.320 (1975)&lt;sup&gt;911&lt;/sup&gt;</td>
<td>threatens to injure, accuse, expose or publish libel or a secret</td>
<td></td>
<td></td>
<td>felony</td>
<td></td>
</tr>
<tr>
<td>N.H.</td>
<td>N.H. Rev. Stat. Ann. § 637.5 (1974) (Theft by)</td>
<td>obtains or controls by extortion through threat to injure, accuse, expose, etc.</td>
<td>property of another</td>
<td>intent to deprive another of property</td>
<td>knowledge&lt;sup&gt;812&lt;/sup&gt; felony&lt;sup&gt;813&lt;/sup&gt; (if value exceeds $500 or threat to person of injury)/ misdemeanor</td>
<td></td>
</tr>
<tr>
<td>N.J.</td>
<td>N.J. Stat. Ann. § 2C:20-5 (West 1979)&lt;sup&gt;814&lt;/sup&gt;</td>
<td>obtains&lt;sup&gt;915&lt;/sup&gt;</td>
<td>property of another by extortion</td>
<td>purposely</td>
<td>second degree crime</td>
<td></td>
</tr>
<tr>
<td>N.M.</td>
<td>N.M. Stat. Ann. § 30-16-9 (1978)</td>
<td>communicates threats to injure, accuse, expose, etc.</td>
<td>wrongfully</td>
<td>intent to obtain thing of value or to compel person to act against his will</td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>N.Y.</td>
<td>N.Y. Penal Law § 155.05(2)(e) (McKinney 1975) (Larceny by)&lt;sup&gt;916&lt;/sup&gt;</td>
<td>compels or induces delivery by fear through threat to injure or kill, kidnap, etc.</td>
<td>property of another</td>
<td>intent to deprive another of property</td>
<td>knowledge&lt;sup&gt;817&lt;/sup&gt; felony</td>
<td></td>
</tr>
<tr>
<td>STATE</td>
<td>STATUTES</td>
<td>CONDUCT</td>
<td>ATTENDANT CIRCUMSTANCES</td>
<td>CONDUCT</td>
<td>ATTENDANT CIRCUMSTANCES</td>
<td>PENALTIES</td>
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<td>N.C.</td>
<td>N.C. GEN. STAT. § 14-118.4 (Supp. 1977)</td>
<td>threatens or communicates a threat</td>
<td>wrongfully</td>
<td>intent to obtain anything of value</td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>N.D.</td>
<td>N.D. CENT. CODE § 12.1-29-02 (1976) (Theft)</td>
<td>obtains by threat to injure, accuse, expose, etc.</td>
<td>property of another</td>
<td>knowingly and with intent to deprive owner of property</td>
<td>knowledge</td>
<td>felony (if value exceeds $50) / misdemeanor</td>
</tr>
<tr>
<td>Ohio</td>
<td>OHIO REV. CODE ANN. § 2905.11 (Page 1975)</td>
<td>threatens to expose, commit a felony; menaces, utters calumny</td>
<td></td>
<td>purpose to obtain valuable thing or benefit, or to induce unlawful act</td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>Okla.</td>
<td>OKLA. STAT. ANN. tit. 21, §§ 1481 1482 (West 1958)</td>
<td>obtains by use of force or fear induced by threat to injure, accuse or expose</td>
<td>property of another with his induced consent</td>
<td></td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>Or.</td>
<td>OR. REV. STAT. § 164.075 (1977)</td>
<td>compels or induces delivery by fear from threat to injure, accuse, expose, etc. and such delivery and fear occurs</td>
<td>property of another</td>
<td>intent to deprive another of property</td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>State</td>
<td>Statute</td>
<td>Description</td>
<td>Penalty</td>
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<tr>
<td>Pa.</td>
<td>18 Pa. Cons. Stat. Ann. § 3923 (Purdon Supp. 1979) (Theft)</td>
<td>obtains or withholds by threat to commit another criminal offense, expose secrets, take or withhold official action, etc.</td>
<td>felony (e.g., if value of property exceeds $2000)/misdemeanor&lt;sup&gt;325&lt;/sup&gt;</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>R.I.</td>
<td>R.I. Gen. Laws § 11-42-2 (1969) (Extortion and Blackmail)</td>
<td>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</td>
<td>felony</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.C.</td>
<td>S.C. Code §16-17-640 (1977) (Blackmail)</td>
<td>accuses, exposes or compels act against his will verbally or in writing intent to extort money or other valuable thing</td>
<td>felony</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>S.D.</td>
<td>S.D. Compiled Laws Ann. § 22-30A-4 (Special Supp. 1976) (Theft by)</td>
<td>obtains by threat to injure, accuse, expose, etc.</td>
<td>property of another intent to deprive another of property</td>
<td>felony (if value exceeds $200)/misdemeanor&lt;sup&gt;327&lt;/sup&gt;</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tenn.</td>
<td>Tenn. Code Ann. § 39-4301 (1975)</td>
<td>threatens to injure person, property or reputation, or to accuse</td>
<td>maliciously intent to extort money, property or pecuniary advantage, or to compel behavior</td>
<td>felony</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
| Tex.  | Tex. Penal Code Ann. tit. 7, §§ 31.01 to 31.03 (Vernon 1974 | appropriates by threat to injure, accuse, property of another unlawfully | intent to deprive owner of property | felony (if value exceeds $200)/
<table>
<thead>
<tr>
<th>STATE</th>
<th>STATUTES</th>
<th>CONDUCT</th>
<th>ATTENDANT CIRCUMSTANCES</th>
<th>CONDUCT</th>
<th>ATTENDANT CIRCUMSTANCES</th>
<th>PENALTIES</th>
</tr>
</thead>
<tbody>
<tr>
<td>&amp; Supp. 1978) (Theft by)</td>
<td>molest, etc.</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>misdemeanor</td>
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<tr>
<td>Utah</td>
<td>UTAH CODE ANN. § 76-6-406 (1978) (Theft by)</td>
<td>obtains or controls by extortion by threat to injure, accuse, expose, etc.⁶²⁸</td>
<td>property of another</td>
<td>purpose to deprive another of property</td>
<td></td>
<td>felony (if value exceeds $250)/ misdemeanor⁶²⁹</td>
</tr>
<tr>
<td>Vt.</td>
<td>VT. STAT. ANN. Tit. 13, § 1701 (1974)</td>
<td>threatens to injure person or property or to accuse</td>
<td></td>
<td>maliciously with intent to extort money or other pecuniary advantage, or to compel behavior</td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>Va.</td>
<td>VA. CODE § 18.2-59 (1975)</td>
<td>threatens injury or accuses and extorts</td>
<td>money, property or pecuniary benefit</td>
<td></td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>Wash.</td>
<td>WASH. REV. CODE ANN. § 9A.56.110 (1977) (Theft)</td>
<td>obtains or attempts to obtain by threat (e.g., to injure, accuse, expose, etc.)⁶³⁰</td>
<td>property or services of owner</td>
<td>knowingly⁶³¹</td>
<td></td>
<td>felony</td>
</tr>
<tr>
<td>W. Va.</td>
<td>W. VA. CODE § 61-2-13 (1977)</td>
<td>threatens to injure or accuse and extorts</td>
<td>money, property or pecuniary benefit</td>
<td></td>
<td></td>
<td>felony (threatens and extorts)/ misdemeanor⁶³² (threatens but fails to extort)</td>
</tr>
<tr>
<td>State</td>
<td>Code</td>
<td>Description</td>
<td>Verbal or Written</td>
<td>Intent</td>
<td>Penalty</td>
<td></td>
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<tr>
<td>Wis.</td>
<td>Wis. Stat. Ann. § 943.30(1) (West Supp. 1979)</td>
<td>threatens or commits injury to person or property; threatens to accuse or accuses of crime</td>
<td>verbally or in writing</td>
<td>maliciously with intent to extort money or pecuniary advantage, or to compel behavior</td>
<td>felony</td>
<td></td>
</tr>
<tr>
<td>Wyo.</td>
<td>Wyo. Stat. § 6-7-601 (1977) (Blackmail)</td>
<td>demands with menaces of injury, accusations, threatened accusation or exposure or sends or delivers letter containing threats</td>
<td>verbally or in writing chattel, money or other valuable thing of any person</td>
<td>intent to extort or gain chattel, etc., or to compel behavior; letter sent or delivered knowingly</td>
<td>felony</td>
<td></td>
</tr>
<tr>
<td>D.C.</td>
<td>D.C. Code Encl. § 22-2305 (West 1967) (Blackmail)</td>
<td>accuses or threatens to accuse or expose or publish</td>
<td>verbally or in writing</td>
<td>intent to extort thing of value or to compel behavior</td>
<td>felony</td>
<td></td>
</tr>
</tbody>
</table>
An honest claim for restitution or indemnification is a defense to extortion in the second degree. Ala. Code § 13A-8-15(b) (1975).


See also Cal. Penal Code § 524 (West Supp. 1978) (attempt to extort).


A claim of right is a defense to a prosecution for extortion. Del. Code tit. 11, § 847(a) (1975).


See also Idaho Code §§ 18-2808 (attempt to extort) (misdemeanor), 18-2806 (extortion not otherwise provided for) (1979).


See also Minn. Stat. Ann. § 609.275 (West 1964) (attempt to coerce).

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).


See also Mont. Codes Ann. § 45-5-203 (1978) (intimidation).


See also Nev. Rev. Stat. §§ 207.180 (threatening letters or writings) (misdemeanor), 207.190 (coercion) (felony/misdemeanor) (1975).


See also N.Y. Penal Law §§ 135.60 (McKinney 1975) (coercion in the second degree), 240.25 (McKinney 1967) (harassment).


820 See also Ohio Rev. Code Ann. §§ 2905.12 (coercion), 2903.21-2903.22 (menacing), 2921.03 (intimidation) (Page 1975).
826 An honest claim of right or ignorance that the property belonged to another is an affirmative defense. S.D. Comp. Laws Ann. § 22-30A-16 (Special Supp. 1977).
828 An honest claim of right is an affirmative defense. Utah Code Ann. § 76-6-402(3) (1978).
830 Where the threat was to accuse another of a crime, and the actor reasonably believed that his accusation was true and intended only to right the wrong done by the accused, the actor has an affirmative defense. Wash. Rev. Code Ann. § 9A.56.130 (1977).